

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

Date: 28 November 2013

Public Authority: English Heritage
Address: The Engine House
Fire Fly Avenue
Swindon
SN2 2EH

Decision (including any steps ordered)

1. The complainant has requested information about the 'Caring for Kenwood' project. English Heritage provided the complainant with some of the requested information, but withheld some information under sections 36(2)(c), 40(2) and 43(2) FOIA and regulation 12(5)(e) EIR.
2. The Commissioner's decision is that the DfE has correctly applied sections 36(2)(c), 40(2) and 43(2) FOIA and regulation 12(5)(e) EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 December 2013 the complainant made the following request for information under the FOIA for:

"As English Heritage will be aware, the response from [named individual] fails to disclose the precise nature and scope of the materials used in the chimneypieces of the various rooms of Kenwood House identified in the Gazetteer relating to the 'Caring for Kenwood' project. In the absence of the comprehensive environmental information requested, please will you arrange for me to be provided with this information, as soon as possible, together with a copy of the document referred to (including the Gazetteer).

In particular, in so far as [named individual] does not specify whether or

not the "extraordinary chimneypiece" in the Upper Hall at Kenwood House was made of timber or of some other material, English Heritage is requested to clarify this issue and to determine whether or not the various materials incorporated in that chimneypiece were indeed described by that speaker as stated in the symposium programme...

...In the circumstances, please will you arrange for English Heritage to provide me with a copy of the formal application for the Heritage Lottery Fund grant, together with the relevant State aid decisions of the European Commission which provide the legal justification for such an award together with a copy of the EIA screening decision and / or the EIA assessment by the relevant local authority in the corresponding development consent procedure.

Furthermore, please will you arrange for English Heritage to provide me with a detailed breakdown of the distribution and amounts of the grant awarded by the Paul Mellon Centre to English Heritage, together with the detailed instructions that were provided by English Heritage to the various speakers at the Symposium, that is to say, the precise scope and nature of the subject-matter that the speakers were required to address, not only in the preparation of the presentations, but also in the preparation of the summaries of papers.

It is not clear which persons at English Heritage were instructed to select the speakers, determine the nature and scope of the presentations, distribute the grant monies, prepare the Summary of papers, prepare the list of Speakers and Delegates, prepare the Speakers' biographies and the Brief bibliography relevant to [named individual] at Osterley and Kenwood."

5. On 14 February 2013 English Heritage responded. It provided the complainant with some of the information he requested. It said that the remainder was exempt under section 22, section 36(2)(c), section 43(2) FOIA and regulation 12(5)(e) and 13(1) EIR.
6. The complainant requested an internal review. English Heritage sent the outcome of its internal review on 5 March 2013. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 18 July 2013 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation English Heritage provided further information to the complainant. It continued to withhold some information under sections 36(2)(c), 40(2), 43(2) FOIA and section 12(5)(e) EIR.
9. The Commissioner has considered whether English Heritage was correct to withhold information under sections 36(2)(c), 40(2), 43(2) FOIA and section 12(5)(e) EIR in this case.

Reasons for decision

Section 36(2)(c)

10. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

11. English Heritage has applied subsection 36(2)(c) to redact parts of the Marketing and Communications strategy which was provided to the complainant.
12. In determining whether section 36(2)(c) was correctly engaged by English Heritage the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;

- Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
13. English Heritage has explained that, Dr Simon Thurley, Chief Executive at English Heritage, is the qualified person in this case and his opinion was obtained on 14 August 2013. English Heritage went back to the qualified person at this stage as information to which section 36(2)(c) FOIA was originally applied was disclosed to the complainant and so it wanted to ensure that the qualified person was still of the view that the remaining information withheld under this exemption was correct. English Heritage has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.
14. The following submissions were put to the qualified person in relation to the application of section 36(2)(c):
- The information in question is part of English Heritage's Marketing and Communications strategy for the 'Caring for Kenwood' project which is still 'live'. The milestones that are considered to be exempt have not happened yet and the launch angles' show the themes around which the press office are using to structure our current handling of the media and public interest in the project.
 - Disclosing the information at the present time would be likely to prejudice English Heritage's ability to handle the project from a media/public relations perspective in the way that it would like. English Heritage should be able to inform both the media and public of developments in the 'Caring for Kenwood' project at a time and a manner of its choosing. The disclosure of the forthcoming milestones and the themes that are likely to be used when they occur will significantly reduce any sense of occasion brought by any media coverage of the milestones being reached.
15. The qualified person's response agrees that section 36(2)(b)(c) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.
16. The Commissioner considers that English Heritage's marketing and communications strategy relating to live and forthcoming stages of the project is information which is crucial to the successful completion of these areas of the project. The Commissioner therefore accepts that it was reasonable to conclude that disclosure of this information would be likely otherwise to prejudice, the effective conduct of public affairs.

17. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(c) was correctly engaged.
18. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
19. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

20. English Heritage said that there is a public interest in the transparency of English Heritage's work.

Public interest arguments in favour of maintaining the exemption

21. English Heritage said that the 'Caring for Kenwood' project is currently in progress and the information under consideration here relates to the press office's management of events which are yet to occur. It is very important that staff feel able to formulate such strategies without concern that they will be placed in the public domain at an inappropriate time.

¹ EA/2006/0011; EA/2006/0013

Balance of the public interest

22. The Commissioner considers that there is a public interest in openness and transparency in the work of English Heritage. English Heritage has however provided the complainant with a significant amount of information in this case which goes some way to meeting the public interest in favour of disclosure.
23. The Commissioner also considers that there is a very strong public interest in the English Heritage press office being able to manage and plan for forthcoming events which are yet to occur without concern that this information will be disclosed into the public domain prior to execution of the strategy. He considers that there is a public interest in English Heritage being able to plan such strategies in relation to the projects it is running without being inhibited by fear of premature disclosure.
24. On balance the Commissioner considers that public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
25. The Commissioner therefore considers that the redactions made to the Marketing and Communications Strategy were applied correctly under section 36(2)(c) FOIA.

Section 40(2)

26. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

"Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

27. Section 40(3)(a)(i) of the Act states that:

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

- (i) any of the data protection principles, or*
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),”*

28. The Commissioner has first therefore considered whether the information redacted under section 40(2) is the personal data of one or more third parties.
29. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
- “data which relate to a living individual who can be identified –
- (i) from those data, or
 - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”
30. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
31. The information withheld under section 40(2) FOIA are the personal email addresses of individuals invited to speak at the Symposium and parts of two letters written in support of the ‘Caring for Kenwood’ project by private individuals which were appended to the HLF grant application. The parts withheld contain information from which the writers would be identifiable. The Commissioner considers that this is information that the data subjects would be identifiable from and would therefore be personal data.
32. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met.

Likely expectation of the data subjects

33. English Heritage said that the letters written in support of the project were written by private individuals who would not expect their name and address or any other identifiable information contained within those letters to be disclosed into the public domain. It went on to confirm that the individuals invited to speak at the Symposium would not expect their personal email addresses to be disclosed into the public domain.
34. The Commissioner considers that the private individuals who wrote the letters in support of the project would not have expected that their names, addresses or any other personal information which would identify them would be disclosed into the public domain. Furthermore the Commissioner does not consider that those invited to speak at the Symposium would expect their personal email addresses to be disclosed into the public domain.

Legitimate public interest

35. English Heritage has explained that there is a legitimate public interest in furthering understanding of the 'Caring for Kenwood' project. However it does not consider that disclosure of the personal email addresses of those invited to speak at the Symposium or the personal details of private individuals who wrote the letters in support would meet this legitimate public interest. It reiterated that the body of the invites and the parts of the letters in support which express the authors views and their reasons for supporting the project have however been disclosed to the complainant. It therefore considers that the legitimate public interest has been met by the information which has been disclosed.
36. The Commissioner does not consider that the data subjects would expect the withheld information to be disclosed into the public domain. Furthermore the Commissioner considers that English Heritage has disclosed a significant amount of information which goes a great way to meeting the legitimate public interest in this case. He does not consider that the information withheld would increase public understanding of the project in a significant way.
37. The Commissioner considers that section 40(2) FOIA was correctly applied in this case.

Section 43(2)

38. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is

a qualified exemption, and is therefore subject to the public interest test.

39. English Heritage redacted the sensitivity analysis from the business plan and its bank details from the second round application form. It has explained that it considers that its own commercial interests would be likely to be prejudiced if this information were disclosed.
40. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's commercial interests.
41. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

“...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.”

42. English Heritage has explained that Kenwood House is a visitor attraction in a highly competitive market. The Commissioner considers that this is a commercial activity.

English Heritage said that disclosure of its bank details could expose English Heritage to fraud and disclosure of the sensitivity analysis would provide its competitors with its forward plans and how it intends to become a more sustainable financial visitor attraction. The Commissioner considers that disclosure of information which would open English Heritage up to potential fraud or provide its competitors with detailed forward planning information which could be used to their advantage would be likely to impact on its ability to participate competitively in this commercial activity.

43. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
44. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the successful bidder would be likely to be caused by the disclosure of the requested information.
45. English Heritage said that disclosure of its bank details could expose English Heritage to fraud and disclosure of the Sensitivity Analysis would provide its competitors with its forward plans and how it intends to become a more sustainable financial visitor attraction. It said that the Sensitivity Analysis explores the changes that certain variations in both income and expenditure would have on the property's ability to generate income in a competitive market. It said that the release of the Sensitivity Analysis would be likely to prejudice Kenwood's ability to

operate as effectively as it might otherwise do in London which has a saturated tourist market. It said that it details the impact of different scenarios on Kenwood's finances and is crucial for forward planning. It said that disclosure would provide potential competitors with commercially valuable data about Kenwood's revenue streams and the impact that fluctuations in them (both positive and negative) are predicted to have on the property's balance sheet.

46. The Commissioner considers that disclosure of information which would open English Heritage up to potential fraud or provide its competitors with detailed forward planning information which could be used to their advantage would be likely to impact its ability to participate competitively in this commercial activity.
47. The Commissioner therefore considers that section 43(2) FOIA was correctly engaged in this case.
48. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested Information

49. English Heritage said that there is a public interest in being open and transparent in how its properties operate.

Public interest arguments in favour of maintaining the exemption

50. English Heritage said that it is not in the public interest to disclose information which could be misused for fraudulent purposes. It said that such activities would lead to English Heritage, which is partially funded by public funds, suffering a financial loss.
51. English Heritage argued that it is not in the public interest to disclose information which would be likely to put Kenwood House at a commercial disadvantage in a highly crowded and competitive tourism market.

Balance of the public interest

52. Whilst the Commissioner considers that there is a public interest in English Heritage operating openly and transparently, he also considers that there is a very strong public interest in not disclosing information which could expose English Heritage to fraud, or information which would be likely to be used by its competitors which would put it at a commercial disadvantage. Furthermore the Commissioner considers that the information that has been disclosed to the complainant in this

case does go same way to meeting the public interest arguments in favour of disclosure.

53. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Regulation 12(5)(e)

54. English Heritage explained that it considers that the cost of the roofing and lead work and render and joinery repairs and external representation are exempt from disclosure under regulation 12(5)(e) EIR. It said that it considers this information is environmental because Kenwood House is a Grade I listed property and completion of the works to which the costs relate required listed building consent (LBC). It said that the listing process, which is intended to protect a building of architectural and/or historical interest, is an administrative measure under regulation 2(c) EIR. It said that this is therefore a measure that will affect the environment and therefore falls within the definition of regulation 2(c). The Commissioner is satisfied that this part of the withheld information is environmental and was therefore correctly dealt with under the EIRs.
55. Regulation 12(5)(e) of EIR allows a public authority to withhold information if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
56. Under regulation 12(9) this exception cannot be applied to information on emissions. Having examined the information the Commissioner is satisfied the information is not about emissions and therefore regulation 12(9) does not prohibit its use.
57. For regulation 12(5)(e) to apply the information has to satisfy a number of conditions.
- The information has to be of a commercial or industrial nature
 - The information has to be confidential, for example it may be protected by a common law duty of confidence
 - That confidentiality has to protect a legitimate economic interest.
 - Disclosing the information would have an adverse effect on that confidentiality.
58. However in respect to the final part of the test set out above the Commissioner considers that if the previous three conditions are met

then it is inevitable that this element will be satisfied too. This is simply because the disclosure of truly confidential information would inevitably harm its confidential nature by making the information public.

59. Even if all these conditions are met the information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure.
60. The information relates to the estimated cost of a private sector company contracted to complete two pieces of highly specialist repair and conservation work. The Commissioner is satisfied that this information is of both a commercial nature.
61. It is now necessary to consider whether the information is confidential. English Heritage regard the information as being protected by the common law of confidence. For information to be protected in this way it has to have been provided in circumstances that would give rise to an expectation of confidence. The information itself also has to have the necessary quality of confidence.
62. The estimates have been provided by a private sector company as part of a contract that was awarded to it to carry out specialist repair and conservation work. English Heritage has explained that the contractor in question is one of a very small number of companies which specialise in the heritage sector, particularly the restoration and repair of historic buildings and structures. As it operates in a small but competitive market it is reasonable to consider that disclosure of the professionally estimated cost of very specific specialist work to be confidential in nature and covered by the common law of confidence. The Commissioner considers that it is reasonable to conclude that when providing estimates for very specialist work, English Heritage would treat that sensitive information as confidential.
63. The information also has to have the necessary quality of confidence, ie it is neither generally known nor is it trivial. Having examined the information the Commissioner is satisfied that the information is not generally known. He is also satisfied that it is not trivial as it relates to highly specialist works.
64. In respect of whether that confidentiality is protecting a legitimate economic interest it is first important to look at whose legitimate interests are being protected. Clearly in this case it is the interests of the contractor. The next step is to ensure that the interests in question are both economic and legitimate ones. The Commissioner considers that the provision of a highly specialist service to repair and conserve parts of a Grade II listing building is a legitimate economic interest.

65. However the real test of this condition is whether the duty of confidence serves to protect that economic interest. In other words, if the contractor's economic interests would be adversely affected if that duty of confidence was not in place and the information was released.
66. It should be noted that the under the EIR the Commissioner has to consider whether disclosing the information '**would**' be harmful. This is a high test. The Commissioner has to be satisfied that it is more probable than not that the harm would arise.
67. Where the interests that would be harmed are those of someone other than the public authority, the public authority must usually consult with that third party. It is not usually sufficient for the public authority to speculate on why the information is sensitive. However in this case due to English Heritage's specialist experience in the type of specialist work being contracted in this case, the Commissioner considers it has sufficient prior knowledge of the contractor's views in this case.
68. In this case it has explained that due to the highly specialist nature of the work to which the redacted costs relate and the small competitive market in which the contractor operates, disclosure of these precise costs would be likely to damage the contractor's commercial interests. It said that although the contractor's name is not on the cost breakdown form which the specific costs of the highly specialist work has been redacted, the fact that they have been awarded the contract to complete the work is widely publicised on the hoardings outside Kenwood House and the contractor's website. It stated that the work can only be completed by a very limited pool of companies and disclosure of the costs of this specific piece of work would be used by the contractor's competitors to its commercial disadvantage.
69. In this case, due to the small number of companies that can undertake the specialist work, in relation to which the specific cost has been redacted, the contractor's competitors would use this information when in competition with the contractor for future work. The Commissioner does therefore consider that the exception is engaged in this case. He has therefore gone on to consider the public interest arguments.

Public interest in favour of disclosure

70. English Heritage said that there was a public interest in it being transparent and accountable for the money it spends.

Public interest in favour of maintaining the exception

71. English Heritage said that it is not in the public interest to disclose this level of detail about the cost of highly specialist work which would

adversely affect the affect the confidentiality of commercial information which is protected by law.

72. The Commissioner considers that the confidential commercial information was provided by the contractor to English Heritage and there is a strong public interest that this is not disclosed. However the Commissioner does consider that there is a public interest in English Heritage being open and accountable for the money it spends on particular projects. In this case the Commissioner has borne in mind that the remainder of the project breakdown and other information about the cost of the project has been disclosed, which goes some way to meeting the public interest in favour of disclosure. On balance the Commissioner considers that the public interest in favour of disclosure of the costs of the highly specialist work undertaken as part of the overall project, is outweighed by the public interest in favour of maintaining the exception.

Right of appeal

73. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

74. 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.
75. 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

Pamela Clements
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