

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

Decision notice

Date: 28 May 2012

Public Authority: Daventry District Council
Address: Lodge Road
Daventry
Northamptonshire
NN11 4FP

Decision

1. The complainant has requested a copy of a lease agreement between Daventry District Council (the council) and a developer, agreed in 2007. The council initially refused the request, stating that the requested information is not held by it. Subsequently it confirmed that no lease exists, but a conditional agreement to lease does exist. This was refused under regulation 12(5)(e) of the EIR on the grounds that disclosure would adversely affect the confidentiality of commercial information, where such confidentiality is provided by law to protect a legitimate commercial interest.
2. The Commissioner's decision is that Daventry District Council incorrectly refused to disclose the entire lease, but that some elements of the refused information may be withheld under the provisions of regulation 12(5)(e) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the refused information, with redactions to the specified sections as described in Annex 1.
4. The public authority 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.

Request and response

5. On 12 July 2011, the complainant wrote to Daventry District Council and requested information in the following terms:

"Please could you send me a copy of the lease agreement with Henry Boot and Daventry District Council in respect of Eastern Way Playing Field. (Agreed lease in 2007)"

6. The council responded on 28 July 2011. It stated that there is no lease of land to Henry Boot Plc or Henry Boot Development Limited by Daventry District Council. The complainant disputed this on 8 August, citing an entry in the Land Registry which described an 'Agreement for lease dated 30 July 2007'. The council conducted an internal review and responded on 9 August 2011. It confirmed that there is a conditional agreement to lease (development agreement), but there is no lease, therefore its previous response was accurate.
7. The complainant again challenged this response, on 15 August 2011, arguing that proper consideration of the code of practice, issued under section 45 of FOIA¹, would have resulted in the conditional agreement to lease being made available to him.
8. Following a further review the council wrote to the complainant on 4 October 2011. It confirmed that the conditional agreement to lease is held by it and stated that the requested information is environmental information. It refused to disclose the information on the grounds of the exception provided at regulation 12(5)(e) of EIR, that disclosure would adversely affect the confidentiality of commercial or industrial information, when protected by law to cover legitimate economic interest. It gave its view that disclosure would not be in the public interest.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He complained about the council's refusal to disclose the requested information.
-

¹ Available for download at <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

10. The Commissioner considers the scope of his investigation is to determine whether or not the 'conditional agreement to lease' has been correctly withheld. For the avoidance of doubt, the Commissioner is satisfied that the complainant's 8 August 2011 letter, disputing the council's initial response, clarifies the request so that the requested information is identified as the conditional agreement to lease which is described in the Land Registry entry. The Commissioner also agrees with the complainant, and the council, that the withheld information is environmental information.
11. The proposed scope of the investigation was put to the complainant by the Commissioner on 3 November 2011, and agreed by the complainant on 7 November 2011.

Reasons for decision

Regulation 12(5) of EIR states:

"For the purposes of paragraph (1)(a), 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;"

12. The Commissioner agrees that a conditional agreement to lease between a council and a developer will, in general, be likely to constitute commercial information and that it does so in this case. He has also verified that a confidentiality clause forms part of the document in question so that it can be shown that confidentiality is provided by law, namely the common law of confidence. This requires that the information has the necessary quality of confidence, and was imparted in circumstances importing an obligation of confidence. It is clear that these conditions will be met in circumstances such as a sensitive commercial negotiation about a project of considerable value. The Commissioner is also satisfied that this confidentiality is to protect a legitimate economic interest. Therefore, the exception at regulation 12(5)(e) can be engaged in respect of the requested information.
13. There is much within the withheld information which is anodyne and routine; standard contractual terms which reveal nothing in particular about the parties' positions or commercial interests. The public authority accepts that there is no reason why it would harm either party's commercial interests for these elements to be disclosed, and the developer concurs. Therefore, for these particular elements, the confidentiality protected by law would not be adversely affected by

disclosure. Having discussed the matter with the Commissioner, the public authority has agreed to disclose the document, except for certain specified elements where it argues that the contents remain commercially sensitive and continues to apply the exception at regulation 12(5)(e).

14. It explains that these withheld elements were incorporated into the agreement after hard negotiations on both sides and arise from the particular and unusual circumstances, including the prevailing financial climate at the time. They neither reflect standard commercial terms, nor terms which would necessarily be acceptable to either side in other circumstances. For that reason, disclosure of these elements would reveal a position which each party had accepted, and which may represent a position which it would not choose to accept in other negotiations. Making public what was acceptable to each party in this case would make it more difficult for either party to negotiate more favourable terms for itself in future negotiations.
15. The Commissioner is satisfied that, on the balance of probabilities, it is more likely than not that disclosure of these agreed terms would enable a third party to acquire useful commercial intelligence about the negotiating standpoint of each side, which could be used to those parties' detriment.
16. The Commissioner therefore finds that, in respect of the specific elements which the public authority continues to claim the exception at regulation 12(5)(e), disclosure would adversely affect the confidentiality of commercial information, and that confidentiality protects a legitimate commercial interest. Consequently, the exception is engaged for those specific elements. Whether the information in those elements should be withheld or disclosed will therefore depend on the balance of the public interest factors favouring disclosure, compared to those favouring maintaining the exception.

Public interest considerations

General public interest in preserving the principle of confidentiality

17. The consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. There will therefore always be some inherent public interest in maintaining confidences, including commercial confidences.

18. However in respect of the commercial confidences in the present situation this is not a particularly significant factor in isolation, because commercial organisations must recognise that disclosure under FOIA or EIR is one of the potential consequences of doing business with a public authority. It is not therefore a matter of a breach of trust, but of recognising that there are legal obligations upon a public authority and a weighing up of the likely commercial risks. Public expenditure constitutes a very substantial income stream for many businesses, which can decide for themselves whether the value of the business is worth the possible downsides associated with FOIA or EIR.
19. It is therefore reasonable to conclude that a firm which elects to do business with a public authority does so in the knowledge of potential disclosure under FOIA or EIR. Therefore no erosion of trust, or associated reluctance to disclose confidential information, would ensue following disclosures legitimately made under the relevant legislation, because any confidential information will have been shared between the business and the public authority largely because it furthers the business interests of both parties to do so. The public interest inherent in the principle of preserving confidences therefore carries only modest weight in the circumstances of this case.

Public interest favouring maintaining the exception

20. There may still, however, be legitimate reasons why commercial confidences should be respected. In this case, a key public interest factor favouring withholding the information rests on the possible consequences to either party of that disclosure, and the detriment which they might face. That detriment may, in general terms, be illustrated by the following examples:
 - A party in negotiations with either the public authority or the developer might press for more favourable terms for itself, on the basis of terms agreed by either party in the requested information. Renegotiating, or resisting, these terms might therefore prove more difficult and expensive. This could therefore compromise either party's future negotiating position; or
 - A competitor to the developer might be able to use the information to its advantage in competitive bidding against the developer for other contracts.
21. These generic arguments carry some weight. Irrespective of the findings at paragraph 19, above, there remains a legitimate public interest in making provision for the confidentiality for commercially sensitive information. There are also similar arguments which relate more specifically to the present circumstances and which consequently carry

22. The council explains that Daventry is the largest town within the council's administrative area, has expanded rapidly in recent times and is projected to continue expanding to a significant degree. A review of services within the town has shown a significant under-supply of retail provision in the town centre, which leads to people from Daventry choosing to shop elsewhere. The current town centre does not allow for larger-format retailers as there are no suitable units available. The development is intended as part of a regeneration to attract large national retailers, and also to provide other shopping and leisure facilities. This will benefit the community not only in terms of provision of facilities, but also in creation of employment.
23. Therefore, the council argues that there is a strong public interest in the success of the proposed development, and disclosure of the withheld information would be likely to jeopardise the commercial viability of the development. The Commissioner accepts this argument as a valid reason for withholding the information in the public interest.

Public interest in disclosure of the information

24. The Commissioner recognises the public interest inherent in transparency and accountability, which may be likened to the public interest inherent in the protection of confidences in that it is a general principle which may be applicable. In light of the public interest argued by the council above, the Commissioner is satisfied that this general principle of openness and transparency will not, in itself, be sufficient to counter the specific public interest in maintaining the commercial confidentiality in this case.
25. However, regulation 12(5)(e) is often at issue in requests relating to planning matters. The Commissioner considers that the particular public

interest in public participation in planning matters is likely to carry some weight in favour of disclosure in such cases.

26. For example, in *Bristol City Council v IC & Portland and Brunswick Squares Association* (EA/2010/0012)², the First-Tier Tribunal considered various features of the planning regime concerned with public participation and transparency, with specific reference to the demolition of protected buildings. The Tribunal concluded: “*All that in our view indicated a very weighty public interest in disclosure in this case*”. The tribunal also considered that the fact that the Council itself owned the site to be developed “*gave rise to a need for ‘particular scrupulousness’ on the part of the Council*” and added substantial weight in favour of disclosure.
27. This case is not directly analogous to the *Bristol City Council* case, however, because in that case the requested information was a viability assessment which was, by its nature, somewhat hypothetical and based on standard industry financial assumptions not company-specific data, and was therefore less directly commercially sensitive than the contract document at issue in the present case. Secondly the *Bristol City Council* development involved the demolition of a (council-owned) protected building, which was a matter of some local controversy at the time. Because of these differences, the Commissioner therefore gives only moderate weight to the general principle of transparency, and has gone on to consider more specific local issues raised by the complainant.
28. In this case, the consequences of disclosure (both to the developer and to the possible viability of the development), are more direct and weighty, as examined above. The development does have its opponents, however, and there is some degree of local controversy. The complainant has brought a matter to the Commissioner’s attention in respect of an area of open land which falls to become part of the development area.
29. The complainant has explained his understanding that an area proposed for development, known as the Eastern Way playing field, was acquired and held under a statutory provision³ which stipulates its use for

2

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf) see paragraphs 16-17

³ Either the Public Health Act 1875 or the Local Government (Miscellaneous Provisions) Act 1976

recreation. His argument was therefore that the proposed development would contravene this statutory use of the land and that it was in the public interest for any 'commercial dealing' in the land to be disclosed.

30. The Commissioner notes that the proposals affecting this land are already in the public domain as a result of the normal public consultation processes associated with planning and that the complainant and other objectors have therefore had an opportunity to make their case in the appropriate forum.
31. In light of the complainant's stated position, the Commissioner has also considered the extent to which disclosure of the requested information will assist the public understanding, or expose any possible wrongdoing in relation to any change of use of the land.
32. During the course of the Commissioner's investigation, it transpired that an application had been put in to have this land designated as a village green, by a member of a local campaigning group, Friends of Daventry Open Spaces (FODOS). Subsequently, an agreement between the council and the applicant was reached, to designate an area of the land on Eastern Way as village green, and that application was withdrawn.
33. The complainant maintains that this agreement was forced on the applicant, mainly due to costs in pursuing the matter at a public inquiry. He argues that the threat to the remaining land, and the associated public interest, has not changed. He reasserts his view that there is a significant and legitimate public interest in understanding the council's decision-making process, together with information on any agreements that have been made with a developer given the statutory rights of the local community for use of the land as recreational land. It is clear that he believes the council is acting contrary to the public interest in negotiating a deal with a developer in its own interests.
34. The Commissioner observes that the designation of the land as a village green was done with the agreement of the local campaigning group, and the complainant has not produced any evidence to support his assertion that the matter was settled under any form of duress beyond what may be thought of as normal legal bargaining.
35. Furthermore, the council disputes some of the applicant's grounds for its application, namely that the land which was the subject of the application had been in use by *"a significant number of the inhabitants of [the locality ...] as of right for a period of at least 20 years"* as

required by section 15(2) of the Commons Act 2006⁴. The council's opposition to the application shows that the land was acquired by it in 1998, prior to which it constituted school playing fields, for which a right of access to the public for recreation is disputed on the grounds that the public was excluded when the land was in use by the school.

36. The Commissioner has searched the websites of local newspapers, to see whether the development has attracted notable local opposition or controversy, but his searches have located little comment, and still less adverse comment, and no additional material on this matter has been provided to the Commissioner which materially alters his observation. These enquiries have not led him to the view that opposition extends significantly beyond the membership of FODOS, which is understood to consist of 10 people, plus a further 68 who have given written support.
37. The Commissioner has given the complainant an opportunity to produce evidence to support his view that the matter remains controversial with the general public in Daventry (ie, beyond the interests of a dedicated campaigning group). His submissions do not materially affect the Commissioner's findings. He cites campaigning material produced by FODOS, and a page with critical comment about the development, on the Daventry Town Council⁵ website, but no evidence or statistics to show that this opposition extends beyond a small number of objectors. The complainant cites 85 evidence forms in support of the use of the land for public recreation, submitted to Northamptonshire County Council. Even allowing for the fact that only a small percentage of interested citizens will be likely to have taken the trouble to submit a form, this does not support the complainant's claims that the development has attracted substantial local opposition.
38. The complainant has also given his view that the development agreement has been improperly reached, and that there may be wrongdoing or conflicts of interest which have led to a decision favourable to the development and the developer in this proposal. He has not produced any evidence for this view, however, beyond more general assertions that the council is conspiring with the developer. The Commissioner cannot therefore ascribe any particular public interest to the principles of transparency and openness, beyond that which has already been applied in paragraphs 24-27 above.

⁴ <http://www.legislation.gov.uk/ukpga/2006/26/contents>

⁵ The complaint is about Daventry District Council, which is the planning authority. The Town Council is understood to be a statutory consultee to the planning application.

39. The development as a whole, and the use of the land at Eastern Way playing fields in particular, has not been shown by the complainant to be controversial or opposed by a significant proportion of the affected community. It is clear that the complainant, and the rest of the campaigning group FODOS, are opposed to the development and the loss of the open space, but he has not shown that these concerns are widely shared by the local community. The Commissioner is therefore unable to accept the complainant's claims as to the degree of public interest in this matter or the number of people who may be adversely affected by it.

Balance of the public interest

40. The complainant has argued that:

"There is clearly significant and legitimate public interest in understanding the council's decision-making process, together with information on any agreements that have been made with a developer, especially for land that has been acquired under powers giving the local community statutory rights of use as recreational land."

Consequently, he suggests that the exception at regulation 12(5)(e) should be disapplied in the public interest in respect of the withheld information.

41. The Commissioner considers that the withheld information (the conditional agreement to lease) does not contain information which provides particular insight into the council's decision-making process in respect of the decision to pursue the development and utilise the land at Eastern Way, but he observes that the planning procedure is a public process which facilitates a considerable degree of public participation. Consequently, the public interest he argues in support of this particular element carries little weight and disclosure of the withheld information would be of limited assistance for that particular purpose.
42. Insofar as the withheld information assists his second point (the public interest in understanding or obtaining information on the agreements made with a developer) that public interest is, as examined in the analysis above, balanced against the public interest in protecting the economic interests of the parties. The Commissioner also recognises that the complainant's assertion (that the local community has statutory rights of use of the land for recreation), has been formally disputed by the council.
43. In addition to the findings at paragraph 39, above, the Commissioner considers that complainant has not produced any evidence, beyond his

own assertions and those of FODOS, to suggest that the council has conspired with the developers. The Commissioner is therefore unable to give any additional weight to either the general principle of transparency, or the specific public interest arguments put forward by the complainant, which would permit him to decide that the public interest in disclosure is equal to, or greater than, the public interest in maintaining the exception.

Conclusion

44. The Commissioner concludes that, in respect of the sections of the agreement which the council wishes to withhold under regulation 12(5)(e) of the EIR, the exception is engaged and the public interest in maintaining the exception outweighs the public interest in disclosing the information. The agreement will therefore be disclosed as agreed by the council, except for the sections listed in Annex 1 which may be withheld under the provisions of regulation 12(5)(e) of EIR.

Right of appeal

45. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

Annex 1

Information to be withheld

Section A, Definitions Interpretation and Conditionality

Withhold text under the following sub-headings:

'End Date'	redact the date
'Long Stop Date'	redact the date
'Viable'	redact text from "means that" until "Development Costs"

Section E, Grant of lease and other provisions

Clause 6.7	withhold entire clause
Clause 6.8	withhold entire clause
Clause 6.9	withhold entire clause
Clause 12.7.1	withhold entire clause
Clause 12.8	withhold entire clause
Clause 13.7.1	withhold entire clause including subsections
Clause 13.7.2	withhold entire clause including subsections
Clause 33.3	withhold entire clause

Schedules

Third Schedule	withhold S3.1(v) withhold S3.1(vii) withhold S3.8.1(vi)
Fifth Schedule	withhold S5.3.1 withhold S5.3.4 withhold S5.3.5

Eighth Schedule

redact S8.1.1 after line 4 (ie all text after "*...as the case may be*")

withhold S8.1.1(1)

redact S8.1.1(2) line 4 (ie, after "*professional advisers*") as far as "*...and the application for...*" (on line 5)

withhold S8.1.1(7) (including subsections)

withhold S8.1.1(16)

withhold S8.1.1(17)

withhold S8.1.1(19)

withhold S8.1.1(20)

withhold S8.1.1(21)

withhold S8.1.1(24)

withhold S8.1.1(25)

withhold S8.1.1(26)

withhold S8.1.1(27)

withhold S8.1.1(28)

withhold S8.1.1(29)

withhold S8.1.1(30)

withhold S8.2.2

withhold S8.3.1 (including subsections)

withhold S8.5 (including subsections)

withhold S8.7 (including subsections)

withhold S8.8 (including subsections)

withhold S8.9 (including subsections)

withhold S8.10 (including subsections)

withhold S8.11 (including subsections)

withhold S8.12 (including subsections)

withhold S8.13 (including subsections)

withhold S8.14 (including subsections 8.14.1; 8.14.2;
8.14.3; and 8.14.7)

Withhold remainder of S8 from 8.15 to end of
Schedule 8

Appendices

Appendix 3 withhold

Appendix 5 withhold

Appendix 6 withhold

Appendix 8 withhold

Appendix 10 withhold

End of Annex 1