

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

Date: 6 December 2022

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
HU17 9BA

Decision

1. The Commissioner's decision is that, on the balance of probabilities, East Riding of Yorkshire Council ('the Council') has disclosed all the recorded information it holds within scope of the request for information about a 'Beverley Energy Network' project. The Council is entitled to rely on regulation 12(5)(e) of the EIR to withhold some of the requested information in order to protect commercial confidentiality. The Council breached regulation 14(2) of the EIR as its refusal was provided outside the 20 working day requirement, and it breached regulation 14(3) of the EIR as it incorrectly issued its refusal under FOIA and not the EIR.

Request and response

2. The complainant made the following information request to the Council on 7 July 2021:

"1. Names of all ERYC Officers involved in the planning application and/or the application process, and in what capacity.

2. Any and all correspondence, including letters, memos, emails, notes, records of conversations and any other documents, between:

The applicant and all /any councillors of ERYC, including Planning Committee members

The applicant and all/any Officers of ERYC in any department
The applicant and all /any Beverley Town Council members
Any Officers of ERYC and all /any Beverley Town Council members
The applicant and AECOM
Any Officers of ERYC and AECOM

3. Any and all correspondence, including letters, memos, emails, notes, records of conversations and any other documents, between:

Alan Menzies and [redacted]
Alan Menzies and/or [redacted] and any other party/parties involved in the project

4. Any and all correspondence, including letters, memos, emails, notes, records of conversations and any other documents, between ERYC's legal department, planning department and the applicant regarding money/profit/gain to the Council.

5. Full details of conversations/communications, written or verbal, declared by members of the Planning Committee at the Planning Meeting on Monday 12/4/21.

6. A copy of the Council's Business Plan concerning this project.

7. A breakdown of the costs of the planning application. Full financial breakdown of any monies received or paid. The identity of any/all financial beneficiaries of the project.

8. Full details of who will operate and control the proposed Beverley District Energy Network."

3. The Council's final position was that it holds no further relevant information other than what it had disclosed and that it was entitled to withhold some information under section 43(2) of FOIA, which is the equivalent of regulation 12(5)(e) of the EIR.

Reasons for decision

4. This reasoning first discusses why the Council should have handled the request under the EIR and not FOIA. The reasoning then covers whether the Council holds further information within scope of six parts of the request, whether it is entitled to withhold some information under regulation 12(5)(e) of the EIR and its refusal of the request.

Is the requested information environmental information?

5. The Council handled the request under FOIA. However, the requested information concerns a planning matter. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) and 2(1)(c) of the EIR¹ and the Council should have handled the request under the EIR and not FOIA.

Regulation 5 – duty to make environmental information available on request

6. Under regulation 5(1) of the EIR, a public authority must make environmental information available on request if it holds the information and it is not subject to an exception.
7. Having reviewed the Council's response to parts 1, 5 and 8 of the request, the Commissioner is satisfied that the Council's response fully addresses those parts.
8. The Commissioner had a telephone conversation with the Council on 6 December 2022 and discussed whether the Council held further information within scope of parts 2, 3 and 4 of the request.
9. The Council has explained that what limited recorded information it holds within scope of part 2 of the request – ie emails - has been disclosed. The Council advised that the majority of the discussions about the planning matter in question were carried out verbally and were not recorded. The Council has confirmed that it carried out searches for any relevant correspondence and has disclosed all that it identified. In the absence of evidence to suggest otherwise, the Commissioner accepts that is the case and that the Council holds no further relevant information.
10. With regard to part 3 of the request, the Council acknowledged that its response to this part incorrectly refers to it not holding any correspondence between the "Applicant" and Alan Menzies rather than between a particular Council officer, and Alan Menzies, the Council's Deputy Chief Executive, which is what is requested. The Council said that this was a "typo". The Council said that having spoken to the officer concerned, it could confirm it holds no correspondence between that officer and Alan Menzies as the officer stated they have never corresponded with Alan Menzies. The Council also said that any

¹ <https://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

correspondence between those two individuals and any other parties had been disclosed in response to part 2 and that it holds no other relevant information. The Commissioner sees no reason to doubt that is the case and accepts that the Council holds no further recorded information within scope of part 3.

11. The Council has confirmed that, with regard to part 4, the information that it holds that falls within scope of this part has been disclosed in relation to part 2 and through disclosure of the business plan. It confirmed it holds no other relevant information. Again, the Commissioner is satisfied that the Council has considered this matter satisfactorily and accepts that it holds no further information.
12. With regards to parts 1-5 and part 8, therefore, the Commissioner has decided that, on the balance of probabilities, the Council has complied with regulation 5(1) of the EIR.

Regulation 12(5)(e) – commercial confidentiality

13. On 24 November 2022 the Council disclosed the project business plan within scope of parts 6 and 7 of the request, with some information redacted under regulation 12(5)(e) of the EIR.
14. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
15. In a submission to the Commissioner, the Council advised that the redacted information remains commercially sensitive, including the secured financial borrowing rates, and its full breakdown of costs/expenditure and the project's financial beneficiaries.
16. The Council has confirmed that the redacted information is commercially sensitive for the following reasons:
 - Although the project has ceased, the redacted information would still reflect the Council's commercial activities. Disclosure could prejudice future projects of a similar nature and its ability to participate competitively in the energy market. The Council also sought views from the partners that were already involved with the Council and they were concerned about their own commercial interests.
 - The Council runs a similar, active, project in Goole and all that work is reflected in the documents for the Beverley project in question as they are based on the same modelling. Disclosing the redacted information could prejudice the Council's commercial interests, ie the borrowing rates. This is because it could

negatively impact on its ability to undertake and deliver a commercially beneficial project without competitors being aware of its costs and expenditure. This would open up the potential for the scheme to be copied by competitors. Given the ongoing themes of climate change and rising energy costs, disclosing information around this point could prejudice the Council's commercial ability to operate in this sector, if its commercial planning were disclosed to competitors.

17. The Commissioner has considered four tests. First, he is satisfied that the requested information is commercial in nature. Second, he is satisfied that the information is subject to confidentiality by law because it is not trivial, nor otherwise accessible and so has the necessary quality of confidence.
18. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. The Council advised the complainant that disclosing the redacted information could harm the commercial interests of both the partners to the project and the Council in continuing to develop and run schemes such as the project in question. It said that the company's pricing structure is not generally known and is a key component of its trading advantage.
19. The situation is less clear with its partner organisations but the Commissioner is satisfied that disclosing the withheld financial information at the time of the request would undermine the Council's financial position. Disclosure would potentially result in its borrowing rates increasing and it would have a detrimental impact on the Council's ability to undertake such projects in the future. This is because the Council's competitors in the marketplace would have insight into the Council's costs and expenditure, associated with such energy projects.
20. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the Council disclosed this information.
21. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the withheld information would adversely affect the Council's commercial interests. He has gone on to consider the associated public interest test.
22. In the Commissioner's view, the general public interest in transparency and the specific public interest in the project that is the subject of the request has been met to an adequate degree through the information the Council disclosed, both as a result of this request and through the information about the project that it proactively published. The Commissioner considers that there is greater public interest in the Council being able to compete fairly and to use public funding to the best effect.

Regulation 14 – refusal to disclose information

23. Under regulation 14(2) of the EIR a public authority must issue a refusal notice in respect of excepted information as soon as possible and no later than 20 working days after the date of receipt of the request.
24. Having initially withheld it completely under section 43(2) of FOIA, the Council disclosed the majority of the business plan on 24 November 2022. It disclosed this information, not because it considered it had incorrectly relied on regulation 12(5)(e) (as discussed, the EIR equivalent of FOIA section 43) but because, given the time that had elapsed since the complainant submitted their original request on 7 July 2021, the potential prejudice to commercial interests associated with disclosing the business case had lessened.
25. The Commissioner is satisfied that the Council would have been entitled to rely on section 12(5)(e) in respect of the entire business case at the time of the request on 7 July 2021. As such, when it refused this element of the request on 6 August 2021, its refusal was appropriate. However it was provided just outside the timescale of 20 working days required under regulation 14(2) of the EIR.
26. Because the Council issued its refusal under FOIA and not the EIR it also breached regulation 14(3) of the EIR. This concerns the exception(s) a public authority is relying on to withhold information and why the exception(s) are engaged.

Right of appeal

27. 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

28. 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.
29. 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

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