

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

Date: 2 November 2017

Public Authority: Lancashire County Council
Address: County Hall
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a bridleway which borders his land. The council provided the majority of the information however the complainant believes that further information should be held.
2. The Commissioner's decision is that on a balance of probabilities the council does not hold any further information falling within the scope of the request. She also considers that it was correct to apply Regulation 12(5)(e) to some information (commercial confidentiality), however she has also decided that the council was wrong to apply Regulation 12(4)(e) (internal communications) to other information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which it withheld under Regulation 12(4)(e)
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 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.

Request and response

5. On 13 September 2016 the complainant wrote to council and requested information in the following terms:
 1. *"All correspondence, internal notes (including notes to tele communications), operation decisions and references to County Councillors, from the LCC relating to [address redacted and name of complainant redacted]."*
 2. *All correspondence, file notes and notes of telecommunications between LCC and Natural England relating to [address redacted and name of complainant redacted], The Pennine bridleway in this area and the environmental /pollution hazards caused in general vicinity of [address redacted] during the last 5 years.*
 3. *All work schedules, instructions, letters, file notes (including notes of telecommunications) held by LCC relating to all contractor, sub contractors and supervisors who worked on the Pennine bridleway adjoining [address redacted] AND all letters, notes and communications of any sort which were received by LCC from the contractors, sub contractors and supervisors involved in the Pennine Bridleway Construction in the area identified."*
6. The complainant initially made a complaint to the Commissioner that the council had not responded to his request for information. This was dealt with by decision notice FS50646617, which was issued to both parties on 16 March 2017. The decision notice required the council to respond to the request.
7. The council subsequently responded to the complainant on 28 March 2017. It provided information to the complainant but said that it had withheld some information under Regulation 12(4)(e)(internal communications) and Regulation 13(2)(1)(b)(personal data).

Scope of the case

8. The complainant contacted the Commissioner 14 April 2017 to complain about the way his request for information had been handled.
9. The complainant stated that it was clear from the documentation provided to him previously that further information should be held by the council which had not been disclosed to him.
10. He also asked the Commissioner to consider whether the exception in Regulation 12(4)(e) had been applied correctly. The complainant has not made a complaint to the Commissioner regarding the application of Regulation 13 and so the Commissioner has not considered this redaction from the withheld information.
11. Further to a subsequent disclosure in October 2017 the council also applied Regulation 12(5)(e) to a small amount of information, although the complainant stated in a telephone call to the Commissioner that that information had previously been disclosed to him in an unredacted form.
12. The Commissioner therefore considers the complaint to be that the council holds further information which has not been disclosed to him. The complainant has also complained that the council has incorrectly applied Regulation 12(4)(e) and Regulation 12(5)(e) to withhold information.

Reasons for decision

Regulation 12(4)(e)

13. Section 12(4)(e) of the EIR states that information may be exempted from the duty to disclose if the information is internal communications.
14. The exception is subject to a public interest test if the withheld information falls within its scope. This is set out in Regulation 12. Regulation 12(2) also provides a presumption towards the disclosure of the information.
15. The withheld information is one short paragraph in an email dated 6 March 2012. The remainder of the document has been disclosed, other than one section to which the council applied Regulation 13.
16. The council argues that the information redacted under Regulation 12(4)(e) is an internal communication and that the public interest rests in the document being withheld. Whilst it acknowledged that there is a

general public interest in the council being as open and transparent as possible, it said that this should be considered against the wider public interest in employees being able to ask for advice etc. internally without fear that such correspondence will be made public. Additionally, it felt the public interest in the disclosure of the content of this part of the email was minimal.

17. The Commissioner has considered the redacted information and accepts that it is an internal communication. The exception in Regulation 12(4)(e) is therefore engaged. The Commissioner has therefore considered the public interest test in respect of this information.
18. The test in Regulation 12 is whether the public interest in the information being disclosed is outweighed by the public interest in the exception being maintained. Regulation 12(2) provides a general presumption towards the disclosure of information.

The public interest

The public interest in the exception being maintained

19. As stated the council argued that the public interest in employees being able to ask for advice etc. internally without fear that such correspondence will be made public. Additionally, it felt the public interest in the disclosure of the content of this part of the email was minimal.
20. The council's arguments relate to the 'chilling effect' argument. Essentially it is arguing that if the information is disclosed there is a potential that its employees may not feel able to have full and frank discussions between themselves in the future on the basis that that information may subsequently be disclosed, thereby affecting its position and potentially resulting in a weakening of its case in any legal action/compensation claims etc etc.
21. The council did not elaborate on its reasons for considering that if the information were disclosed this effect would occur. It did not provide further arguments to support its case and demonstrate why a disclosure of this particular paragraph in particular out of a fairly large email might have the effect addressed by the exception.

The public interest in the information being disclosed

22. The Council said that it recognised the public interest in public authorities being open and transparent in their actions.
23. The Commissioner notes that the background to this case relates to the construction of a bridleway on the complainant's land. He argues the

bridleway is defective, and has as a result damaged the land and, through this, affected his cattle. There have been ongoing complaints following this. The Commissioner must put aside the fact that the applicant has personal reasons for wishing the information in this case. She must consider the public interest, rather than his private interests, in the information being disclosed.

24. The wider issue which the Commissioner must consider is an argument that the construction of the bridleway detrimentally affected the environment on farmland. The Commissioner is obviously unable to make any judgement over fault in this issue however she can take into account the possibility that the actions of the council or its contractors may have led to a detrimental effect upon the environment in the area. There is therefore public interest in this issue. The Commissioner therefore recognises a strong public interest in information being disclosed which can shed light on the actions of the council and its agents regarding the construction of the bridleway, on the extent of any damage which has been caused to the land and the landscape, and to the extent that this can be clarified, provide evidence as to what the cause of this damage was. This is the public interest in the background to this case which the Commissioner must take into consideration. She must also consider the specific information which has been withheld under the exception by the council.
25. The council has argued that the public interest in the disclosure of this particular information is minimal. The Commissioner has considered the council's arguments, and accepts that the part of the information does not specifically address the issue of the bridleway to any great extent. It addresses internal advice which has no bearing on the actual issues at hand. However that is not the case for all of the information within the paragraph and some of the redacted information does address the bridleway itself, as well as give an indication of the council's considerations at that time.
26. The Commissioner has therefore balanced the public interest in the information being disclosed against the statement of the council that it would prevent full and frank discussions, and the provision of advice and assistance.
27. The Commissioner considers that the council's arguments are weak when balanced against the nature of the information itself, and given the wider public interest in creating greater transparency on the actions of the council regarding the damage caused to the environment.
28. The Commissioner has not been persuaded that the arguments provided by the council outweigh the public interest arguments in favour of a disclosure of the information. Taking into account the presumption in

favour of disclosure in Regulation 12(2) she has therefore decided that the public interest rests in the disclosure of the information redacted under Regulation 12(4)(e) in this case.

Is further information held?

Regulation 5(1)

29. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
30. Regulation 12(4)(a) provides that a public authority may refuse to disclose information where it does not hold that information when a request is received.
31. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of balance of probabilities, the public authority holds any information within the scope of the request (or was held at the time of the request). She is not expected to prove categorically whether the information is held. In making this decision, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
32. The complainant has looked through the documents which have been disclosed to him and noted that some information which he would expect to be held by the council is not. He considers that it should be, given the history of the development of the bridleway and his experience in such matters. He considers that further information which should be held includes invoices, tendering documents etc between the council and other contractors which carried out work on the bridleway. He has also noted that the documents which have been disclosed to him refer to other documents which have also not been disclosed.
33. The council argues that some information which was held has been destroyed as part of its normal records management policy on the retention and deletion of documents. It said that this occurred in February 2016. It said that the complainant's request included a copy of the contract between Lancashire County Council and one of the contractors in respect of the construction of the Pennine Bridleway but this contract has not been located. As an alternative, sub contract orders were requested from Lancashire County Archives but were found

to have been destroyed on 31st March 2016, in line with the retention period set for this type of document, which is 4 years from the date of closure. The documents were created on 1st April 2011 and closed on 29th February 2016. It said that the '4 years from close date' retention period follows the requirements of the Finance Act 2009 which came into force from 01/04/2011.

34. It said that any Deeds, Contracts, Framework Agreements, Grant Funding Agreements or Legal Documents should be sent to the deed room at the council for storage. However, there was a period between approximately 2008 and 2011 when all procurement exercises for the Council were carried out by One Connect Ltd, a partnership between Lancashire County Council and British Telecom. Unfortunately it believes documentation was not consistently forwarded to the deed room, which may account for certain paperwork being missing.
35. Further to this the council argues that some information had been sent to the complainant and he had not informed the council that he had not received it but had instead made a complaint directly to the Commissioner.
36. The councils position is therefore that it accepts that some further information should have been held, but some has been destroyed under its records and retention policy, some was never received from One Connect Ltd, and some information would never have been recorded by officers in the first instance as they would have judged that there would be no substance or reason for recording the information on the relevant file etc.
37. The complainant argues that regardless of whether One Connect Ltd still exists, further information should be held falling within the scope of his request within the council's quality management system. The Commissioner therefore specifically asked the council to clarify its position on this point. The council said that it does not hold a file with that name, however it did carry out a further search of its files and sent further information to the complainant, although it considered that the majority, if not all of the information, had been disclosed to him previously. It did however withhold one small section of information in the basis that Regulation 12(5)(e) applied. This is considered further below.
38. Given the wide ranging nature of the information requested in this case, the council is in a difficult position to say categorically that it has located all information falling within the scope of the request. However its arguments that it has carried out appropriate searches of the necessary file systems on a number of occasions are persuasive in this respect,

and it has clarified that it recognises that some information is missing, and clarified why this is likely to be the case.

Further issues

39. The council said that the complainant had only ever requested information in relation to one of the contractors which worked on the Bridleway, O'Callaghans. The Commissioner asked the council the following question:

"Please can I also ask you to confirm whether any tendering documents are held for the councils switch to the alternative providers from the construction of the bridleway? I believe these were Terra Firma and/or Stewarts. If so please can I ask you to confirm whether these have been disclosed to [name of complainant redacted] or withheld under any exception?"

The council responded by stating:

"The tendering of contracts for the construction of the bridleway was carried out in phases to mirror the fact that the design was passed to us in phases. O'Callaghan's completed the phase they won under competitive tender and the next phase was won by Terra Firma. No contractors were dismissed.

[Name of complainant redacted] has only ever requested documentation relating to O'Callaghans."

40. However the Commissioner has considered parts 3 of the request of 13 September 2016. This states: "All work schedules, instructions, letters, file notes (including notes of telecommunications) held by LCC relating to all contractor, sub contractors and supervisors who worked on the Pennine bridleway adjoining [address redacted] AND all letters, notes and communications of any sort which were received by LCC from the contractors, sub contractors and supervisors involved in the Pennine Bridleway Construction in the area identified."
41. Parts 1 and 2 of the request also did not qualify the scope of the request to O'Callaghans.
42. In an email to the council dated 7 September 2017 the Commissioner therefore again asked the council to confirm whether it had considered information for disclosure relating to all contractors and subcontractors, not just O'Callaghans; *"Additionally please can I ask you to confirm that the council has included all contractors which worked on the relevant section of the Bridleway within the scope of its searches for information and has not limited its searches to information relating to O'Callaghans."*

The council confirmed that it has carried out searches for all relevant information regarding the bridleway as regards the complainant's farm and for all contractors or subcontractors via a telephone call with the Commissioner on 19 October 2017.

The Commissioner's conclusion as to whether further information is held

43. Having considered the council's arguments, together with the fact that it has now searched relevant locations on a number of occasions the Commissioner is satisfied that on a balance of probabilities no further information is held, and that the council was therefore correct to apply Regulation 12(4)(a) to the remainder of the request.

Regulation 12(5)(e)

44. In the council's disclosure of 10 October 2017 it redacted a small section of information on the basis that Regulation 12(5)(e) applies (commercial confidentiality). The withheld information is small number of figures relating to individual costs charged by a contractor for work carried out on specific tasks, together with a further small section of redactions on a contractor price list for craftsmen and labourers. Both appear to relate to a single sub-contractor.
45. Whilst the complainant suggested in a telephone call in October 2017 that he believed that he may have had this information disclosed to him before he did not provide evidence of this to the Commissioner. The Commissioner has therefore considered the application of the exemption to the information.
46. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
47. When assessing whether this exception is engaged the Commissioner will consider the following points:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

In the information commercial or industrial in nature?

48. The information is the specific pricing of various tasks carried out by one of the contractors. As such the Commissioner considers that the

information is commercial in nature – it is the price of specific services and goods provided to the council.

Is the information subject to confidentiality provided by law?

49. The council did not specify that there was a contractual obligation of confidence. However following the test in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41:

- the information has the necessary quality of confidence (as it would only be known to parties contracting with the contractor and so its disclosure would only be to limited parties).
- the information has the necessary obligation of confidence. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. The information was provided to the council for the purposes of invoicing for work carried out. The information would be on the terms initially agreed between the parties, and there would be an implied agreement at that time that the information would be held in confidence and would not be more widely distributed other than within the council for the purposes of completing payments due once the work had been carried out. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark, Megarry J*, suggested that the 'reasonable person' test may be a useful one. He explained:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."

- In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association (EA/2010/0012)* the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.
- Having considered the withheld information the Commissioner is satisfied that both parties would have considered the individual item costings to have been agreed under a duty of confidence.

- the Commissioner has considered whether there would be a public interest defence to the disclosure of the information in breach of the duty of confidence. Although the complainant has raised the issue that the work by some contractors may not have been completed to a satisfactory quality, and that this may have caused damage the land on which he farms, information on why that occurred would not be enhanced by a disclosure of the individual costs of parts of the work carried out in response to the request. A disclosure of the overall costs provides details as to whether the work was significantly under-priced to the extent that substandard work would have been necessary to bring the price within that budgeted. Disclosing this information would undermine the level playing field which the contractor has with its competitors as it would disclose commercially sensitive pricing information to the whole world. However the withheld information relates to fencing rather than to issues which the complainant believes may have caused the damage to his land.

Is the confidentiality required to protect a legitimate economic interest?

50. As noted above, a disclosure of the information would disclose price sensitive information into the public domain. Competitors to the contractor would then have an additional advantage when tendering against the contractor for contracts of a similar nature. It would undermine the current level playing field when contractors bid for work to be carried out by subcontractors, thereby disrupting the market.
51. The Commissioner therefore considers that the confidentiality is in place to protect the legitimate economic interests of the contractor.
52. The Commissioner has decided that the council was correct to apply Regulation 12(5)(e) to the limited information it has redacted. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12(1). She has taken into account the presumption towards disclosure required by Regulation 12(2).
53. The test required by Regulation 12 is whether, in all of the circumstances of the case the public interest in the exception being maintained outweighs that in the information being disclosed.

The public interest

The public interest in the information being disclosed

54. The central public interest in the information being disclosed is to create greater transparency over the costs to the council of the work which was carried out. There is always a public interest in creating greater

transparency on public money spent by the council on projects, although in this case this is reduced by the disclosure of the full costs of work. The withheld information relates to figures for individual parts of the work and for materials. These have been taken into account in the overall figures for the work carried out.

55. There is also a public interest in the disclosure in order that interested parties can determine whether the contractors bid for the work was fair and competitively priced, but this is largely met through the disclosure of the overall costs which have not been redacted from the invoice.

The public interest in the exception being maintained

56. The central public interest in the exception being maintained is that outlined above. Disclosing price sensitive information on a contractor risks affecting the level playing field on bids for contractors by allowing competitors to the contractor to outbid it for contracts. This disadvantages one of the potential bidders. A disclosure of the information would therefore be likely to damage the competitive position of the contractor in future bids for similar work of this nature. There is a strong public interest in protecting the level playing field and allowing the market to determine the price for work carried out.
57. Having considered the above, the Commissioner's decision is that the public interest rests in maintaining the exception in this instance.

Right of appeal

58. 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

59. 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.
60. 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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