

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

Date: 6 August 2024

Public Authority: North East Combined Authority
Address: Silverlink North
Cobalt Business Park
Newcastle Upon Tyne
NE27 0BY

Decision (including any steps ordered)

1. The complainant requested information from North of Tyne Combined Authority (NTCA), which is now part of North East Combined Authority (NECA), regarding a brownfield housing fund. NECA has withheld one document within the scope of part one of the request under regulation 12(5)(e) of the EIR (confidentiality of commercial information). It has also redacted some information from an email within the scope of part one of the request, the initial application email, under regulation 13 of the EIR (personal data). NECA's position is that it has now disclosed all of the information it holds within the scope of part two of the request; the complainant disputes this.
2. The Commissioner's decision is that:
 - NECA is entitled to withhold some, but not all, of the information it has withheld under regulation 12(5)(e) of the EIR on this basis;
 - on the balance of probabilities, NECA does not hold any further information within the scope of part two of the request;
 - NECA is entitled to withhold some, but not all, of the information it has redacted from the initial application email under regulation 13 of the EIR.
3. The Commissioner requires NECA to take the following steps to ensure compliance with the legislation.

- Disclose pages one and two of the contract sum analysis document which it had withheld under regulation 12(5)(e).
 - Disclose the domain names for each of the email addresses it redacted from the initial application email.
 - Disclose the name and job title of the sender of the initial application email.
4. NECA must take these steps within 30 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 7 December 2024, the complainant wrote to NTCA and requested information in the following terms (numbering added for ease of reference):

“Re: NTCA Brownfield Housing Fund - Bellingham Mart

1. Application for public money

Please provide an electronic copy of the documentation/email sent to the NTCA as the application for NTCA Brownfield Housing Fund to support the development of Bellingham Mart, to include the stated reason(s) why BHF grant money was needed.

2. Granting of public money

Please provide an electronic copy of the documentation/email sent from the NTCA to inform Karbon Homes (Maple Oak Living?) that NTCA Brownfield Housing Fund had been granted to support the development of Bellingham Mart.

3. Payment of public money

Please provide:

i) details of all payments to date made to Karbon Homes in relation to the Bellingham Mart site.

ii) the details that were provided by Karbon Homes (Maple Oak Living?) to justify the above payments.”

6. NTCA responded on 19 December 2023. With respect to part one of the request it stated that this information could not be shared as it includes commercially sensitive information. In response to part two of the request it provided a link to the delegated decision report on its website. In response to part three of the request it stated, "...as payments are made to applicants in arrears, we have not yet made any payments to Karbon for the project. Prior to NTCA making payments to applicants, appropriate checks are made to ensure that grant expenditure has been incurred for its intended purpose".
7. The complainant requested an internal review on 22 December 2023. They:
 - argued that, with respect to the information requested in part one of the request, the public interest in disclosure outweighs that in withholding the information;
 - stated that the delegated decision report was not what they had requested in part two of the request, they said "the dated formal documentation/email informing Karbon Homes of NTCA's decision to make the BHF award, is what is required";
 - stated that NTCA had not responded to part 3(ii) of the request and made a new request for the information held as of 22 December 2023.
8. NTCA provided an internal review on 5 February 2023 in which it disclosed additional information. It disclosed some further information in scope of part one of the request, including the initial application email (partially redacted). It also disclosed an email in response to part two of the request which informed the applicant that the grant funding agreement had been posted. It continued to withhold some of the information held within scope of part one of the request, stating, "we are not able to provide the financial appraisal information as this is commercially sensitive". It also stated that it did not hold any information within scope of part 3(ii) of the request.

Scope of the case

9. The complainant contacted the Commissioner on 11 February 2024 to complain about the way their request for information had been handled.
10. The Commissioner asked NECA (as NTCA now formed part of NECA) to reconsider the request under the EIR as the information requested relates to the redevelopment of a brownfield site.

11. NECA issued a fresh response under the EIR on 30 May 2024. It confirmed it was continuing to withhold some of the information held within the scope of part one of the request under regulation 12(5)(e) (confidentiality of commercial information) and that it had already disclosed all of the information it holds within the scope of part two of the request. It also provided some information in relation to part 3(ii) of the request, which had not been held at the time of the request.
12. NECA subsequently disclosed some additional information which it had previously redacted from the initial application email and confirmed the remaining information within this email was redacted on the grounds that it was exempt from disclosure under regulation 13 of the EIR (personal data).
13. The scope of this case is to consider:
 - whether NECA correctly applied regulation 12(5)(e) to some of the information held relevant to part one of the request;
 - whether, on the balance of probabilities, NECA holds any further information within the scope of part two of the request, beyond that which it has already disclosed;
 - whether NECA is entitled to withhold the information redacted from the initial application email under regulation 13 of the EIR.

Reasons for decision

Regulation 12(5)(e) - Commercial confidentiality

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 this case the withheld information comprises one document within the scope of part one of the request, specifically, a contract sum analysis document. The document is made up of three parts, the first page contains information about the underlying assumptions on which the costing information is based, the second page contains headline figures for costs, revenue and surplus, the following seventeen pages contain very detailed cost information.
16. NECA argues that the information is commercial and industrial in nature as the information relates to the applicant's costings and how they price their projects which is commercially sensitive and industrial in nature. In

the context of this exception "Industrial" is generally understood to describe the processing of raw materials and the manufacture of goods in factories, the Commissioner does not therefore consider this information to be industrial. However, he accepts that the withheld information is commercial in nature as it relates to the provision of goods and services, specifically construction and development, for profit.

17. NECA argues that the information is subject to confidentiality provided in law as the applicant supplied this information in confidence and advised it that the information cannot be in the public domain due to its commercial sensitivity.
18. 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 and is not otherwise accessible and so has the necessary quality of confidence.
19. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. NECA argues that disclosure of the withheld information would prejudice both its own economic interests and those of the applicant.
20. With respect to its own economic interests, NECA argues that, if this information were disclosed other applicants could be discouraged from bidding for similar funding in the future due to fear that pricing information such as this may be disclosed under the EIR. NECA did not provide any specific arguments about how this would harm its economic interests. In the absence of any specific arguments to this effect the Commissioner does not consider NECA has demonstrated that disclosure of the withheld information would prejudice its own economic interests. He has gone on to consider whether disclosure would prejudice the economic interests of the applicant.
21. With respect to the applicant's economic interests, NECA argues that disclosure of information about the applicant's costings and how they price their projects would give the applicant's competitors an unfair advantage. The Commissioner agrees that the applicant's competitors having access to detailed cost and pricing information when tendering for future work or submitting similar applications would prejudice its economic interests.
22. The Commissioner is satisfied therefore that, with respect to the information in the document that relates specifically to pricing and costing, the confidentiality is provided to protect the legitimate economic interests of the applicant.

23. However, the Commissioner notes that the document also contains information which does not directly relate to pricing or costing, he does not consider that disclosure of this information would prejudice the economic interests of the applicant. The Commissioner's decision is that the exception is not engaged for any of the information on page one, except the two value amounts in paragraph twelve. He has therefore ordered disclosure of this information at paragraph three of this notice.
24. The Commissioner has gone on to consider the fourth test with respect to the information relating specifically to pricing and costing. The Commissioner is satisfied that the confidentiality would inevitably be affected if NECA disclosed the withheld information.
25. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged with respect to the information relating directly to pricing and costing as disclosing the withheld information would adversely affect the applicant's economic interests. He has gone on to consider the associated public interest test for this information.
26. NECA stated the following about how it has considered the public interest test:

"The authority understands that there is a legitimate public interest in relation to a private companies' participation in public authority tenders and the public being able to view where the combined authority is spending money, due to this we have supplied the complainant a breakdown the money the Combined Authority are providing will be spent on and advised what has been claimed so far. However, there is also an important public interest in ensuring that potential tenderers are not discouraged from tendering for public contracts because of the disclosure their commercially sensitive costing and pricing information that would give an economic advantage to their competitors. Due to these reasons, we still hold the view this document cannot be released to the public domain."

27. The Commissioner's view is that the balance of the public interest regarding the headline figures included in pages one and two of the document differs to that for the very detailed costing and pricing information contained in pages three to nineteen of the document.
28. The Commissioner considers that there is a strong public interest in the disclosure of information about the funding of the development using public money and information about how this money will be split between construction costs, the cost of the land and the developer's profit.

29. While there is also some public interest in disclosure of the detailed costing and pricing information the Commissioner's view is that the public interest in the disclosure of this information is less significant than that in disclosure of the headline figures.
30. The Commissioner agrees that it is not in the public interest to discourage potential tenderers from bidding for public contracts due to concerns about commercially sensitive information being disclosed to their competitors. He considers the risk of this occurring to be much greater with respect to very detailed costing information such as that contained in pages three to nineteen of the document than with headline figures.
31. The Commissioner's decision is therefore that the public interest favours maintaining the regulation 12(5)(e) exception with respect to the very detailed costing and pricing information contained in pages three to nineteen of the document, but not the headline figures included in pages one and two of the document. The Commissioner has therefore ordered disclosure of this information at paragraph three of this notice.

Regulation 5(1) – duty to make environmental information available on request

32. 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.
33. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
34. The complainant believes that NECA holds further information within the scope of part two of the request, beyond that which it has already disclosed. For ease of reference, this part of the request was for the following information:

"Please provide an electronic copy of the documentation/email sent from the NTCA to inform Karbon Homes (Maple Oak Living?) that NTCA Brownfield Housing Fund had been granted to support the development of Bellingham Mart."
35. NECA has disclosed a delegated decision report regarding the decision and an email sent to the applicant confirming the grant funding

agreement had been posted. Its position is that it does not hold any further information within the scope of this part of the request.

36. In their complaint to the Commissioner the complainant provided the following reasons as to why they believe further information may be held:

“Suffice it to say that I will find it astounding, if the NTCA now NECA, does not have an official post approval process, particularly as such large amounts of public money are involved.

It seems all too convenient that the officer who might have been in communication with the applicant in relation to the approval of the funding, has since left the organisation.

I would like to understand how an applicant learns that their BHF monies have been approved by the investment panel, subsequent to the meeting of that panel.”

37. In the course of his investigation the Commissioner asked NECA to provide details of the searches it has carried out to ensure that all information within the scope of the request has been identified and to address the complainant’s reasons as to why they believe further information may be held, as quoted in the paragraph above.

38. NECA provided the following information about the searches and staff consultations it has carried out:

“We have searched the electronic file system for any emails stored and we have contacted people externally and internally to see what emails they hold. From this search we were able to supply the email which advised the applicant their contract had been posted and what their next steps were.

The searches should bring any information regarding the request as on officers’ emails and the electronic file system will be the only places such information if it was available would be held.

We have contacted officers and external applicants who could have had involvement in the project and have searched key words within the electronic file system as well as looking in each folder of the project folder.”

39. NECA also confirmed that the search terms used were “Bellingham” and “Investment Panel” and the email addresses of relevant staff members.

40. NECA also provided the following comment on the reasons given by the complainant for believing that further information is held:

"We have advised the complainant that we publish funding awards on our website, and we also provided an email showing one of our officers contacting the applicant to state the contract will be issued through the post."

"We do often contact applicant to advise that their project has been approved by Investment Panel prior to publication, this could be a brief emailing just stating that the project was approved by the panel, a phone call, or in an already scheduled meeting. However, this is not part of our official process so may be different on each project and not an official record as the official record for funding awards are the contract and delegation publications on our website. Additionally, there is no longer anyone on the Housing and Land Team who were working on the project at the time of the application, so we are unable to ask how or if this was communicated."

41. The Commissioner is satisfied that NECA has carried out appropriate searches designed to identify information held within the scope of this part of the request. He also accepts the explanation provided by NECA as to why no further information is held. It is clear that the main instrument for communicating the decision in this case was the delegated decision report, which has already been disclosed.
42. The Commissioner is therefore satisfied that, on the balance of probabilities, NECA does not hold further information within the scope of this part of the request.

Regulation 13 - personal data

43. Regulation 13(1) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
44. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

45. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

46. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

47. In this case the information that NECA has withheld under regulation 13 comprises the names and email addresses of the sender, the recipient and three people who were copied into the initial application email, as well as the job title and mobile phone number of the sender.

48. The Commissioner accepts that all of the withheld information is personal data as it both identifies and relates to the individuals listed in the paragraph above.

49. However, in this case the complainant has indicated that part of their reason for wanting a copy of the email addresses is that they want to see which organisations were involved. NECA had previously informed the Commissioner that it was happy to disclose the domains for each of the email addresses but it appears it has not done so. The Commissioner’s decision is that, while each of the email addresses in its entirety is personal data, the email domains for each of the email addresses withheld is not personal data as the domain alone, that is the information after the @ symbol, does not relate to or identify an individual. As the exception at regulation 13 is not engaged for the domain names the Commissioner has ordered disclosure of this information at paragraph three of this notice.

50. As the Commissioner accepts that the names (including those within email addresses) of the sender and all recipients and the job title and mobile phone number of the sender are personal data, the next step is to consider whether disclosure of this personal data would breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

51. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

52. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

53. The Commissioner considers that the complainant is pursuing a legitimate interest in transparency regarding the application. He will therefore next consider the question of necessity.
54. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The Commissioner does not consider that disclosure of the sender's mobile phone number is necessary to meet the complainant's legitimate interests.
56. In addition, the Commissioner notes that the names of two of the people copied in to the email have already been disclosed within the body of the email. The Commissioner does not consider the disclosure of their full email addresses to be necessary to meet the complainant's legitimate interests.
57. His decision is therefore that NECA is entitled to withhold this information under regulation 13 of the EIR as disclosing the information in question would contravene a data protection principle as it would not be lawful.
58. The Commissioner, does however, consider that disclosure of the names (including those within email addresses) of the sender, the recipient and the remaining person copied into the email, as well as the job title of the sender, is necessary to meet the complainant's legitimate interests. He will therefore go on to consider the balancing test with respect to this information.
59. With respect to the name and job title of the sender the Commissioner notes that the name of the company that sent the email has already been disclosed. Given the sender holds a senior position at the company and information about their position is already in the public domain the Commissioner considers that it would be within their reasonable expectation that this information be disclosed. The Commissioner is also not aware of any information to suggest that disclosure of this information would cause them any harm or detriment. The Commissioner's decision is therefore that with respect to this information the complainant's legitimate interests override the rights and freedoms of the sender as a data subject. He has therefore ordered disclosure of this information at paragraph three of this notice.

60. With respect to the names of the recipient and the remaining person copied into the email, the Commissioner's understanding is that these are both relatively junior members of staff at the respective public authorities they work for, in that they are not senior managers. Having already ordered disclosure of the domain names of their email addresses and therefore the organisations they work for, the Commissioner does not consider that it would be within their reasonable expectations that their names and full email addresses be disclosed in response to an EIR request such as this.
61. The Commissioner does not consider that, with respect to this information, the complainant's legitimate interests override the rights and freedoms of the data subjects. His decision is therefore that NECA is entitled to withhold this information under regulation 13 of the EIR as disclosing the information in question would contravene a data protection principle as it would not be lawful.

Right of appeal

62. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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