

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

Date: 17 May 2017

Public Authority: Hemsworth Town Council
Address: Community Centre
Bullenshaw Road
Hemsworth
West Yorkshire
WF9 4NE

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract between the public authority and a developer in relation to Kirby Road Sports Complex. Hemsworth Town Council refused the request, withholding the information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA. During the Commissioner's investigation the public authority reconsidered the request under the EIR and withheld the information under the exception for adverse affect to commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Hemsworth Town Council:
 - handled the request under the wrong legislation and breached regulation 5(1) and regulation 14;
 - failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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 30 August 2016, the complainant wrote to Hemsworth Town Council (the "council") and requested information in the following terms:

"Sight of the signed contracts between the council and Saul Construction."

6. The council responded on 27 September 2016. It stated that it was withholding the requested information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 24 November 2016. It stated that it was maintaining its position.

Scope of the case

8. On 6 December 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information and whether it had handled the request under the correct information access regime.
10. During the Commissioner's investigation the council acknowledged that the request should have been handled under the EIR and confirmed that it wished to withhold the information under the exception for adverse affect to commercial confidentiality (regulation 12(5)(e)).

Reasons for decision

Is it environmental information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'

13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. In this case the focus of the withheld information is the potential development of land. The information, therefore, relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
15. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information

Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

16. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

17. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR
18. In these circumstances the Commissioner believes that it is appropriate for her to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
19. As the council addressed this failing during the course of her investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

20. During the Commissioner's investigation the council confirmed that it wished to withhold the requested information under regulation 12(5)(e) of the EIR. It also confirmed it wished to rely on the submissions it had made in this regard in relation to another complaint to the Commissioner regarding a request for the same information¹.
21. The withheld information constitutes a contract between the council and a third party relating to the sale of council land at Kirby Road in Hemsworth for the purposes of development.

¹ ICO reference: FER0681064, decision notice issued on 17 May, 2017.

22. 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".
23. 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?

24. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
25. In this case, the withheld information relates to the sale of land so the Commissioner is satisfied that it is commercial in nature.

Is the information subject to confidentiality provided by law?

26. 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.
27. 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.
28. 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.

29. The council has stated that the withheld information was provided to it under a "legal duty of confidence". It has further stated that, if the information was disclosed this would be an "actionable breach of confidentiality."
30. Whilst the council has provided no further details in this regard, the Commissioner understands that contracts will often be drafted by both (or more) parties involved. It is plausible, therefore, that not all the withheld information is derived from a third party. However, the Commissioner acknowledges that, unlike the exemption for information provided in confidence (section 41 of the Freedom of Information Act 2000) there is no need for public authorities to have obtained the information from another for regulation 12(5)(e) to apply. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
31. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it relates to a significant potential development.
32. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

33. 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.
34. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably 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:

"Determine harm. 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".

35. In this case the council has not identified which party's or parties' specific legitimate economic interests would be adversely affected by disclosure. In its initial response to the request it simply stated that the information was "...deemed to be exempt from disclosure under Confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest..."
36. The council provided no further arguments for engaging the exception with its internal review response. In its submissions to the Commissioner the council provided no further clarification of the party or parties whose legitimate economic interests would be affected by disclosure of the information, nor did it identify any elements of the withheld information which result in specific harm.
37. In its submissions, the council stated to the Commissioner that the contract is "...still not concluded and the land in question is the subject of a judicial review application", however, did not explain the relationship between this statement and any adverse effects to the legitimate economic interests of any party.
38. The Commissioner considers that the submissions she has received from the council do not identify any specific adverse effects and link these effects to specific withheld information; nor do they explain the causal link between disclosure and any ensuing adverse effects.
39. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council does not properly understand what the effects of disclosure would be and has also struggled to meet the evidential and explanatory burden set by the exception. The absence of any reference to specific elements of the withheld information and the potential harm that disclosure would cause also suggests to the Commissioner that the council has sought to withhold the information on a general or blanket basis.
40. Where information is being withheld, the Commissioner considers that it is for public authorities to fully explain the relevant causes and effects that are relevant to the engagement of an exception and it is not her role to generate arguments on their behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.

41. In this instance, the Commissioner has decided that the council has failed to demonstrate that disclosure would adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
42. As she has found that the exception is not engaged the Commissioner has not gone on to consider the public interest in this case.

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: 0870 739 5836
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

Andrew White
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