

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 March 2017

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant has requested information relating to relation to a Leeds City Council (the council) Executive Board Report dated June 2013 concerning a £9.9m loan to GMV Twelve Ltd (the developer). The council provided some information, but withheld the remainder relying on the exceptions at regulation 12(5)(e) for commercially confidential information and regulation 13 for third party personal data.
2. The Commissioner's decision is that the council has correctly relied on regulation 12(5)(e) and regulation 13 to withhold the information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 29 June 2016 the complainant made the following request for information to the council in relation to an Executive Board Report dated June 2013 concerning a £9.9m loan to the GMV Twelve Ltd:

"Can you please provide a copy of the exempt Appendix B, as well as copies of any due diligence reports?"

5. On 27 July, the council informed the complainant that due to the complex nature of the request, it was relying on regulation 7(1) of the EIR to extend the deadline for response to 40 working days, rather than the usual 20 working days.

6. On 25 August 2016, the council then provided a full response. It provided some information within the scope of the request but refused to provide the remainder. It cited regulation 12(3) as some of the information was personal data and disclosure would breach the Data Protection Act 1998 (the DPA). It also relied on regulation 12(5)(e) as some of the information concerned was confidential commercial or industrial information and disclosure would have an adverse affect on a legitimate economic interest.
7. The complainant requested an internal review on 29 August 2016. The council sent the outcome of this on 24 October 2016. It maintained its position in relation to the application of 12(3). It revised its position in relation to some of the information withheld under regulation 12(5)(e), and this information was therefore disclosed. However, for the majority of the information withheld under regulation 12(5)(e), it maintained the position that the exception applied and the public interest favoured withholding it.

Scope of the case

8. The complainant contacted the Commissioner 24 October 2016 to complain about the way his request for information had been handled. He confirmed that he did not agree with the council's application of the exceptions at regulation 12(3) and regulation 12(5)(e). The scope of this case therefore is to determine whether the council was correct to withhold the requested information.

Background

9. The council has informed the Commissioner that the request relates to a large private sector development, known as Kirkstall Forge, which is being constructed within the council's area. Commercial Estates Group (CEG) acquired the Kirkstall Forge site, and GMV Twelve Ltd (the developer) is a special purpose vehicle established to develop the site.
10. The developer has agreed a loan from the Leeds Local Enterprise Partnership. The council states that the LEP is a separate body from the council but has no legal personality. As such, at the relevant time, the council acted as the accountable body for the LEP. In addition, the council confirmed that it has agreed to undertake highways works associated with the development on the condition that the costs would then be repaid by the developer.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. Regulation 12(5)(e) of the EIR provides that 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*".
12. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

13. With respect to the part of the request regarding due diligence reports, the council has explained that it did not hold a specifically titled 'due diligence report' concerning the developer, but does hold a confidential appendix to a report by the Chief Officer for Financial Services, which detailed the due diligence that was undertaken. This was disclosed, but some redactions were made under Regulation 12(5)(e) on the basis that the information in question was commercially confidential. The council explained that the withheld information falls within three categories:
 - Information concerning third party companies and their relationship to the developer.
 - Detailed information regarding the developer and their parent company's operations and unaudited accounts.
 - Information regarding the developer's business plan for the Kirkstall Forge development.
14. The council states that the withheld information relates to the developer's commercial operations and is clearly commercial in nature.

15. Having had sight of the information, the Commissioner is satisfied that it is commercial in nature.

Is the confidentiality provided to protect a legitimate economic interest?

16. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence. In addition, in order to determine whether or not the information has the necessary quality of confidence the Commissioner must be satisfied that the information is not trivial and is not in the public domain.
17. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
18. The council states that it and the developer have treated the information in the strictest confidence. It points to a non-disclosure agreement between the parties entered into at the start of due diligence, and also the fact that the council treated the information as exempt under local government legislation during meetings. The council has confirmed that the information is considered to be confidential by virtue of common law.
19. The council considers it is clear that the confidentiality protects legitimate economic interests. It states that disclosure of the information in question would undoubtedly cause the developer financial prejudice if released to the world at large.

Would the confidentiality be adversely affected by disclosure?

20. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
21. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

“Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”.

22. The council provided its arguments in relation to each of the three types of information.
23. With regard to the first category of information; information concerning third party companies and their relationship to the developer, the council states that whilst it disclosed some of the information regarding the third party companies' relationship with the developer, it was of the view that the information at paragraphs 2.6 to 2.9 of the withheld information was commercially sensitive to the developer and provided in confidence. This information relates broadly to financial agreements between the developer and the third party companies.
24. The council advised that it took into account representations from the developer in relation to the requested information and was advised that disclosure would impact ongoing contractual negotiations that it is involved with relating to other UK developments. The developer specified two projects in particular where funding discussions were taking place at the time of the request and which they considered would be prejudiced by the release of the information. The council has argued that disclosure of the information would clearly prejudice the developer's commercial operations, particularly in terms of the two projects cited by the developer.
25. This Commissioner accepts that on the balance of probabilities, disclosure of financial agreements that the developer has with third party companies would prejudice its negotiating position in other ongoing projects in a way which competitors would not be subject to.
26. Moving to the second type of information; detailed information regarding the developer and their parent company's commercial operations and unaudited accounts, the council has again stated that this information was provided in confidence to the council, and that its release would clearly cause commercial prejudice to the developer.
27. The council has informed the Commissioner that the developer has confirmed that disclosure of this information would also prejudice its commercial interests. The Commissioner understands that the prejudice to commercial interests for this information is also the prejudice to funding discussions ongoing in some of the developer's current projects.
28. The Commissioner again accepts that on the balance of probabilities, the disclosure of unaudited, and so previously undisclosed accounts information, would be prejudicial to the developer's negotiating position with respect to other ongoing projects. This is because it puts the

developer on the back foot with regard to the ongoing funding negotiations by giving that information to the other parties in a manner and timing not of their choosing, which would impact the developer's ability to secure its desired terms.

29. Finally, with regard to the third type of information; that regarding the developer's business plan for the Kirkstall Forge development, the council states that if disclosed, the redacted 'timetable' for the development would provide competitors with valuable information regarding the developer's strategy. It has elaborated on this to explain that the information is significant as there is currently a careful balance between the supply and demand for commercial and residential space in Leeds. Therefore, all developers are seeking to time their developments to reach the market at a time when demand is high, so as not to suffer high void periods.
30. The developer's representations to the council on this point stated that disclosure of this information would prejudice their operations as it would enable other developers to time developments to soak up demand in which is currently a highly competitive market. The developer listed 15 other developments which may come online in the near future to evidence the real nature of this prejudice.
31. In such a competitive market, the Commissioner can see that the timing of bringing a development to market is crucial to its commercial success. Disclosing timescales for completion of various parts of the project would clearly give competitors an edge as they would then have knowledge about a competitor's plans, which would not be reciprocated.
32. The Commissioner accepts that disclosure of the withheld information would prejudice the commercial interests of the developer, and therefore she finds that regulation 12(5)(e) is engaged. She has therefore gone on to consider the public interest test.

The balance of the public interest

33. The EIRs envisage that there is always some public interest in the disclosure of environmental information, and so there is effectively a presumption in favour of disclosure when considering the public interest test for environmental information. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
34. The complainant considers that the public interest in the requested information very much favours its disclosure. He has explained to the Commissioner that the chief executive of CEG, Gerard Versteegh lost a tax avoidance case to HMRC in 2013 involving the interest on intra-

group loans to a third entity. He argues that there is a strong public interest in knowing whether the decision by the council to enter into a contract with CEG and various non-UK companies represents a good deal for public finances.

35. He has also argued that CEG has a poor track record in completing large scale development projects. He gives the example of a development in Carlyon Bay in Cornwall which is not complete after over a decade. He also stated that CEG has been planning works at Kirkstall Forge for more than a decade and little work has yet to be completed. He suggests that these factors weigh particularly in favour of disclosing information on the timescales of the development.
36. The complainant's final view is that given the history of tax avoidance relating to the company, and the late development projects means that the public interest in disclosing the information outweighs any harm to the economic interests of the developer.
37. The council has argued that the public interest is in favour of maintaining the exception. It argues that the public interest generally lies in assuring the public that due diligence was undertaken by the council prior to the expenditure of public money, and that the council obtained reasonable and proper security for the repayment of that money.
38. With regard to the information at the first and second bullet points, the council argues that such assurances are provided in the unredacted parts of paragraphs 2.9 and 2.10 and also in paragraphs 2.11 and 2.12. These confirm that the council received a first charge over the site, and a parent company guarantee that there was sufficient "headroom" for the debt, and there was no legal obstacle to entering into the agreements or to the council taking enforcement action if necessary to recover the debt. Given these assurances, the council considers that the public interest in the disclosure of more detailed withheld is greatly reduced.
39. The council also informed the Commissioner that it finds that there is an inherent public interest in the maintenance of commercial confidentiality and it would not be in the public interest for the council to disclose commercial information which would impair its working relationship with the developer, prejudice their commercial operations, and result in other companies becoming unwilling to share commercially confidential information with the council in the future.
40. With regard to information at the third bullet point, the council accepts that there is a public interest in the public being assured that the Kirkstall Forge development will be undertaken, and what the different phases will entail. The public will also be reassured that a business plan

has been presented to, and approved by, the council. It considers that the information at paragraphs 2.13 to 2.16 meets that interest and that there is further detailed information available to the public as part of the planning process.

41. However, the council argues that due to the affect the disclosure of the information would have on the commercial interests of the developer, it finds that the public interest favours maintaining the exception.
42. In balancing the public interest, the Commissioner considers that there is always a public interest in being assured that a public authority is getting best value for the public purse in its business dealings. The council has disclosed a fair portion of the requested information from within the document, and it is her view that this certainly goes some way towards satisfying that public interest.
43. Given the clearly commercially confidential nature of the withheld information, and the fact that the council has disclosed a large proportion of it, the Commissioner concludes that the public interest favours maintaining the exception in this case.
44. The Commissioner therefore finds that the council was entitled to rely on regulation 12(5)(e) in this case.

Regulation 13 – Third party personal data

45. Regulation 13 states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach one of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

Is the information personal data

46. Section 1 of the DPA defines personal data as:

*"...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

47. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

48. The disputed information in this case comprises the names of individuals who hold director positions in offshore companies with relationships with the developer company contained within a structure chart. In the first instance, the council sought to withhold the names of all directors of all associated companies within annex B. However, during the Commissioner's investigation it disclosed the name of the director of one company as this was a company rather than a private individual. It also accepted the director details for a company based in Cyprus were publicly available online on the Cyprus equivalent of Companies House. This information therefore is no longer withheld under regulation 13.
49. Having viewed the withheld information, the Commissioner is satisfied that it comprises personal data as it clearly relates to living individuals who may be identified from that data and that it constitutes their personal data.
50. The Commissioner must next consider whether disclosure would breach one of the data protection principles. The data protection principles are set out in Schedule 1 of the DPA. The council considers that disclosure would breach the first data protection principle, and the Commissioner agrees that it is most relevant in this case.

Would disclosure breach the first data protection principle?

51. The first data protection principle states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

52. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would disclosure be fair?

53. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
54. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the data subject(s) reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
- the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

55. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, the purpose for which they provided their personal data and any assurances they were given.
56. The council has explained to the Commissioner that as a general rule, directors of offshore companies are not matters of public record. As such, the council does not consider that these individuals had a reasonable expectation that their information would be disclosed to the public upon providing it to the council.
57. The Commissioner notes that directors of UK based limited companies would have a reasonable expectation that their status as director will be publicly available as this is a requirement of the Companies Act 2006. However, she understands that the same is not true of company registration for all countries. Therefore directors of companies registered in countries where director registration and publication is not a requirement would not reasonably expect this information to be disclosed.

Consequences of disclosure

58. As to the consequences of disclosure on the data subjects, the question is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
59. The council's position is that disclosure would have unreasonable consequences to the privacy of these individuals which it says cannot be justified. It explains that the reason for this is that the council's agreements concerning the development of Kirkstall Forge are with the developer's companies themselves, and not with the private individuals. It states that these individuals do not have personal liability with regard to the agreements.

60. The council also suggests that it is possible that the individuals are no longer associated with the companies. The Commissioner considers this to be a speculative argument, and as such, does not give any weight to it.
61. The council has confirmed that it has received representations from the developer that the information should be excepted from disclosure.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

62. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public.
63. As disclosure under the EIR is considered to be disclosure to the public at large, and not to the individual applicant, the interest in disclosure must be a public interest, not the private interest of the individual requester.
64. The complainant considers that as the requested information relates to the expenditure of public money, the directors of non-UK companies in the structure chart do not have a reasonable expectation of privacy. He adds that the companies in question are based in offshore tax havens, and refers to the tax avoidance case involving Gerard Versteegh as demonstrating that there is a strong public interest in knowing whether the council's decision to enter into a contract with the developer represents a good deal.
65. It is clear that the complainant has concerns about the tax avoidance history of the director of the Management Services Company of the developer company. Whilst disclosure of the names of the directors of these companies might provide some indication to the complainant regarding the possibility of tax avoidance, the Commissioner is not persuaded that the information would be evidence of tax avoidance.
66. The Commissioner recognises the complainant's concerns about the history of tax avoidance of those associated with the developer, and that the request seeks assurances that the public purse is sufficiently protected in these circumstances. However, there are other regulatory and government bodies in place to regulate tax matters, such that the names of the directors does not materially add to the disclosed information regarding the relationships between the various companies in the group.
67. Balancing the reasonable expectations of the individuals against the legitimate interests in disclosure, given that the names add little to the

bigger picture of company solvency and due diligence, and also that there are more appropriate means to address tax avoidance concerns, the Commissioner concludes that disclosure would be unfair and would breach the first data protection principle.

68. The Commissioner finds that the Council was entitled to withhold the requested information under the exception at regulation 13(1).

Right of appeal

69. 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

70. 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.

71. 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
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