

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

Date: 24 September 2018

Public Authority: Ryedale District Council
Address: Ryedale House
Old Malton Road
Malton
North Yorkshire
YO17 7HH

Decision (including any steps ordered)

1. The complainant has requested information relating to Wentworth Street car park. Ryedale District Council disclosed some information and withheld other information under the FOIA exemptions for prejudice to effective conduct of public affairs (section 36), information provided in confidence (section 41), legal professional privilege (section 42) and commercial interests (section 43(2)). During the Commissioner's investigation the council reconsidered the request under the EIR and withheld the information under regulation 12(4)(e), regulation 12(5)(b) and regulation 12(5)(e).
2. The Commissioner's decision is that Ryedale District Council:
 - Wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 of the EIR,
 - correctly applied regulation 12(5)(b) to withhold the information in parts 1 and 3 of the request and,
 - failed to demonstrate that regulation 12(5)(e) is engaged and wrongly withheld the information in part 2 of the request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in part 2 of the request 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 5 February 2018, the complainant wrote to Ryedale District Council (the "council") and requested a range of information relating to Wentworth Street Car Park, including correspondence between named individuals.

[specific wording of request redacted for personal data]

6. The council responded on 2 March 2018. It disclosed the information in part 4 of the request and withheld the information in parts 1-3 of the request under a range of FOIA exemptions, specifically, section 36 - prejudice to effective conduct of public affairs, section 41 - information provided in confidence, section 42(1) - Legal professional privilege and section 43 - commercial interests.
7. Following an internal review the council wrote to the complainant on 5 April 2018. It stated that it was maintaining its position.

Scope of the case

8. On 19 April 2018 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 in parts 1-3 of the request.
10. During her investigation it occurred to the Commissioner that, due to the nature of the request, it was likely that the information constituted environmental information and fell to be considered under the EIR rather than the FOIA. She invited the council to reconsider the request under the EIR. The council took this step and confirmed that it was now

withholding the information under a number of EIR exceptions. The Commissioner has considered whether the exceptions have been correctly applied.

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 withheld information relates to the 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").

15. 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

16. 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.
17. 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.
18. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(b) – course of justice

19. The council has withheld the information in parts 1 and 3 of the request under the exception for the course of justice.
20. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
21. The council confirmed that, in applying the exception, it was relying on legal professional privilege to withhold the information.
22. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in Bellamy v ICO & DTI [EA/2005/0023] as, "a set of rules or principles which are designed to protect the confidentiality of legal or

legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation¹”.

23. There are two types of privilege – legal advice privilege and litigation privilege. The council confirmed that it was relying on legal advice privilege to withhold the information.
24. The council explained that the email in part 1 of the request is an exchange between the council’s solicitor and an elected member of the council. It confirmed that the email contains legal advice about the planning functions of the council and governance around sale of assets and best value.
25. In relation to part 3 of the request, the council confirmed that the information consists of a brief to a barrister seeking legal advice on behalf of the council.
26. Having considered the council’s submissions and referred to the withheld information the Commissioner is satisfied that the information relates to the course of justice and falls within the scope of the exception. She has gone on to consider whether disclosure of the information would result in adverse effects to the course of justice.

Adverse affect to the course of justice

27. In the decision of Archer v Information Commissioner and Salisbury District Council (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It explained that there must be an “adverse” effect that would result from the disclosure of the requested information. Another Tribunal decision – Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/030), the Tribunal interpreted the word “would” as being “more probable than not”.
28. In the case of Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023) the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”. The Commissioner accepts that disclosure of legal advice would undermine this important

¹ EA/2005/0023, para 9

common law principle. She further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.

29. In *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), case number GIA/2545/2011, the Upper Tribunal considered the significance of LPP under the EIR. The Upper Tribunal stated that an adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The Upper Tribunal also accepted that it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice; but suggested that there would need to be special or unusual factors in play for this not to be the case.
30. In addition to the above considerations, the council's submissions highlighted a previous decision notice issued by the Commissioner which related to a request for legal advice in the context of local authority planning functions². In this decision notice the Commissioner found that there was a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters, such as those relating to planning. The Commissioner concluded that disclosure of the information would inhibit the effectiveness of the public authority's public function and result in adverse effects to the course of justice.
31. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.

² ICO reference: FER0601925, published online here: https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560596/fer_0601925.pdf

32. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The Public Interest Test

Arguments in favour of disclosing the requested information

33. The council confirmed that, in considering the balance of the public interest in this case, it had taken into account the presumption in favour of disclosure provided by regulation 12(2).
34. The council acknowledged that there is a general public interest in transparency in decision making and the exercise of statutory powers. It confirmed that it considered that disclosure of the information may assist the public in satisfying themselves that the council has sought and provided appropriate legal advice and that all relevant matters have been considered. The council confirmed that it recognised that the proposal to which the matter relates (which has not been progressed) is a matter of concern for the local community and disclosure might aid local understanding of the situation.
35. The complainant has provided the Commissioner with the following submissions in support of disclosure:
- On 29 July 2010 the council voted to sell the edge-of-town car park in its ownership at Wentworth Street, Malton (WSCP) to a superstore developer.
 - The council chose to bring the WSCP application to the same planning meeting as an application from Fitzwilliam Malton Estate (FME) to redevelop the livestock market.
 - At the planning meeting the council refused the livestock market site on four grounds and awarded permission to its own car park site. The subsequent planning appeal resulted in all four grounds for refusal being reversed and permission awarded to FME along with £148,000 costs being paid by the council.
 - In 2014 the council again awarded permission for a superstore on its site. A subsequent Judicial Review in the High Court quashed the permission, ruling that the council's conclusions were "infected with error", 'inchoate' and 'significantly misled members.'" (Justice Dove,

Judgment 9.7.2015, case CO/4915/2014)³ and the council again had to pay costs.

36. In light of the above submissions the complainant considers that the council's conduct in this matter has been unreasonable and resulted in irresponsible wasting of public money. These factors, it is argued by the complainant, constitute compelling reasons for transparency and accountability and for disclosure of the information to serve these ends.

Arguments in favour of maintaining the exception

37. The council has acknowledged that there is a strong inbuilt public interest in it not being discouraged from obtaining appropriate legal advice to enable it to make sound, well-reasoned and balanced decisions.
38. The council has noted that the proposal in question was of interest to the local community at the time, however, the proposal did not proceed and, therefore, no disposal of assets took place nor was any development undertaken.
39. The council has confirmed that the information remains relevant to its decision making procedures generally and would be equally relevant should there be a further development proposal made in the future relating to the same site.
40. The council has further argued that the planning process itself provides a transparent system of decision making where information is routinely made public and that the public can raise objections that can formally be considered by those decision makers. It has clarified that there is a further right of appeal to The Planning Inspectorate and that the law, therefore, already provides adequate information and means of challenge in relation to planning proposals without the need for compromising the council's ability to seek legal advice in administering the planning process.

Balance of the public interest

41. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general

³ <https://s3-eu-west-1.amazonaws.com/cjp-rbi-estatesgazette/wp-content/uploads/2015/07/miltonj.rtf>

public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.

42. The Information Tribunal in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006): “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.
43. The Commissioner notes that the legal advice is still ‘live’ in the sense that it will be relevant to future proposed developments at the site. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the legal basis of the council’s strategy and this could result in adverse effect to the course of justice via revealing the Council’s legal strategy to potential opponents and undermining the principle that legal advice remains confidential. . In the Commissioner’s view, this weighs heavily in the balance of the public interest test in this case.
44. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
45. In relation to the complainant’s concerns around the council’s conduct in relation to its handling of the planning process in this matter, whilst she acknowledges that criticism of the council is a matter of public record she does not consider that these equate to countervailing considerations sufficient to override the public interest in maintaining the confidence of LPP. She further acknowledges that, as submitted by the council, legal remedies for those seeking to overturn the council’s planning decisions are available, as evidenced by the referenced planning appeal and Judicial Review in this matter.
46. Whilst the Commissioner is alive to the complainant’s concerns in this matter she does not consider that the available evidence provides sufficiently weighty reasons for overturning the public interest in maintaining the exception in this case. In light of this, the Commissioner has concluded that, having regard for the facts of this matter, the public interest on this occasion, favours maintaining the exception.

Regulation 12(5)(e) – commercial interests

47. The council confirmed that it was applying regulation 12(5)(e) to withhold the information in part 2 of the request, namely the Conditional Agreement for Lease between the council and GMI Holbeck.
48. 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”.
49. 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?

50. The council confirmed that the information contained in the requested conditional agreement relates to a commercial activity, namely, the proposed long term lease of land belonging to the council in return for monetary consideration.
51. Having considered the council’s submissions and referred to the withheld information the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

52. 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.
53. 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.

54. The council has confirmed that the conditional agreement contains a confidentiality clause requiring the parties to the agreement not to disclose or publish or permit or cause to be disclosed or publish any details of the agreement. The council clarified that the information is not in the public domain and that it is not trivial in nature.
55. The council has argued that, notwithstanding the explicit confidentiality terms of the agreement, any reasonable person who was party to the agreement would have considered that a duty of confidence applied, indeed it is usual practice for such agreements to be confidential. In light of this, the council has concluded, a common law duty of confidentiality also applies.
56. 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.
57. 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?

58. 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.
59. 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.
60. 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".
61. The council has argued that disclosing the conditional agreement would result in adverse effects to its own legitimate economic interests.

62. The council has stated that, although the proposed lease did not materialise and no commercial income or development happened at that time, the land itself remains a prime commercial development opportunity and potential source of revenue. It has argued that, in the face of radical cuts to local government finance, it has found itself year on year having to make more and more cuts and efficiencies to its services, whilst being required to provide a high standard of service delivery to those within the council area. The council has confirmed that the risk that it might not be able to balance its budget is a real possibility and it must, therefore, look at more commercial opportunities to supplement income, including making use of its property portfolio.
63. The council explained that the site to which the conditional agreement relates remains a valid development site and part of its property portfolio. It has argued that, were the information to be disclosed, its commercial interests would be harmed, not only in relation to the council's ability to attract other parties to bid for the site but in relation to other properties in its portfolio.
64. The council has further argued that there is a need to protect its bargaining position in relation to future negotiations and the detriment to the council will be particularly severe in relation to larger sites and property from which multi-million pound receipts are possible. The council considers that the harm in this case would result from some parties deciding not to tender for or enter into agreements with the council, for concern that details of the same being placed in the public domain, or from some parties being unwilling to share full details with the council.
65. Firstly, the Commissioner acknowledges that cuts to local authority funding are a real factor which is driving a need for authorities to seek alternative revenue streams, including commercial exploitation of property portfolios. The Commissioner accepts that, where disclosure of information would inhibit this process or otherwise harm an authority's ability to negotiate a favourable agreement, this would constitute a disclosure resulting in harm to a party's legitimate economic interests.
66. However, in order for the exception to be engaged, the Commissioner considers that it is not sufficient to simply identify a general form of harm, the specific adverse effects must be demonstrated with reference to explicit elements of withheld information and the causal sequence, for example, the benefits that the information would provide to a potential developer. In relation to adverse effects, the council's submissions make no reference to any specific parts of the conditional agreement but rather treats the entire document as if, inherently, its disclosure would result in harm.

67. In view of the above, the Commissioner approached the council and gave it a second opportunity to provide details of the specific harm that disclosure would cause. The council's additional submissions, again, begged the question, reiterating its concerns about potential shortfalls in revenue without making any concrete link between these effects and disclosure of the information contained within the conditional agreement.
68. In relation to the council's argument that disclosure would have the effect of discouraging third parties from seeking to enter into agreements with the council the Commissioner has no evidence that this would happen. She is also sceptical that a third party would deny itself an opportunity to enter into potentially lucrative agreements involving the use of public authority land. Having considered the content of the withheld information, the Commissioner is further unpersuaded that disclosure would result in the effects identified by the council.
69. 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...."*
70. 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."

71. 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.
72. 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, however, in this case the council was also given a further opportunity and guidance. 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.
73. The Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letters of investigation clearly set out the level of detail required for engaging the exception and the council has failed to meet this threshold.
74. 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.
75. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Regulation 12(4)(e) – internal communications

76. The council withheld part 1 of the request under regulation 12(4)(e). As the Commissioner has concluded above that part 1 of the request was correctly withheld under regulation 12(5)(b) she has not gone on to consider the council's application of regulation 12(4)(e).

Right of appeal

77. 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

78. 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.

79. 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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