

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

Date: 6 August 2018

Public Authority: Cumbria County Council
Address: Cumbria House
117 Botchergate
Carlisle
CA1 1RD

Decision (including any steps ordered)

1. The complainant has requested information relating to a Kendal transport infrastructure study. Cumbria County Council initially handled the request under the FOIA. At the Commissioner's direction the council reconsidered the request under the EIR, disclosing some information and withholding other information under the exceptions for personal data (regulation 13) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Cumbria County Council wrongly handled the request under the FOIA and breached regulation 5(1) and 14 of the EIR, and that it failed to demonstrate the 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 21 November 2017, the complainant wrote to Cumbria County Council (the "council") and requested information in the following terms:

"1. Kendal Strategic Transport Infrastructure Study (NOT the online summary note - the full document, please);

2. The Strategic Outline Business Case (referred to in the summary note, under 4. Next Steps)."
6. The council responded on 19 December 2017. It stated that it was withholding the information under the exemption for commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 1 February 2018. It stated that it had revised its position and disclosed a copy of *The Strategic Outline Business Case* specified in part 2 of the request. It withheld some of this document under section 43(2) of the FOIA.

Scope of the case

8. On 20 February 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the investigation it became apparent to the Commissioner that, given the nature of the request, it was likely that the information constituted environmental information and fell to be considered under the EIR. The Commissioner, therefore, advised the council of her initial view and directed it to reconsider the request under the EIR.
10. The council accepted the Commissioner's view and reconsidered the request, confirming that it was withholding part of the Strategic Outline Business Case under the EIR exceptions for personal data (regulation 13) and commercial confidentiality (regulation 12(5)(e)).
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied 12(5)(e) to withhold some of the information. The complainant confirmed that they were content for the information withheld under regulation 13 to be excluded from the scope of their request and the Commissioner's investigation.

Reasons for decision

Is it Environmental Information?

12. 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.
13. 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...'

14. 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.
15. 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").

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. 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

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 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 as the council actually dealt with the request under FOIA.
19. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

20. The introduction to Strategic Outline Business Case identified in the request states:

"The Kendal Strategic Transport Infrastructure Study was commissioned by Cumbria County Council (in partnership with South Lakeland District Council and Kendal Town Council) in August 2016 to investigate the feasibility of strategic transport improvements in Kendal. This Strategic Outline Business Case (SOBC) represents the final deliverable for the study. The purpose of this document is to demonstrate the case for investment in a scheme to deliver strategic transport improvements, and to support future development in Kendal and across the wider area."

21. The council confirmed to the Commissioner that The Strategic Outline Business Case (SOBC) (identified in part 2 of the request) also incorporates the Kendal Strategic Transport Infrastructure Study specified in part 1 of the request. It confirmed that the scope of the request, is therefore satisfied in full by the SOBC. It also confirmed that its submissions in relation to regulation 12(5)(e) are applicable to the

SOBC and the Commissioner notes that the council's submissions do not explicitly distinguish between these two elements of the requested information.

22. At the internal review stage, the council disclosed a redacted version of the SOBC to the complainant. The information redacted from the disclosed version of the SOBC was withheld under regulation 12(5)(e).
23. 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".
24. 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?

25. For the information to be commercial or industrial in nature it will need to relate to a commercial activity. The council confirmed that the withheld information relates to potential route details, development areas and scheme costs.
26. Having considered the council's submissions and referred to the requested information the Commissioner is satisfied that it relates to a commercial activity and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

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. The council has stated that the information is not trivial and that it is not in the public domain. It has confirmed that the information was shared with or provided to its officers in circumstances creating an obligation of confidence. It explained that the relevant project team and stakeholder groups were briefed on the sensitivity of the information and the expectation of confidence was made explicit. It stated that a reasonable person in the place of a recipient of the information would have considered that the information had been provided to them in confidence.
30. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.
31. In view of the above, the Commissioner is satisfied that the withheld information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

32. 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.
33. 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. The council confirmed that it considered disclosure of the information would adversely affect its own legitimate economic interests. It stated that disclosure would:
- Harm the council's present and future negotiations with prospective landowners in relation to the purchase of land in the areas in question;
 - Hinder the council's ability to negotiate sales as it would reveal the amount it had budgeted for, at the time the business case was produced.
 - Provide parties involved in negotiations with the council with information that would assist their bargaining position and thus harm that of the council.
36. The council's submissions provide no specific indication of who it is currently negotiating with, nor do they direct the Commissioner to any specific elements of the withheld information which would cause the ascribed effects. The Commissioner recognises the general principle that disclosing information which would undermine a negotiating strategy, benefitting the recipient of the information to the detriment of the party to which the information relates, can result in harm. However, she considers that it is for public authorities to demonstrate how such harm would occur in any given case and identify a causal link between the release of specific information and specific adverse effects.
37. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in *Hartlepool Borough Council vs the Information Commissioner* (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")
- "What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable..."¹*

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20\(14-03-18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20(14-03-18).pdf)

38. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."

39. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects would follow as a direct result of information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.

40. In this case the council's submissions make reference to high-level, generic categories of information (e.g., negotiating sales) but do not explicitly identify the relevant elements of the withheld information or explain how disclosure would result in actual harm. In relation to its suggestion that disclosure of the information would improve parties' bargaining position, to the detriment of the council's position, the

council has not identified specific elements of the information or explained the causal mechanism via which this would happen.

41. In her letter of investigation the Commissioner clearly set out the level of detail required in order to justify the engagement of the exception. She also made it explicit that the council would have just one opportunity to set out its final position. Having considered the council's submissions the Commissioner is left with the impression that the exception has been applied on a general basis without a link being made between specific adverse effects and discrete elements of the withheld information.
42. Having viewed the withheld information the Commissioner considers that a case might be made for engaging the exception but that the council has, in this instance, failed to make this. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letter of investigation clearly set out the level of detail required for engaging the exception and the council has failed to meet this threshold.
43. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person.

Right of appeal

44. 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

45. 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.
46. 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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