

## Report to Overview and Scrutiny Committee

Date of meeting 24 September 2018

By the Chief Executive

### INFORMATION REPORT



**Horsham  
District  
Council**

Not Exempt

## Advice on Work Programme Suggestion about Viability Reports

### Recommendations

To note the findings of (1) Information Commissioner's Decision Notice FER0690402 and (2) Planning Policy Guidance published by Ministry of Housing Communities and Local Government on 24<sup>th</sup> July 2018 in respect of publishing viability assessments.

Overview and Scrutiny committee to recommend that Horsham District Council follows the latest guidance from the Ministry.

### Reasons for Recommendation

To respond to the Chairman's request for advice on how to address concerns raised at the Overview and Scrutiny committee.

### Executive Summary

At the Overview & Scrutiny Committee (O&S) meeting held on 23<sup>rd</sup> July 2018 two members of the public raised concerns regarding the omission from the O&S work programme of a suggestion to conduct a review into "how/why some key data was incorrectly classified as commercially confidential and thereby consistently and repeatedly withheld from the public". The specific information involved was contained in reports prepared in connection with the viability of one of the council's strategic development sites. A decision notice issued by the Information Commissioner's Office (ICO) was cited as evidence of 'a fundamental misapplication of Environmental Information Regulations'.

O&S had previously agreed to defer making a decision on the work programme suggestion until after the imminent publication of Planning Policy Guidance from the Ministry of Housing, Communities and Local Government (MHCLG) which was understood to be likely to address the issue of commercial confidentiality. The Chairman agreed to seek advice from the Council's lawyers, together with the Vice Chairman and the Chief Executive on how to address the concerns raised.

This report summarises the main points contained within the ICO's decision notice so that O&S can form its own view of the ICO's findings. A full copy of the notice is included in the background papers. Since the last O&S meeting MHCLG has gone on to publish detailed

Planning Policy Guidance that specifically addresses the issue of publication of viability reports. This guidance was updated to reflect the changes made to the National Planning Policy Framework (NPPF) and provides much needed clarity and simplification removing the previous ambiguity in this matter. An extract of the guidance relating to the publication of viability reports is also included in the background papers together with a link to the full guidance notes.

Section 4 of this report sets out issues that members of O&S may wish to consider in assessing the merit of the work programme suggestion. This report stops short recommending for or against including the suggestion in the work programme (even though there is an obvious conclusion) because it's not appropriate for the Chief Executive, or for that matter a member of the public, to direct O&S on the content of their work programme. Instead the recommendations above are designed to address the desired outcomes of the work programme suggestion as set out in paragraph 1.4 of the report. A copy of the work programme suggestion is also included in the background papers.

## **Background Papers**

- (i) Environmental Information Regulations 2004 (EIR) Decision Notice FER 0690402 14<sup>th</sup> December 2017.
- (ii) Work Programme Suggestion Form submitted by Mr Paul Kornycky dated 31.01.17.
- (iii) Statements made by Mr and Mrs Kornycky 23.07.18.
- (iv) Extract from new NPPF guidance dated 24.07.18.

**Contact:** Glen Chipp, Chief Executive.

## **Background Information**

### **1 Introduction and Background**

- 1.1 At the O&S meeting held on 23<sup>rd</sup> July 2018 the Chairman agreed to seek advice from the Council's lawyers, together with the Vice Chairman and the Chief Executive on how to address concerns raised by members of the public regarding redaction of information contained in reports prepared in connection with the viability of the North of Horsham development.
- 1.2 Decision Notice FER0690402 from the ICO dated 4<sup>th</sup> December 2017 has been cited as evidence of 'a fundamental misapplication of Environmental Information Regulations'. It is also suggested that 'the ethos behind the wrongful and arguably deliberate withholding of information still persists'.
- 1.3 O&S has been asked to conduct a review into "how and why some key data was incorrectly classified as commercially confidential and thereby consistently and repeatedly withheld from the public".
- 1.4 The desired outcomes of the review include the following:
  - In future, residents will not have information wrongly withheld.
  - Clarity over the viability assessment process and correct disclosure of data.
  - Compliant open planning process minimising the risk of call-in and/or judicial review.

### **2 Information Commissioner's Decision Notice**

- 2.1 Perhaps the obvious first step is to consider the comprehensive report produced by the ICO and understand the key findings. A copy of the full report is included as a background paper so that members of O&S can read it for themselves.
- 2.2 A summary of the key findings is also provided in this report to assist the committee members.
- 2.3 The complainant requested a copy of a review of a viability assessment relating to a planning application. Horsham District Council (HDC) disclosed some of the information and withheld other information under the exemption for commercial confidentiality [regulation 12(5)(e)].
- 2.4 The Commissioner's decision is that HDC failed to demonstrate that the exemption is engaged and required that the withheld information be disclosed to the complainant within 35 days of the Decision Notice.
- 2.5 In reaching that decision the Commissioner considered how each of the following four conditions apply to the facts of the case.

CONDITIONS REQUIRED FOR COMMERCIAL CONFIDENTIALITY EXEMPTION TO APPLY	COMMISSIONER'S FINDING
(i) Is the information commercial or industrial in nature?	The Council confirmed that the information relates to the activity of a developer and <b>the Commissioner is satisfied that the information is commercial in nature.</b>
(ii) Is the information subject to confidentiality provided by law?	In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain. <b>The Commissioner is satisfied that the information is subject to confidentiality provided by law.</b>
(iii) Is the confidentiality provided to protect a legitimate economic interest?	<p>To satisfy this element of the exemption, disclosure of confidential information would have to adversely affect a legitimate economic interest. The Commissioner considers it is necessary to establish that on the balance of probabilities that some harm <u>would</u> be caused by disclosure.</p> <p><u>The Council's Economic Interest</u> The Commissioner understands that the Council considers that disclosing the information would make developers reluctant to engage with the Council ... because of the risk that commercial information might be disclosed <b>but considers the argument speculative and generic in nature and fails to meet the threshold for engaging the exemption.</b></p> <p><u>Liberty's Economic Interest</u> The following arguments were put to the Commissioner –</p> <ul style="list-style-type: none"> <li>• Disclosure would significantly impact Liberty's ability to negotiate and compete in the market.</li> <li>• The information is a trade secret of Liberty which if disclosed would undermine Liberty's competitive advantage.</li> <li>• Disclosure would destroy Liberty's negotiating position with potential purchasers of the land.</li> </ul> <p><b>The Commissioner concluded that the threshold for engaging the exemption has not been met</b>, namely it has not been shown that disclosure would harm Liberty's economic interests.</p>
(iv) Would confidentiality be adversely affected by disclosure?	The Commissioner concluded that the exception is not engaged and has not gone

- 2.6 It has been claimed that the ICO's Decision Notice confirmed that "there was a fundamental misapplication of EIR regulations at the most senior of levels in HDC" and O&S is being asked to answer the question "How could the Planning Director and Head of Legal knowingly get these regulations so wrong?"

Both of these statements present a misinterpretation of the ICO's report.

- 2.7 It is clear from the Decision Notice that the Commissioner formed the view that the redacted information was commercial or industrial in nature and was subject to confidentiality provided by law but on balance neither Liberty nor HDC provided sufficient evidence to demonstrate that the disclosure of the information would (ie more probably than not) significantly damage a legitimate economic interest. It is unreasonable to characterise this scenario as a fundamental misapplication of EIR regulations and that is not a conclusion reached by the Commissioner.

- 2.8 Perhaps the most revealing comment in the Decision Notice is paragraph number 48 (replicated in full below) which more accurately reflects the views of the Commissioner.

"The Commissioner is left with the impression that the Council has been content to be steered by Liberty in relation to the information which should be withheld. This in itself is no bad thing – the Commissioner would not expect authorities to have diverse knowledge of the commercial concerns of third parties. However, the ultimate responsibility for handling requests rests with public authorities and the Commissioner makes it clear in her correspondence what level of detail is required to justify the use of exceptions".

### **3 The Wider Context**

- 3.1 The O&S Committee deferred making a decision on the work programme suggestion pending the publication of new NPPF guidance.
- 3.2 Statements made by members of the public would have the O&S Committee believe that this is missing the point because it is alleged the ICO has confirmed the HDC has fundamentally misapplied the existing EIR regulations. That allegation is also extrapolated to further suggest that "HDC almost certainly is continuing to wrongfully deny the public their rightful access to data in other matters".
- 3.3 Members of the Committee will no doubt form their own view of these claims but it would seem highly significant that MHCLG has decided that the guidance given in NPPF in respect of viability assessments requires revision. Could it be that MHCLG agrees with the ICO in that she "would not expect authorities to have diverse knowledge of the commercial concerns of third parties"?
- 3.4 At the time of the original request from the complainant for the review of the viability assessment, 14<sup>th</sup> June 2017, decisions from the ICO were not wholly consistent and a number of decision notices from the ICO found in favour of not disclosing the full information where the facts were similar to those in this case.

## 4 The Way Forward

- 4.1 It is not for the Chief Executive, nor indeed a member of the public, to set the work programme of the O&S Committee but the Chairman has asked for advice on how to address concerns raised by members of the public.
- 4.2 In assessing the merit of the suggested work programme item, Members may wish to consider the following points:
- The ICO has issued a detailed report after a comprehensive review of submissions from the complainant, the Council and Liberty. Is it likely that an additional review by the committee will add value or reach a different conclusion?
  - Does the committee agree that it is reasonable to interpret the ICO's report as suggesting "a fundamental misapplication of Environmental Information has occurred" and "the ethos behind the wrongful and arguably deliberate withholding information still persists"? - OR do they agree with the Commissioners' statement that "the Council has been content to be steered by Liberty in relation to the information which should be withheld. This is in itself no bad thing – the Commissioner would not expect authorities to have diverse knowledge of the commercial interests of third parties."?
  - All of the senior officers involved in applying the exemption have left the Council so it is not practicable to ask them why they believed that the exemption applied. Even if they were asked they would undoubtedly point, with some justification, to existing custom and practice in many councils at the time. It is clear that best practice in respect of disclosure has evolved over time and it is highly significant that MHCLG has thought it necessary to provide guidance about what was evidently a grey area.
  - New planning policy guidance was published on 24 July 2018 and an extract relating to viability reports is included in the background papers. The guidance sets out that "any viability assessment should be prepared on the basis that it will be made publically available other than in exceptional circumstances." This new presumption, in favour of disclosure, rather helpfully moves the onus away from public authorities having to argue that information isn't commercially sensitive in order to make it publically available – something that they were ill-equipped to do. The new default position is that developers must now demonstrate that information is sensitive and should be withheld.