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

Decision notice

Date: 13 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 submitted a request to the public authority for a copy of the financial viability assessment undertaken on a piece of land purchased by the public authority. The public authority disclosed most of the financial viability assessment. It withheld information relating to the costs of remediation or decontamination of the land and the projections/assumptions in relation to rental income, sale values, and other associated costs and profits. The information was withheld by the public authority in reliance on the exception at regulation 12(5)(e) EIR.
2. The Commissioner's decision is that although the exception is engaged, the public interest in maintaining the exception does not outweigh the public interest in the disclosure of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with unredacted copies of the four documents supplied to him following his request.
 - The information redacted from the documents is described in the body of this notice.
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

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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, request and response

5. The public authority helpfully provided the Commissioner with a brief background to the request which she has summarised below.
6. The public authority purchased an area of derelict land (4.35 hectares) in Cheriton, a suburb of Folkestone in Kent for £1.5 million in or round about December 2016. Prior to the purchase, the land had been redundant for over thirty years. Planning permission had previously been granted by the public authority in 2014 to try and support redevelopment of the site. However, despite significant compromise in allowing the construction of 77 homes, rather than a wholly employment based development, to support the site's redevelopment, the owner was unable to find a developer to take on the proposal. The land is contaminated, has difficult ground conditions and is close to the M20 motorway.
7. The public authority intends to develop the land in accordance with the planning permission for commercial use and housing, including 23 council houses.
8. On 6 January 2017 the complainant wrote to the public authority in connection to the proposal and requested information in the following terms:

"Background

Planning Application Y13/0024/SH know as the Land at Biggins Wood, Caesars Way, Cheriton, Folkestone

see: <http://www.shepway.gov.uk/moderngov/mgIssueHistoryHome.aspx?IID=13491&PlanId=213>

Has recently been bought by the Council for £1.5 million. Planning permission with conditions was granted on Monday 25th July 2016 according to the Council planning portal

The Request

Please could you provide me with the full Financial Viability Assessment undertaken for the site."

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9. On 23 January 2017 the public authority issued its response to the request. Most of the information in scope was released to the complainant. The public authority did this by disclosing redacted copies of the four documents containing the information in scope. The redacted information was withheld in reliance on the exception at regulation 12(5)(e) EIR.
10. On 23 January 2017 the complainant requested an internal review.
11. The public authority wrote to the complainant with details of the outcome of its internal review on 20 February 2017. The review upheld the original decision.

Scope of the case

12. The complainant contacted the Commissioner on 27 February 2017 to complain about the public authority's handling of his request, specifically the decision to withhold the remaining information within the scope of his request. He provided the Commissioner with submissions to support his view that the withheld information was not exempt from disclosure. The Commissioner has considered his submissions in full even though she has not found it necessary to reproduce them fully in this notice.
13. For the avoidance of doubt, the scope of the Commissioner's investigation was to determine whether the public authority was entitled to withhold the information redacted from the disclosed documents in reliance on regulation 12(5)(e) EIR.

Reasons for decision

The withheld information

14. The public authority explained that the withheld information falls into two broad categories. Firstly, the costs of remediation or decontamination of the land. Secondly, the projections/assumptions in relation to rental income, sale values, costs and anticipated profits. This information was redacted from the four documents that were supplied to the complainant following his request.
15. Having inspected the withheld information, the Commissioner is satisfied with the public authority's categorisation above.

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Regulation 12(5)(e)

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

“A public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

Public authority's position

17. The public authority's submissions in support of its decision to engage the exception are summarised below.

18. It acknowledged that in order to successfully engage the exception, it will need to establish that:

- The withheld information is not on emissions¹,
- The withheld information is commercial or industrial in nature,
- The withheld information is confidential under the common law of confidence, contract or a statutory bar,
- The confidentiality is protecting a legitimate economic interest, and
- The confidentiality will be adversely affected by disclosure

19. In terms of the first consideration, the public authority noted that by virtue of regulation 12(9), it would not be able to rely on the exception at regulation 12(5)(e) to the extent that the withheld information “relates to information on emissions”.

20. It however submitted that the withheld information is not information on emissions falling directly within the provision in regulation 2(1)(b)² and therefore regulation 12(9) did not apply.

¹ This is not actually a prerequisite for engaging the exception and will need to be considered on a case by case basis only.

² “Environmental Information” is described in regulations 2(1) (a) – (f). Information on emissions constitutes environmental information under the EIR specifically by virtue of regulation 2(1)(b). <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

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21. In terms of the second consideration, the public authority explained that it had expended a considerable amount of public money to purchase the land and will be involved in similarly spending public money in decontaminating the land. In other words, there is a commercial purpose to the purchase.
22. With regard to the third consideration, the public authority submitted that the withheld information is subject to the common law of confidence. It argued that the information is not trivial, relating as it does to one of its assets which it has purchased for a large sum of money. It further explained that increase in the social housing stock for the local authority is an area of priority in view of the fact that there are 1,500 applicants on the housing waiting list but approximately only 300 homes become available each year. It submitted that development of the land will result in the increase of the council housing stock. Similarly, it explained that Shepway has relatively low economic activity. Employment rates and wage levels are relatively low for both residents and workers and are significantly lower than the South East and England averages. It submitted therefore that development of commercial and office spaces would increase employment opportunities in the area.
23. It submitted that information relating to property transactions would normally be expected to be held in confidence. In addition, those involved in the development are aware of the importance and sensitivity of the withheld information. It noted that the valuation report, a redacted copy of which has been released, is explicit that it is a private and confidential report prepared for the public authority.
24. With regard to the fourth consideration, the public authority explained that it intends to invite tenders for the remediation work or pass on the responsibility to a developer. It argued that disclosing the costs associated with decontamination of the land would "corrupt" the tendering process in that potential bidders would know the price it would expect to pay. This could lead to the public authority paying a higher price given that any competitive bids would be based on prior knowledge of its expectations.
25. It further argued that disclosing information in relation to projected rental income, sale values, costs, profits etc would place it at a disadvantage in any negotiations with potential developers, future tenants of the commercial/office spaces, and in the sale of non-social housing.
26. Consequently, it submitted that the legitimate economic interest in question is the protection of the public authority's bargaining position in

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future negotiations in relation to developing the land and marketing developments on the land.

27. Having established in its view that the withheld information is; commercial, confidential, and that the confidentiality is protecting a legitimate economic interest, the public authority concluded that the confidentiality of the information would be adversely affected by its disclosure.

Complainant's position

28. The Commissioner considers that the crux of the complainant's position pertinent to whether the public authority was entitled to engage the exception can be summarised as follows.
29. The exception cannot be engaged because the withheld information is financial rather than commercial information.
30. It cannot be engaged because the withheld information is on emissions which means that the public authority was excluded from relying on the exception at regulation 12(5)(e) by virtue of the provision in regulation 12(9).

Is the exception engaged?

31. For the avoidance of doubt, the Commissioner considers that the withheld information is environmental information within the meaning of regulation 2(1)(c) EIR.³ 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.
32. However, regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words, it will only apply where information is directly linked to emissions. The Commissioner considers that although the withheld information relates to information on emissions in that it reveals the financial costs of treating land likely to emit gases into the atmosphere, it is not "information on emissions" in and of itself, and that is the key consideration. She has therefore concluded that the public authority was not excluded from relying on the exception at regulation 12(5)(e) by virtue of the provision in regulation 12(9).

³ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

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33. The Commissioner is satisfied that the withheld information is commercial, relating as it does to the purchase of land by the council for a commercial purpose. The land was purchased for development to meet social housing needs and crucially, to also generate a return for tax payers. The development of the land is also a commercial activity.
34. She accepts that the withheld information is subject to the common law of confidence. It is clearly not trivial, is not in the public domain, and was shared in circumstances creating an obligation of confidence. Clearly, a reasonable person in the public authority's position would quite rightly consider the withheld information confidential. The public authority intends to invite tenders for the remediation work, negotiate with developers to construct the houses and commercial spaces, and put up some of them for sale and lease. Under these circumstances, it would be reasonable to consider that information regarding costs and projections relating to profits would be confidential to the public authority.
35. Furthermore, she accepts that the confidentiality is protecting a legitimate economic interest which is the public authority's bargaining position in future negotiations relating to developing the land for public and commercial use, along with the sale and lease of property on the land. She is satisfied that in the circumstances, disclosure of the withheld information would adversely affect this economic interest. She is mindful of the fact that the public authority has publicly revealed the land is contaminated and also that the cost of decontamination would be expensive. Therefore, it is arguable that this revelation alone would adversely affect its negotiation position. Nevertheless, there is no less traction in the view that revealing the cost of decontaminating the land, along with the projections in respect of sale values and rental income, would place the council in a weak position in negotiations with bidders, developers, potential buyers and leaseholders. If they knew the actual costs to the public authority and its projected profits, they would submit bids/offers they consider the authority is unlikely to be able to afford to refuse. This would clearly place the public authority at a commercial disadvantage, to the detriment of tax payers.
36. The Commissioner is therefore satisfied that disclosing the withheld information in the circumstances of this case would harm its confidentiality and the legitimate economic interest of the public authority.
37. Consequently, she has concluded that the public authority was entitled to engage the exception at regulation 12(5)(e).

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Public interest test

38. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR. 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 withheld information.

Complainant's arguments

39. The Commissioner has summarised below the complainant's arguments to support disclosure of the withheld information in the public interest.
40. He has argued that it is in the public interest to disclose the withheld information due to the substantial risk to human health and safety from the remediation and construction work on the site to a nearby primary school in particular and generally across the local authority.
41. He has also argued that it is in the public interest to disclose the withheld information because the land, he alleges, was purchased from a company with a shareholder convicted for hacking offences.⁴ He claims that it is not known what due diligence if any the public authority undertook on the seller and that releasing the withheld information would place the authority "above the plausible suspicion of any wrong doing."
42. He also alleged that the public authority's accounts for 2015/16 remain unaudited and "not fully signed off as the auditor is carrying out investigations into the accounts." He therefore submitted that the withheld information should be disclosed in order for tax payers to know whether they are getting best value for money.
43. More generally, he submitted that the disclosure would foster accountability and transparency in respect of how the public authority spends taxpayers' money. It would inform public understanding of how much money the public authority will spend considering "it already has a £58 million debt." It would increase public understanding of the public authority's general approach to handling planning issues. It would inform the public more fully about the assistance given to the public

⁴ <http://news.bbc.co.uk/1/hi/england/london/6270899.stm> The Commissioner has not verified whether this allegation is true or not.

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authority by external consultants in the planning process both in the specific case and more generally.

Public authority's arguments

44. The Commissioner has summarised below the public authority's arguments in support of its view that the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.
45. The public authority considers that it has a fiduciary duty to the community it serves. Consequently, there is a public interest in knowing whether it has spent public money wisely and is maximising value for money in respect of the purchased land.
46. It however argued that it is in the public interest for it to be able to function effectively in a commercial sphere given the conclusion that disclosure of the withheld information would jeopardise its position with regards to any negotiations concerning the tendering for the work/developing the land and marketing it.
47. It submitted that it has a duty to negotiate the best possible financial deals to protect the public purse, which in turn enables it to provide the best possible service. It explained that its current baseline position suggests a total level of saving of £9,048,000 over the period 2017/18 to 2024/25 that will be required to balance the budgets in those years. It was therefore vitally important that it attempts to minimise its expenditure and maximise the value of its assets. Any prejudice to its ability to tender and negotiate competitively would undermine this.
48. It pointed out that in order to ensure transparency regarding the purchase, it had revealed the amount paid for the land and released the valuation report (subject to redactions) to the complainant. It noted that the report shows that the public authority obtained professional advice prior to purchasing the land. It also noted that whilst the purchase price is substantial, it has not proved to be controversial and would bring into use an area of land previously derelict. It further submitted that the land is within an urban area so it does not impinge on the countryside, and would provide much needed social housing and employment opportunities. It added that it was not clear how transparency would be enhanced by the disclosure of the withheld information.
49. The public authority provided the following explanation in response to the allegation that its 2015/16 accounts has not been signed off.

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50. The accounts were audited during the summer of 2016 and, following conclusion of the audit in September 2016, its external auditors issued their audit opinion. The public authority's audit and governance committee were therefore able to approve the accounts at their meeting on 21 September 2016. However, the audit certificate has not been issued by the external auditors pursuant to the Local Audit and Accountability Act 2014 (2014 Act).⁵ This is because in August 2016, two local residents (the complainant and one other) lodged formal objections to the 2015/16 accounts with the external auditors, citing the relevant provisions of the 2014 Act. The external auditors have yet to respond to the objections. However, at the meeting on 21 September 2016 their representative informed the public authority that it had been determined that the objections do not materially impact on the accounts or on the value for money opinion and that the accounts were ready and fit to be signed by the Chairman.⁶
51. Therefore, the public authority has no reason to believe that the objections will be upheld or that the 2015/2016 certificate will not be issued. It understands that the reason for the delay is due in part to the relative rarity of objections to local authority audits, particularly since the 2014 Act, and the external auditors having to obtain corporate and legal sign off for the outcome of their review.
52. The public authority's submissions in support of its position that the purchase represents value for money are summarised below and in a confidential annex. The submissions in the confidential annex reveal withheld information and therefore cannot be included in an open decision notice or revealed to the complainant.
53. Using the National Audit Office criteria, the public authority is satisfied that it has spent well and wisely in order to meet two of its corporate priorities:
- More Homes – provide and enable the right amount, type and range of housing, and

⁵ <http://www.legislation.gov.uk/ukpga/2014/2/contents>

⁶

<http://www.shepway.gov.uk/moderngov/ieListDocuments.aspx?CIId=438&MIId=3170&Ver=4>

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- More Jobs – work with businesses to provide jobs in a vibrant local economy.
54. It recognised that it will not be able to know whether the purchase would ultimately generate a profit for public benefit until the land is developed or sold, especially in the current climate. However, it argued that this is a risk it shares with private developers in the current economic climate. Disclosure would therefore put the public authority at a disadvantage with developers which would ensure that it does not get the best price, and consequently, not the best value for tax payers' money.
55. The public authority therefore concluded that the public interest falls squarely in maintaining the exception. It did not see how the public interest could be served by reducing the authority's ability to obtain value for money.

Balance of the public interest

56. The Commissioner's position on where the balance of the public interest lies is explained below.
57. In light of the public authority's explanation, the Commissioner is not persuaded that the fact the public authority's 2015/16 accounts have not yet been signed off by the external auditors increases the weight of the public interest in disclosing the withheld information. This is because the auditors issued an unequivocal statement that the objections do not materially impact on the accounts. In the circumstances, she accepts that the objections to the accounts do not increase the weight of the public interest in disclosure and therefore that the statement issued by the auditors is significant in that regard. She has therefore attached very little weight to this submission.
58. She is also not persuaded by the suggestion that the due diligence carried out by the public authority could be lacking in view of the allegation that a shareholder of the company which sold the land to the public authority was convicted of hacking offences. She is certainly not persuaded that releasing the withheld information would place the public authority "above the plausible suspicion of any wrong doing" in light of this allegation. Whilst the documents caught by the request do not focus on the due diligence carried out by the authority, there is nothing to suggest from the disclosed documents that this was lacking or inadequate. More importantly, she does not consider that the withheld information would shed any significant light on this specific point. Clearly it would shed some light on how the public authority manages its finances. However, she does not understand how it would place the

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public authority "above the plausible suspicion of any wrong doing" as has been asserted. For the avoidance of doubt, she has not seen any evidence to suggest wrong doing by the public authority.

59. The Commissioner accepts that in the circumstances, disclosure of the withheld information would enhance accountability and transparency in respect of how the public authority spends taxpayers' money. She acknowledges that the public authority has released most of the information in scope in recognition of this public interest. By doing that, it revealed the cost of the land and the fact that it requires decontamination and that this would be expensive. These are clearly significant disclosures in the public interest. Therefore, although there is a significant public interest in knowing whether there is a risk to human health and safety from the land, she considers that the withheld information itself would be of limited value in this regard. In her view, it would not add anything substantive to the information that has already been released pursuant to the request.
60. She accepts that there is a strong public interest in not releasing the withheld information given the harm it is highly likely to cause to the public authority's ability to negotiate competitively in relation to developing the land and marketing properties on the land in future. This is consequently likely to also affect its ability to maintain a balanced budget for the benefit of its residents. However, she is mindful of the fact the public authority's bargaining position is not very strong as a result of the information that has been revealed publicly regarding the state of the land and the difficult conditions it would present to a potential developer. It is not the most attractive option for a developer which is why the public authority has struggled to attract them in the first place. She recognises that the public authority has purchased the land in order to explore other options to attract developers and there is a strong public interest in not undermining its ability to explore those options effectively. However, the fact is, the difficult ground conditions make the land a less attractive option for developers, and consequently the public authority's negotiating position, less strong.
61. The Commissioner considers that the key consideration in the circumstances is whether the purchase represents value for money for taxpayers. She considers that this is a significant public interest in the circumstances of this case which narrowly outweighs the strong public interest in maintaining the exception. She has explained the reasons for her position more fully in the confidential annex in order not to reveal withheld information.

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62. For the avoidance of doubt, the Commissioner has concluded that on balance, the public interest in maintaining the exception does not outweigh the public interest in disclosing the withheld information.

Right of appeal

63. 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

64. 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.
65. 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

Gerrard Tracey
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