

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

Date: 13 February 2014

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested information from Cheshire East Council ('the council') regarding plans to provide employment for the occupiers of 3500 intended new houses in the Macclesfield area. The Commissioner's decision is that the council has correctly refused to provide the information provided by business who have not consented to its disclosure under the exception at regulation 12(5)(f). He does not require any steps to be taken.

Request and response

2. On 9 February 2013, the complainant wrote to the council and requested information in the following terms:
 - "(a) What plans are in place by the council to provide employment for the occupiers of the intended 3500 new houses to be built in the Macclesfield area.
 - (b) Please provide a list of the companies that have to date made expressions of interest in locating to this area in order to provide the required employment for this expansion in population.
 - (c) Please detail the nature and extent of the employment that these companies will provide.

- (d) Which if any of these companies have to date been provided with planning permission in order to locate or expand their business into Macclesfield's green belt?"
3. Following the intervention of the Information Commissioner (case reference FS50499163), the council provided its response on 13 June 2013. It denied holding the information requested at parts (c) and (d), provided the information requested at part (a) and some of the information requested at part (b). It refused to provide the remainder of the information requested at part (b) citing the health and safety exemption at section 38 of the FOIA.
 4. On 15 June 2013, the complainant requested an internal review of part (b) of the request. The council provided its internal review response on 11 July 2013 revising its position to conclude that the information is environmental and therefore the request ought to have been handled under the EIR. It released the majority of the information requested in part (b) but refused the names of businesses who had expressly requested that their information is not released citing the exception at regulation 12(5)(f).
 5. The complainant then wrote to the council on 18 July 2013 detailing how it had failed to provide details supporting the application of the exception at regulation 12(5)(f). The council responded on 24 July 2013 providing further details of the application of the exception.

Scope of the case

6. The complainant initially contacted the Commissioner on 29 May 2013 to complain that he had not had a response to his request for information. Following the intervention of the Commissioner (case reference FS50499163), the council provided its response on 13 June 2013. After having exhausted the council's internal review, the complainant contacted the Commissioner on 19 July 2013 to complain that the council's response and subsequent review were inadequate.
7. The Commissioner has considered the council's application of the exception at regulation 12(5)(f) to the nine businesses who requested that their details are not released to third parties.

Reasons for decision

Regulation 12(5)(f)

8. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person -
 - i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - iii) has not consented to its disclosure.
9. The withheld information in this case is the names of businesses that have made expressions of interest in locating to the Macclesfield area who had expressly requested that their information is not released.
10. The council has explained that making an expression of interest in locating to the Macclesfield area was the decision of the businesses and there was no legal obligation on the individual businesses to make such enquiries. The Commissioner is satisfied that the businesses were not under, and could not have been put under, any legal obligation to supply the information to that or any other public authority.
11. The Commissioner is not aware of any circumstances such that the council, or any other public authority, is 'entitled' (as per the wording of the exception) to disclose the information, apart from under the EIR.
12. The Commissioner also notes that the council contacted the businesses to seek consent to release their details but consent was refused.
13. Therefore, the Commissioner has determined that sub-paragraphs i) to iii) of regulation 12(5)(f) are satisfied. The next step is for the Commissioner to consider whether disclosure would adversely affect the interests of the providers of the information.
14. It is the Commissioner's view that the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. It operates on the principle that if those who provide information on a voluntary basis suffer as a consequence of providing that information, they will not be so willing to

volunteer information in the future. Therefore, to engage the exception it is necessary to demonstrate that disclosure would result in some adverse effect on the provider of the information.

15. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the FOIA:

- Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
- Refusal to disclose information is only permitted to the extent of that adverse effect. Therefore if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
- It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner*¹ in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.

16. In its response to the Commissioner's enquiries, the council provided details as to why disclosure of the names of businesses would adversely affect the interests of such businesses. It supplied the Commissioner with the email responses it had received in response to its request for consent to release the business details. The reasons provided fall into the following categories:

- Staff would be unsettled and feel insecure about their jobs if they knew the business they worked for were considering relocating. This would adversely affect relations with employees.
- The property market in Macclesfield is very sensitive to price and any knowledge that major companies were looking for property would not only drive up the price, but would alert any other

¹ Appeal number EA/2005/0026 & 0030

businesses searching for properties to their presence in the market. This would adversely affect the businesses financially.

- Publication of the enquiries could lead to sales calls or being placed on mailing lists which would adversely affect the businesses in terms of time and the diversion from the day to day running of the business.
 - The enquiries were made in confidence and disclosure would breach business confidentiality. This would adversely affect the business in terms of breach of confidence.
 - The enquiries are commercially sensitive and disclosure would adversely affect the businesses commercial interests.
 - One business has stated that it has been plagued with animal right protests and disclosure would adversely affect employee safety and corporate security.
17. The council stated that it owes the nine businesses a duty of confidence. Although it did not provide further details to the Commissioner, he is satisfied that there would have been an implied obligation of confidence, that the information has the necessary quality of confidence, in that it is not trivial and, as far as the Commissioner is aware, is not readily available in this context by other means, and, for the reasons detailed in paragraph 16 above, disclosure would result in detriment to the confiders.
18. The Commissioner is therefore satisfied that there would be an adverse effect on the interests of the providers and that the exception is engaged.
19. The exception is subject to a public interest. Therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
20. When carrying out the public interest test the Commissioner must take into account that regulation 12(2) of the EIR provides a specific presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information.

21. The complainant has stated that there is public interest in the information as local people are unable to make informed judgements concerning the council's consultation of its Local Plan without knowing these necessary details. The Commissioner understands that the council

facilitates employment growth through the allocation of land for employment in the Local Plan.

22. The council explained that the complainant wants to be able to understand why a possible 3,500 extra homes need to be built in that area in the future. By understanding the number and types of businesses expressing an interest in the area, and also possibly the number of people they may employ, he believes he will be able to see the full picture and justification from the council for the large increase in house building.
23. It said that by disclosing all the requested the information, it would have been able to show the complainant the total sum of the location enquiries received by it at the time of his request. By being able to show the full picture of potential interest by businesses regarding locations in the Macclesfield area, it would have been able to go further in its justification for the need to build 3,500 new houses. This would further emphasise the openness and transparency of the Local Plan consultation process. The council would have also been able to show in more detail how all the various businesses would help to create a better jobs market in the Macclesfield area – thus contributing to a better environment.
24. The Commissioner considers that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process. In this particular case, disclosure would result in better informed public opinion as to how inhabitants of extra housing would be employed in the Macclesfield area.

Public interest arguments in favour of maintaining the exception

25. The council said that if it were to disclose the information, it will have betrayed a confidence. It said that it had to respect the wishes of the nine businesses that did not consent to their information being released and who had advised the council how they felt their businesses would suffer as a result of their information being disclosed. It said that the businesses believed that their enquiry was being handled in confidence and would no longer trust the council should disclosure take place.
26. The council explained that disclosure would adversely affect the reputation of the department and thus lead to companies refusing to do business with it. It said that a number of businesses stated that they would no longer use the council services in the future if their privacy couldn't be assured and pointed out that the process of seeking consent for disclosure in this case led to one company refusing to deal with the council and deciding to look at other areas for their expansion plans.

27. The council also said that it is doubtful whether disclosure of all the information requested will actually resolve the complainant's request as although officers from the council's Economic Development Service ask enquirers about the number of potential jobs an investment in the area may create, the enquirers rarely pass this information on to the authority and in this case, the council does not hold this information and cannot as a result pass it on to a requester.
28. The Commissioner considers that there is public interest in avoiding adversely affecting the interests of business who have voluntarily supplied information. In this case, the businesses involved could be damaged commercially and financially as a result of disclosing information.

Balance of the public interest arguments

29. The council said that it was necessary to balance the ability to show a complete picture in relation to location enquires against the wishes of the businesses that had made the enquiries. It said that although full disclosure will have been able to demonstrate the full interest businesses had expressed regarding locating themselves in Macclesfield, the council would have ignored the interests and wishes the businesses involved. It explained that because all of the enquires were undertaken voluntarily, with the assumption that the enquiry was also made in confidence, all of the 86 companies who had enquired about locating to the Macclesfield area were asked if they consented to their information being released and 77 did not object, but 9 did. Details of the 77 businesses that had consented to disclosure were released into the public domain but the council decided to maintain the exception in relation to the 9 remaining cases as it believes that the public interest in withholding the names of the 9 remaining companies is greater than the public interest in full disclosure.
30. The Commissioner considers that there is a public interest in fully understanding the reasons for public authorities' decisions; there is always an argument for presenting the full picture in a decision making process and allowing people to reach their own view. However, the Commissioner considers that the disclosure of 77 of the 86 businesses in this case goes some way to meeting the public interest in disclosure and therefore reduces the weight of this argument.

31. As stated in his guidance on the EIR exceptions and the public interest test², in considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant. The council's argument regarding the reputation of the department could on the face of it appear to be irrelevant to the exception under consideration which relates to the interests of the businesses who provided the information. However, as stated above, the Commissioner considers that the purpose of this exception is to protect the voluntary supply of information to public bodies that might not otherwise be made available. It is entirely feasible that if businesses don't trust that the council will respect their privacy where disclosure would adversely affect their interests, the free flow of information to the council would be hindered. The Commissioner therefore considers that the argument relating to the council's reputation can be taken into consideration in this case.
32. The Commissioner is aware that at the time of writing, public consultation on the Local Plan is ongoing. Whilst that public consultation may not necessarily involve disclosure of the specific information in this case, it does demonstrate that an active means of scrutiny of the wider issue is currently taking place. The Commissioner is also aware that planning permission or change of use is likely to be required for business moving to the area as a result of the Local Plan which will provide a further means of public scrutiny. However, the Commissioner does not accept that the mere existence of other mechanisms for scrutinising or debating an issue goes to affect the public interest in disclosure as EIR exists as an additional rather than alternative means of promoting public debate and transparency. Even where the requested information would add little to the public debate, this does not mean that there is no public interest in disclosure as the Commissioner's view is that there is always some public interest in disclosing the 'full picture' for general transparency and accountability purposes.
33. When attaching weight to the public interest arguments, the Commissioner has considered the likelihood of adverse effect, the severity of the adverse effect, the age of the information and the timing of the request, the specific information and the public interest in

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_effect_of_exceptions_and_the_public_interest_test.pdf

disclosure and information already in the public domain. These are considered under the relevant headings below.

Likelihood of adverse effect

34. As detailed above, to engage the exception, it must be more probable than not that the adverse effect would occur. The greater the likelihood above this 'more probable than not' threshold, the greater the public interest in maintaining the exception.
35. The Commissioner consider that the likelihood will be affected by:
 - how extensive the adverse effect is – how many people or situations would be affected; and
 - how frequently the opportunity for the adverse effect would arise.
36. In this case, the financial and commercial adverse affect would be on nine businesses and it is possible that the opportunity for the adverse effect to arise could occur frequently if the withheld information was in the public domain. This adds weight to the arguments for maintaining the exception. In addition, the adverse affect on the free flow of information to the council could be extensive if other businesses believed the confidentiality of their communications would be breached as a result of disclosure in this case.

Severity

37. The severity of the adverse effect is about the impact of the adverse effect when it happens. As stated in the Commissioner's aforementioned guidance on the subject³, if the adverse effect has a particularly severe impact on individuals or the authority or other public interests, then this will carry considerable weight in the public interest test and this would be relevant if, for example, there is any risk of physical or mental harm to an individual. In this case there would be an adverse affect on individual employees of the businesses and the businesses themselves, as detailed in paragraph 16, and on the council through damage to its reputation.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_effect_of_exceptions_and_the_public_interest_test.pdf

38. The severity and likelihood together indicate the impact of the adverse effect which in turn affects the weight to be attached to the arguments in favour of maintaining the exception. In this case, as the impact of the adverse effect could be severe, extensive and frequent, the Commissioner has placed significant weight on the arguments for maintaining the exception.

Age of the information and timing of the request

39. Generally speaking, the public interest in maintaining an exception will diminish over time as the issue the information relates to becomes less topical or sensitive and the likelihood or severity of the adverse effect diminishes.
40. The Commissioner notes that the information was within one year old at the time the request was responded to and relates to ongoing plans to build 3500 new homes. He therefore considers that significant weight should be attached to the public interest in disclosing information which would aide transparency into a plan that has yet to be finalised.

The specific information and information already in the public domain

41. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interests identified. In this case, although the information may be relevant to a subject of significant public interest, that being the plan to build 3500 homes on greenbelt, disclosure would not add greatly to the public being able to make informed judgements concerning the council's consultation of its Local Plan. This is because details of 77 of the 86 businesses who expressed an interest in moving to Macclesfield is already in the public domain and the remaining withheld information would not significantly add to it. Therefore, the weight given to the public interest arguments about making informed judgements is reduced.

Conclusion on the balance of the public interest arguments

42. Although the Commissioner accepts that the subject of this request is of a particular public interest because it relates to the building of 3500 homes on greenbelt land, taking all the above in to account, and giving particular weight to the fact that details of the majority of the businesses who have expressed an interest in moving to Macclesfield are now in the public domain, he considers that, on balance, the public interest in maintaining the exception in order to protect the voluntary supply of information to public authorities outweighs the public interest

in disclosure in this case. Therefore, the council is entitled to withhold the information requested under the exception at regulation 12(5)(f).

Right of appeal

43. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Gerard Tracey
Principal Adviser

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