

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

Decision notice

Date: 21 May 2018

Public Authority: Broadland District Council
Address: Thorpe Lodge
1 Yarmouth Rd
Norwich
NR7 ODU

Decision (including any steps ordered)

1. The complainant has requested information relating to the creation of a Food Hub near Norwich. Broadland District Council initially refused the request, citing the exemption for commercial interests – section 43(2) of the FOIA. Following the Commissioner's involvement the public authority reconsidered the request under the EIR, disclosing some information and withholding other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that Broadland District Council wrongly handled the request under the FOIA and breached regulation 5(1) and 14(1) of the EIR and that it correctly withheld information under regulation 12(5)(e).
3. The Commissioner does not require the public authority to take any steps.

Background

4. The request relates to the Greater Norwich Food Enterprise Zone. Food Enterprise Zones (FEZ) are a government initiative introduced by the Department for Food, Environment and Rural Affairs (DEFRA). Their aim is to:
 - a) Enhance rural development through the growth of food businesses in a particular location, be it producers, processors, retailers and/or manufacturers;
 - b) Encourage greater collaboration between food and farming businesses, and even encourage links to research and education institutions, in order to develop the domestic food and farming sector;
 - c) Allow local decision making, particularly for planning a development; and
 - d) Attract inward investment¹.
5. The Greater Norwich FEZ was designated in March 2015 and a Local Development Order (LDO) granting planning permission associated with the FEZ was subsequently issued by Broadland District Council.
6. The request in this case is for a Business Case submitted to the council by a landowner which relates to the delivery of the FEZ.

Request and response

7. On 7 June 2017, the complainant wrote to Broadland District Council (the "council") and requested information in the following terms:

"Please provide me with a copy of "the business case" referred to in the email from [name redacted] to [name redacted] dated 11th May, 2016 at 16.36."

¹

https://www.broadland.gov.uk/download/downloads/id/2983/greater_norwich_food_enterprise_zone_local_development_order_ldo.pdf

8. The council responded on 5 July 2017. It stated that it was withholding the information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
9. Following an internal review the council wrote to the complainant on 10 August 2017. It stated that it was maintaining its position.

Scope of the case

10. On 20 September 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. During the Commissioner's investigation the Commissioner advised the council that she considered it was likely that the requested information was environmental in nature and that the request fell to be considered under the EIR. The council accepted the Commissioner's view and reconsidered the request under the EIR, disclosing some information to the complainant and withholding other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and the interests of the information provider (regulation 12(5)(f)). The council also withheld information under the exception for personal data (regulation 13), however, it subsequently disclosed this to the complainant.
12. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld information under the exceptions cited.

Reasons for decision

Is it Environmental Information?

13. 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.
14. 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...'

15. 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.
16. In this case the withheld information relates to the sale of and use of land. 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").
17. 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. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

18. 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.

19. In these circumstances the Commissioner believes that it is appropriate 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.
20. As the council subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

21. 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”.
22. 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?
23. The Commissioner has considered whether the withheld information satisfies the conditions above.

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. The withheld information is associated with the sale of land and the Commissioner is, therefore, satisfied that it relates to a commercial activity.

Is the information subject to confidentiality provided by law?

26. The council has explained that the information is not strictly a "business case" but rather a bid to New Anglia Local Enterprise Partnership (NALEP) for financial assistance in the form of grant/loan funding. The council has stated that information was provided by the landowner voluntarily and in 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. 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.
29. Having had regard for the withheld information, which is not trivial in nature or in the public domain, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

30. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
31. 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.
32. 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".

33. The council has stated that the confidentiality attached to the information is provided to protect the legitimate economic interests of the landowner. It has stated that disclosing the information would harm the landowner's present and future negotiations with prospective tenants and occupiers in relation to the disposal of interests at the site in question.
34. The council confirmed that, in accordance with Part vi of the code of practice issued under regulation 16 of the EIR (the "EIR code"), it sought the views of the landowner in relation to the possible disclosure of information relating to their interests². The Commissioner has had sight of relevant correspondence between the council and the landowner in this regard and is satisfied that the submissions provided accurately reflect the landowner's concerns.
35. The council has argued that, in relation to information associated with land prices, disclosing this would allow interested purchasers to utilise information about minimum tolerable prices the landowner is prepared to accept and use this as leverage in negotiations. The council has stated that the information in question was generated 2 years ago, when the economic and land market was less favourable so it would promote inaccurate expectations and restrict the landowner's headroom for negotiations. The council has confirmed that, at the time of the request and at present, negotiations were live and disclosure of the information would have a direct impact and result in harm to the landowner's ability to promote its legitimate economic interests.
36. In relation to information associated with potentially interested parties or potential purchasers of properties, the council has argued that the landowner enters into non-disclosure agreements to ensure the confidentiality of interested parties. The council considers, following submissions from the landowner, that disclosing this information would hinder the landowner's ability to negotiate sales that are still undecided as it would reveal the amount it had budgeted for at the time the business case was produced. In addition to not reflecting the landowner's current position in negotiations or expectations around returns, the council has argued that this, alongside information about

² The EIR Code is published online here: https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

potentially interested parties, would harm the landowner's position, exposing and causing uncertainty for shareholders of potentially interested parties.

37. The council has argued that other withheld information provides insights into the landowner's finances and expectations around returns which would be of benefit to competitors, allowing them to modify their strategies to the detriment of the landowner. Similarly, the council has argued that the disclosure of this information would, provide parties involved in negotiations with the landowner with information which would assist their bargaining position and thus harm that of the landowner.
38. The Commissioner considers that the council has identified the relevant effects of disclosure and has shown a causal link between the possible and likely effects, and the withheld information. The link is particularly clear in this case as the withheld information is predominantly comprised of discussions about negotiation tactics, or forms part of the ongoing negotiations themselves. It is clear from the withheld information that both at the time of the request and now, those negotiations are ongoing and an agreement is yet to be reached.

Would the confidentiality be adversely affected by disclosure?

39. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the landowner. She therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public Interest Test

40. Under regulation 12(1)(b), public authorities can only withhold information if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2), a presumption in favour of disclosure must be applied to the consideration of the public interest.

Public interest arguments in favour of disclosure

41. The council has acknowledged that there is a general public interest in disclosure to promote transparency, awareness, understanding and accountability.

42. The complainant has argued that the disclosures made are inadequate and that information on public money and advice given to a landowner by the council's planning department should be made public.
43. The complainant has stated that disclosure would shed light on "...discrepancies on the assessment of job potential have come to light" and has further argued that the information should be made public because it relates to an "European Special Area of Conservation and much of the land is designated areas of Special Scientific Interest." The complainant considers that the proposed development is being justified by "overriding economic arguments", suggesting that these are to the detriment of environmental concerns. Disclosure would, therefore, serve the public interest in protecting the environment and in promote accountability and transparency around decision-making having an impact on this.

Public interest arguments in favour of maintaining the exception

44. The council has argued that there is a strong case for maintaining the exception because the information is still "live" and the bid to NALP and associated funding allocation has not been finalised. As a decision is still pending, the council has argued that there is a heightened risk that disclosure at this time would impact upon the funding and development process and adversely affect the landowner's interests.
45. The council has further confirmed that no decision has also yet been reached as to whether public funds will be committed to the project, if so how much, which source this funding might take and what form (grant or loan) it might take.
46. The council has also explained that it has no financial stake in the land associated with the business plan. It is the local planning authority with responsibility for determining the Local Development Order (LDO) associated with the matter but the requested information was not material to its determinations in this regard. The council has, however, highlighted the potential wider economic benefits which the project would produce and cited this as a reason for not disclosing information which would hinder this.

Balance of the public interest

47. The Commissioner notes that the council has disclosed much of the requested information and accepts that this has gone some way to addressing the public interest in this specific case.
48. Whilst the Commissioner acknowledges that the concerns raised by the complainant carry some general weight, she does not see that they are

directly applicable in this case. She does not recognise the issues raised by the complainant manifesting in the withheld information. Disclosing the withheld information would not, in her view, address the concerns raised by the complainant.

49. The Commissioner acknowledges the general importance of protecting the interests for which the exception is designed. In this case she accepts that there is a heightened public interest in withholding the information because it relates to negotiations and other considerations which are live. The Commissioner accepts that the argument that disclosure at this time would be particularly damaging carries considerable weight.
50. The Commissioner also acknowledges that the information does not relate to publicly owned land nor to any finalised decisions around public expenditure. In light of this and the other considerations referenced above, she finds that, at this time, the public interest is weighted in favour of maintaining the exception.
51. In addition to withholding the information under regulation 12(5)(e) the council also withheld the same information under regulation 12(5)(f). As the Commissioner has found that the information is excepted under regulation 12(5)(e) she has not gone on to consider the council's application of regulation 12(5)(f) in this case.

Right of appeal

52. 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

53. 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.
54. 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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