

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

Date: 5 October 2022

Public Authority: Norwich City Council
Address: City Hall
St. Peters Street
Norwich
NR2 1NH

Decision (including any steps ordered)

1. The complainant requested information from Norwich City Council (“the Council”) about its business cases for various commercial property investments.
2. The Council initially refused to provide any of the requested information, citing the commercial interests exemption under section 43(2) of FOIA as its basis for doing so. Subsequently, during the course of the Commissioner’s investigation, the Council reconsidered the request under the EIR. It disclosed the majority of the requested information. However, it continued to withhold some information citing the confidentiality of commercial or industrial information exception under regulation 12(5)(e) of the EIR.
3. The Commissioner’s decision is that the Council has not demonstrated that regulation 12(5)(e) of the EIR is engaged with respect to all of the information it has withheld on this basis.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:

- revisit the request and issue a fresh response directing the complainant to where at least some of the information within the scope of the request is available,
 - in relation to any other information, either disclose it or issue a fresh response providing valid grounds for withholding it.
5. The Council 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 1 August 2020, the complainant wrote to the Council and requested information in the following terms:
- “Could you please provide me with the business case for each of the following Commercial property (non housing) investments:
- a) 1 Featherstone Rd., Wolverton Mill, Milton Keynes
 - b) Kineton Rd., South Worcs Business Park, Southam
 - c) Travelodge, Edinburgh Gate, Harlow
 - d) Units C, E, F Stafford Park 6, Telford
 - e) Lawrence House, St. Andrews Hill, Norwich”
7. The Council responded on 9 September 2020. It confirmed that whilst it held the requested information it was already publicly available. The council went on to provide a link to a page on its website about its commercial property investments.
8. Following an internal review the Council wrote to the complainant on 14 May 2021. It issued a refusal notice citing section 43 of FOIA, the commercial interests exemption, as its basis for withholding the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 7 June 2021 to complain about the way their request for information had been handled.

10. During the course of the Commissioner's investigation, the Council reconsidered the request under the EIR. It disclosed the majority of the requested information, providing the business case for each 'asset' i.e. each of the property investments listed in the request and the attachments to these business cases. However, it redacted some information, citing the confidentiality of commercial or industrial information exception under regulation 12(5)(e) of the EIR and the personal data exception under regulation 12(3) of the EIR.
11. The Commissioner has considered the business cases and agrees that the correct access regime is the EIR, because they include information on measures and activities affecting or likely to affect elements of the environment. The information therefore falls within the definition of environmental information under regulation 2(1)(c) of the EIR.
12. The complainant does not contest the council's decision to apply regulation 12(3) to some of the withheld information on the basis that it is the personal data of third parties. However, they believe the redacted information withheld under regulation 12(5)(e) should be disclosed. This information comprises credit check information held within the reports about the existing commercial tenants of the assets.
13. The following analysis focuses on whether the Council has correctly relied on regulation 12(5)(e) of the EIR to withhold the credit check information about the existing commercial tenants.

Reasons for decision

Regulation 12(5)(e) – confidentiality of commercial or industrial information

14. 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.
15. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
 - 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?
16. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial?

17. The withheld information under consideration is credit check information about the existing commercial tenants of five of the Council's commercial property investments. The credit check information was obtained before they became tenants.
18. The Commissioner is satisfied that all the withheld information is commercial in nature as it relates to the commercial activity of the tenants. The tenants are all commercially trading companies.

Is the information subject to confidentiality provided by law?

19. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
20. 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. For purely internal information, the question will be whether the employees or members of the public authority are under an obligation of confidence imposed by the common law, contract or statute.
21. In this case the Council argues that the information is subject to confidentiality provided by the common law duty of confidence.
22. For a common law duty of confidentiality to exist, it is required (a) that the information has the necessary quality of confidence, and (b) that it was imparted in circumstances which gave rise to an obligation of confidence.

The Council's position

23. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. In its submissions to the ICO the Council gave its position as follows, "The Council believes that the requested

information has the necessary quality of confidence in that the content is neither trivial nor is it in the public domain.”

24. Regarding (b), whether it was imparted in circumstances giving rise to an obligation of confidence, the Council's view is that the information was imparted in circumstances importing an obligation of confidence; that the information was provided solely to the Council to inform a potential investment opportunity. The Council argues that common practice for decision-making on potential investments does not include the publication of third-party advice that has been purchased by a potential investor.
25. The Council has also referred to the Commissioner's guidance on regulation 12(5)(e)¹ and the test of whether a reasonable person in the place of the recipient would have considered that the information has been provided to them in confidence. The Council argues that the provision of investment advice to assist in determining whether or not to bid for a new commercial asset meets the conditions of this test.

The Commissioner's view

26. The Commissioner notes that, when addressing the question of the quality of confidence the Council stated that the withheld information is not in the public domain. However it then went on to say in its submissions to the ICO, when discussing whether confidentiality would be adversely affected by disclosure, “whilst some of this information can be found via other means, such as in accounts filed with Companies House, this does not cover all of the data held”.
27. Having reviewed the withheld information the Commissioner is satisfied that at least some of this information is in the public domain (and was in the public domain at the time of the request).
28. As at least some of the withheld information is in the public domain, the Commissioner is not persuaded that all of the information withheld under the commercial or industrial information exception is subject to confidentiality provided by law. Therefore he has not gone on to consider parts three and four of the four-stage test.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

The Commissioner's decision

29. The Commissioner's decision is that the Council has not demonstrated that the commercial or industrial information exception under regulation 12(5)(e) of the EIR is engaged with respect to all of the information withheld on this basis.

Right of appeal

30. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF