

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 September 2019

Public Authority: South Hams District Council

Address: Follaton House
Plymouth Road
Totnes
Devon
TQ9 5NE

Decision (including any steps ordered)

1. The complainant has requested a copy of draft plans shared with South Hams District Council (SHDC) by a landowner as part of the preapplication stage of a proposed housing development. SHDC refused to disclose the plans, citing the exception provided by 12(5)(e) (commercial confidentiality) of the EIR.
2. The Commissioner's decision is that SHDC has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires SHDC to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. SHDC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The request relates to proposals to build a housing development on presently undeveloped fields to the north of the town of Salcombe, Devon. The complainant says:

"Some elements of the scheme have been discussed at workshops, attended by individuals specifically invited by the council, and the possibility of the open market houses being allowed in return for the plot for affordable housing has been mentioned. But the position and scale of the houses has not been revealed. So while a few residents have generally been told of the benefits of the scheme, it has not been possible for people to gauge the impact the houses would have on the landscape or the likelihood of their leading to further development on the Crofts in the future.

On 11 October last year [a firm of architects] working for the council and the landowner, sent to the council a plan for the developments on the Crofts, in preparation for a workshop. The council told them that it would be a mistake to present to the workshop the detail on the open market houses that they had included, and on the next day [the architects] submitted a modified plan, saying that it indicated the two houses 'without being too prescriptive on their size and design'."

6. The Commissioner understands that, while the modified plans have been placed in the public domain, the original plans have not.

Request and response

7. On 5 December 2018, referring to earlier correspondence with SHDC about the property development, the complainant made the following request for information to SHDC (for brevity, only the part of the request in respect of which the complainant is challenging SHDC's response is quoted):

"There are obviously many gaps in the e-mails, and we will not ask you to fill them all in, but we do ask to see:

...

The original plan submitted by [the architects] with their e-mail of 11 October, before they sent an amended one the following day at [SHDC officer]'s request."

8. SHDC replied on 24 December 2018. It refused to disclose a copy of the original plan, on the grounds that the non-disclosure exception at regulation 12(5)(e) of EIR applied.

9. The complainant requested an internal review on 16 March 2019, challenging SHDC's application of regulation 12(5)(e) to withhold the original plan.
10. SHDC provided the outcome of the internal review on 11 April 2019. It upheld its decision to withhold the information. It made no substantive mention of the EIR, saying that it was exempt from disclosure under sections 36 (prejudice to effective conduct of public affairs) and 43 (commercial interests) of the Freedom of Information Act 2000 (FOIA).

Scope of the case

11. The complainant contacted the Commissioner on 15 April 2019 to complain about the way his request for information had been handled. The complainant wished to challenge SHDC's decision to withhold a copy of the original plans. He also considered that it was incorrect that the FOIA had been cited as the applicable access regime in the internal review.
12. The analysis below considers whether the applicable access regime was the EIR or the FOIA. The Commissioner has then considered whether SHDC was entitled to rely on regulation 12(5)(e) of the EIR to refuse to deal with the request.

Reasons for decision

Is the information environmental information?

13. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
14. The Commissioner considers that the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
15. The request in this case is for a copy of the initial plans drawn up for a proposed property development. The Commissioner considers that the request therefore relates to a measure as defined in regulation 2(1)(c)

of the EIR which will or would be likely to affect the elements described in 2(1)(a), namely land.

16. The Commissioner is therefore satisfied that the request was for environmental information, and that the request fell to be dealt with under the EIR. SHDC was therefore incorrect when it stated, at the internal review, that the information was exempt under the FOIA, and the Commissioner has considered instead its stated position with regard to the application of regulation 12(5)(e).

Regulation 12(5)(e) – commercial confidentiality

17. SHDC argued that the withheld information was exempt from disclosure under regulation 12(5)(e) of the EIR.

18. Regulation 12(5)(e) states:

"...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

19. The Commissioner's guidance on regulation 12(5)(e)¹ explains that in order for this exception to be engaged several conditions need to be met. The Commissioner has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

20. SHDC explained in its refusal notice that the requested information related to its consideration of whether and how a particular plot of land could be developed. It said that this was information which has an economic bearing on the land, its value and potential.

¹

https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

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21. The Commissioner accepts that such information can be defined as being commercial in nature.

Is the information subject to confidentiality provided by law?

22. The Commissioner's guidance makes it clear that information will be subject to confidentiality provided by law if confidentiality is imposed on any person by the common law of confidence, contractual obligation, or statute.
23. In its refusal notice, SHDC said that the plans were shared with it as part of a confidential discussion between the landowner and the Council Assets team, exploring regeneration options for the area. It said that there was a common law duty of confidence in respect of their discussions relating to the possible redevelopment of the land.
24. SHDC told the Commissioner that such discussions take place in confidence to allow all parties to explore different options for a possible development. It said that no planning application was subsequently submitted in respect of the plans, which demonstrated that there was no intention for them to be made public.
25. The Commissioner has considered whether the withheld information has the necessary quality of confidence (ie that it is not trivial and not in the public domain). She notes that it relates to a matter of substance (preapplication discussions about the form a possible housing development might take) and that, although related information has been placed in the public domain, these plans have not.
26. The Commissioner is therefore satisfied that the withheld information is subject to a common law duty of confidence, that it is sufficiently sensitive to merit being treated as "confidential" and that there is no evidence that this confidentiality has been waived or that the withheld information is in the public domain.

Is the confidentiality provided to protect a legitimate economic interest?

27. The Commissioner's guidance states that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
28. The Commissioner's guidance sets out the following examples of what may constitute a legitimate economic interest:

"Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income."

29. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm *would* be caused by the disclosure.
30. In determining this, it is important to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors.
31. This approach is supported by *European Directive 2003/4/EC* on public access to environmental information. The EIR are intended to implement the provisions of the Directive. Article 4, paragraph 2 of the Directive sets out a duty to interpret exceptions in a restrictive way. Taking into account this duty, the wording "*where such confidentiality **is** provided by law to protect a legitimate economic interest*" (as opposed to "*where such confidentiality **was** provided...*") indicates that the confidentiality of this information must be objectively required at the time of the request.
32. In addition to the duty to interpret exceptions restrictively, the implementation guide for the Aarhus Convention (on which the European Directive and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure **would** significantly damage the interest in question and assist its competitors."* (emphasis added)
33. In requesting SHDC's submissions in support of its position, the Commissioner advised it of the following:

"...please ensure that you clearly explain how disclosure of the withheld information would adversely affect the particular economic interest that has been identified. Please ensure that this explanation demonstrates a clear link between disclosure of the information that has actually been withheld and any adverse effect. (The ICO interprets the wording of 'would adversely affect' in regulation 12(5)

to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. In other words it is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would' have an adverse effect. In the ICO's opinion this means that the likelihood of an adverse effect must be more substantial than remote.)"

34. SHDC's response to the Commissioner did not engage with this point, and was largely composed of public interest arguments as to why the information should not be disclosed. It concluded its response by saying that it was relying on reasons that it had previously given to the complainant as to why it was withholding the information.

35. In its refusal notice, SHDC stated:

"...the redevelopment of any land, in particular residential development in a highly desirable area has an economic value. A landowner is entitled to manage their land, subject to statute and regulations as they see fit. Whether or not the Landowner wishes to pursue a scheme at a later date is a matter for him...

...

...its disclosure would adversely affect the interests of the landowner in that it would identify a scheme that he has developed through his discussion with the Council has [sic] part of a wider regeneration proposal. A landowner has his own private interests as part of this process and this is undermined if all information is put in the public domain."

36. SHDC offered no further comment as to the nature or likelihood of the harm to the landowner's legitimate economic interests.

37. The Commissioner notes that she had to ask SHDC three times to provide a response to her enquiries about the request, and that the information it needed to provide in support of its application of regulation 12(5)(e) was clearly identified in her correspondence. She is therefore satisfied that it has been given adequate opportunity to set out its position with regard to regulation 12(5)(e). However, in response to her quite detailed enquiries, SHDC has provided limited arguments to support its application of the exception. While it has said that the landowner has a legitimate interest in protecting information about their intentions for the land, it has not set out how or why the disclosure of the original plans (which were apparently revised almost immediately and are therefore no longer current) would adversely affect this interest, nor has it demonstrated that this adverse affect *would* happen.

38. The responsibility for demonstrating the correct application of an exception lies with the public authority. In the context of regulation 12(5)(e), it is not appropriate for the Commissioner to formulate arguments in support of its application, on behalf of SHDC.
39. In the absence of any clear explanation by SHDC of how, and the extent to which, disclosure of the information would adversely affect the landowner's economic interests, the Commissioner cannot conclude that the third and fourth conditions set out in paragraph 19 are met.
40. On this basis, the Commissioner finds that SHDC has not demonstrated that regulation 12(5)(e) is engaged.

Right of appeal

41. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatorychamber

42. 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.
43. 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

Samantha Bracegirdle
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