



EAST CAMBRIDGESHIRE DISTRICT COUNCIL

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Further to your information request FOI/EIR 21/22-331 please find your question and our response below.

Request:

Provide copies of the part, or parts, of the documentation entered into with the MOD which deals with the further obligation to appeal the Planning decision should it be unfavourable.

Response:

The information you have requested is contained in the sale contract between the MOD ("Secretary of State for Defence") and East Cambridgeshire District Council ("the Council") dated 2019 for the purchase of freehold property, which comprises of former services families' accommodation at RAF Ely, Cambridgeshire. The property is immediately adjacent to the Princess of Wales Hospital in Ely, as this was formerly an RAF hospital and the property consists of former accommodation for families stationed there during the Second World War. The Council confirms that it holds the information requested.

Whilst it is accepted that the various transfer documents with relation to the property are already in the public domain by virtue of being lodged at H M Land Registry on registration of the ownership of the land, it is not a requirement for the contract to be lodged at the Land Registry and therefore the contract is not in the public domain.

A redacted copy of the contract was provided to you on internal review on 20th November 2021, withholding the remaining information under regulation 12(5)(e). After correspondence with the ICO in June 2021, Schedules 3 and 6 were released to you.

However, the Council maintains that the remaining information contained in the contract is subject to the exception from disclosure under Regulation 12(5)(e) of the EIR.

In considering whether the withheld information falls within the exception of regulation 12(5)(e), the Council considered the provisions of regulation 12(5)(e), the guidance on Confidentiality of commercial or industrial information (Regulation 12(5)(e)) on the Commissioner's website, the Information Commissioner's Decision Notice dated 13 January 2016 issued under Reference FS50567915 https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560502/fs_50567915.pdf, the Decision Notice FER0209326 dated 10th December 2009 https://ico.org.uk/media/action-weve-taken/decision-notices/2009/501592/FER_0209326.pdf and the various Decision Notices and case law which are referred to within this letter.

The exception under s12(5)(e) EIR allows that 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.*

The exception can be broken down into a four-stage test, which was adopted by the Information Commission¹ and all four elements are required in order for the exception to be engaged:

The information is commercial or industrial in nature;

Confidentiality is provided by law, including confidentiality imposed on any person by the common law of confidence, contractual obligation or statute;

The confidentiality is protecting a legitimate economic interest; and

The confidentiality would be adversely affected by disclosure.

Turning to the first element under (i), for information to be commercial in nature, it will relate to a commercial activity, either of the public authority or a third party and the commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The contract is for the purchase of

land, but goes further in relation to the development of that land and therefore the contract relates to planning and development. The Council would put forward that the information is clearly commercial or industrial in nature as it relates to the purchase of land and the proposed planning and development of the site in future. This accords with the Commissioner's view in the Information Commissioner's Decision notice dated 16th November 2020 under Reference IC-44222- R1Y9 <https://ico.org.uk/media/action-veve-taken/decision-notices/2020/2618631/ic-44222-r1y9.pdf>

Turning to the second element under (ii) above, confidentiality must be provided by law, including confidentiality imposed on any person by the common law of confidence, by a contractual obligation or statute. The contract between the Secretary of State for Defence and the Council has a clear contractual obligation in relation to "commercially sensitive information" and an obligation to inform the other party should a FOI/EIR request be made to allow the parties to disseminate the contract and make a judgment call on what information should be released.

The Council believes that the information is covered by the law of confidence as in order to be subject to confidentiality provided by law, the information must (a) have the necessary quality of confidence and (b) be imparted in circumstances importing an obligation of confidence.

With regard to (a) the Information Commissioner accepted in the matter of *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012 24 May 2010) that all that was required for the "necessary quality of confidence" was that the information was not trivial and not in the public domain (criteria which are both satisfied in this case).

In relation to (b), due to the commercial nature of the transaction, the Secretary of State for Defence and the Council would be fully aware that the information contained in the contract has the necessary quality of confidence and is shared in circumstances importing an obligation of confidence on all parties.

In relation to (iii), it is not possible to go into great detail as this would disclose the withheld information. As you are aware, there is a current live planning application in relation to the property, and also another under reference 21/00160/FUM relating to the development of the Princess of Wales hospital on the land which is the subject of the contract.

Public disclosure of the withheld information prior to the determination of the two planning applications could be prejudicial to the outcome and put the Council in an impossible position as the local planning authority.

In relation to (iv), disclosure of the withheld information could be prejudicial to the legitimate economic interests of the Council, ECTC Ltd and the Secretary of State and the parties would be adversely affected.

As there are third party interests at stake, the Council is obliged to consult with the third party unless it has prior knowledge of their views, as set out in *Derry City Council v Information Commissioner* (EA/20056/14). It is not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. Therefore, in reaching this view, the Secretary of State has been consulted.

The Council therefore considers that as the first three elements of the exception have been met, and further information supplied in relation to (iii) and (iv), the exception has been satisfied.

Public interest test

The Council appreciates that there is a public interest in transparency and accountability of public authorities and this would be a factor in favour of disclosure. However, the Council is of the view that the premature release of the information could be misleading and not in the public interest. This is because the information contained in the contract is complex and not easily fully understood by a member of the public and could be misunderstood.

¹ *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012 24 May 2010)

As the information is commercially sensitive and is not in the public domain, disclosure could be prejudicial and would prejudice the commercial interests of the Council and the Secretary of State and adversely affect the commercial confidentiality of the parties.

On weighing up the balance of the public interest, the Council is still of the view that there is a greater public interest in favour of maintaining the exception and withholding the remaining information due to the harm that disclosure would cause to the parties and that this outweighs the presumption in favour of disclosure.

Conclusion

I confirm that the Council is still of the view that the remaining information contained in the contract between the MOD and the Council contains commercially sensitive information that should not be disclosed under the exception contained in Regulation 12(5) (e) EIR.

The Council further acknowledges that with the passage of time, the various provisions in the contract will have less commercial sensitivity and confidentiality and therefore the Council would be willing to release the withheld information in the future when that commercial sensitivity and confidentiality has lessened.

This concludes your request FOI/EIR 21/22-331

If information has been refused please treat this as a Refusal Notice for the purposes of the Act.

If you disagree with our decision or are otherwise unhappy with how we have dealt with your request in the first instance you may approach foi@eastcambs.gov.uk and request a review. A request for review must be made in no more than 40 working days from the date of this email.

Should you remain dissatisfied with the outcome you have a right under s50 of the Freedom of Information Act to appeal against the decision by contacting the Information Commissioner, Wycliffe House, Water Lane, Wilmslow SK9 5AF.