

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

Date: 24 February 2015

Public Authority: Cornwall Council

Address: County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

The complainant has requested details of a proposed plan to place wind turbines on a number of sites within the county. The council applied Regulation 12(5)(e) to the information on the basis that the information is commercially confidential to it.

The Commissioner's decision is that the council has correctly applied Regulation 12(5)(e) to the information. He has however also decided that the council did not comply with Regulation 5(2) in that it did not respond to the complainant's request within 20 working days.

The Commissioner does not require the council to take any steps.

Request and response

1. On 14 August 2014, the complainant wrote to the council and requested information in the following terms:

"I attach a Freedom of Information request from myself and [name redacted] representing Cornwall Protect for the most complete available financial statement of the business case for the above Council turbine investment programme. As you will see, a suitable format if available is that used for the earlier 15M Solar Energy programme

spread over 25 years - Kernow Solar Park Update Renewables Appendix 2 (sent to me by [name redacted]) on 7 July 2014."

2. The council responded on 30 September 2014. It stated that the information was exempt under section 43 of the FOI Act (commercial interests).
3. Following an internal review the council wrote to the complainant on 11 November 2014. It stated that it had applied the incorrect information access regime to the request and after having reconsidered the information it considered that it was environmental information as defined in the EIR. It therefore applied Regulation 12(5)(e) of the EIR to the information (commercial confidentiality).

Scope of the case

4. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
5. The Commissioner considers that his complaint is that the council has withheld the information from disclosure in response to his request.

Reasons for decision

Regulation 12(5)(e)

6. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
7. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*. All four elements are required in order for the exception to be engaged:
 - a. The information is commercial or industrial in nature.
 - b. Confidentiality is provided by law.
 - c. The confidentiality is protecting a legitimate economic interest.
 - d. The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

8. The information is a proposal to develop wind turbines on land within the county with a view to providing electricity for sale. The Commissioner is therefore satisfied that the information is commercial or industrial in nature.

Is confidentiality provided by law?

9. The council confirmed to the Commissioner that the information was internally generated by the council. It was not provided to the council by a third party to whom the council would owe a duty of confidentiality.
 10. As opposed to the requirements of section 41 of the FOI Act, under the EIR there is no specific requirement for information to be provided to the authority by a third party in order for the exception to apply. This was found to be the case by the Upper Tribunal in *Chichester District Council v ICO GIA/1253/2011*. At para 20 of the decision the Upper Tribunal found the First-tier Tribunal was not correct to find that there could be no duty of confidentiality provided in law because the information had been internally generated by the council. It said that: "*it is well-established law that an employer can restrain unauthorised disclosure by an employee of commercially confidential information such as trade secrets, estimates, costings and prices whether or not the information has been internally generated*".
 11. Following this, the Commissioner considers that the exception can cover the information created by the public authority itself providing the grounds for common law confidentiality are present. For purely internal information, the question will be whether employees of the public authority would be under a duty to hold the information in confidence.
 12. Where questions of a duty of confidence under the common law the key issues to consider are whether the information has:
 - a. The necessary obligation of confidence
 - b. The necessary quality of confidence
 - c. Whether any detriment would be caused by the disclosure of the information.
- a) The obligation of confidence
13. The information is financial information on the costs, estimates and forecasted financial details of developing each of the proposed sites. The council has said that if planning permission were to be approved then the council may need to put the development out to tender following an

EU compliant procurement process in the external market. It said that if this information were to be disclosed then it would cause commercial prejudice to its ability to negotiate with developers.

14. The Commissioner is satisfied that due to the sensitivity of cost and pricing information the authority's employees would understand that they are under a duty to hold that information in confidence because of the potential damage that a disclosure of the information could cause to the commercial interests of the council.
15. The Commissioner is therefore satisfied that the information has the necessary obligation of confidence.

b) The necessary quality of confidence

16. The council has not shared the information with other parties, and has indicated that it is not otherwise known to the public. The Commissioner also recognises that the information is not trivial as it relates to a multi-million pound development plan which is still in the initial phases of development.
17. The Commissioner is satisfied that a disclosure of costings and prospective profits of a development prior to that development being secured would have a detrimental effect on the council being able to maximise its position when negotiating contracts and tenders. He is therefore satisfied that the information has the necessary quality of confidence.

c) Would any detriment be caused by a disclosure of the information?

18. The council argues that a disclosure of the information would damage its commercial position. It would release details of budgets, costs and the intended profits of the scheme which tendering companies could use to their advantage when submitting tenders. It argues that a disclosure of the information would give tendering companies a potential commercial advantage that would be a *"very real and substantive prejudice to the council's commercial interests"*.
19. The Commissioner considers that this is a strong argument. If tendering companies are aware that the council has a certain figure budgeted for particular areas of the contract it is likely that it would not bid significantly under that amount when tendering for the work, even where it was aware that it was able to do so and still make a profit. Although companies would need to balance the risk of overpricing the contract against remaining competitive against other developers there is a strong likelihood that if the council's budget is known prior to the tender or other negotiations beginning this would detrimentally affect the council's future bargaining position.

20. The timing of the request is central to this issue. In these initial stages the costs and budgets associated with the project define the council's willingness (or ability) to pay those amounts in order for the project to go ahead. Developers can use this information to formulate their tenders to maximise their own profits if successful with the tender.
21. Overall therefore the Commissioner accepts that a disclosure of the information would detrimentally affect the council's bargaining position and potentially raise the price of the development. Over the extended periods envisaged for the life of the contract this could ultimately be costly to the council and therefore the taxpayer.
22. Additionally the council argued that other wind turbine developers may be considering applications in the same areas and use the council's information to benefit this. The council argued that a disclosure of the information would reveal its intelligence to those developers, and that this could threaten the council's own applications. The council did not provide any evidence that other developers were considering such developments in the area however and without this the argument does become more speculative rather than specific for the purposes of considering the exception. Nevertheless there is the risk that the information could highlight to other developers the likely profitability of placing wind turbines in the area, as well as highlighting areas where planning applications may be approved. There is therefore an additional risk to the disclosure which cannot be completely overlooked.
23. The Commissioner is satisfied that a disclosure of the information would be a detriment to the council's commercial interests. He is therefore satisfied that the information is subject to a duty of confidence.

Does the confidentiality protect a legitimate economic interest?

24. The legitimate economic interest which would be affected by the loss of the confidentiality of the information would be the council's. It has a legitimate economic interest in developing the site at the best possible terms as this saves money for the council and hence the taxpayer. The Commissioner considers that this is a legitimate economic interest and accepts that confidentiality is in place for this purpose.

Would that confidentiality be adversely affected by the disclosure?

25. The Commissioner is satisfied that a disclosure of the information would damage the commercial edge of the council in seeking to develop the site. A loss of the confidentiality would leave the council in a disadvantaged position in a future tendering exercise or in future bargaining and negotiations with developers. The Commissioner is therefore satisfied that Regulation 12(5)(e) applies to the information.

The public interest

26. Regulation 12(1) requires the authority to carry out a public interest test to ascertain whether the information should be disclosed in spite of the exception being engaged. The test is whether the public interest in the exception being maintained outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exception being engaged.
27. Regulation 12(2) also provides a specific presumption in favour of the information being disclosed.

The public interest in the information being disclosed

28. The council identified the following public interest arguments in favour of the information being disclosed:
- It will increase access to information held by the authority
 - It could make reasons for the authority's decision more evident.
 - It could enhance the scrutiny of the authority
 - It could contribute to public debate on the issue
 - It would increase public participation in decision making/council processes
 - It would increase accountability for the spending of public money.
29. The complainant has suggested that one of his main reasons for requesting the information is the lack of transparency over the financial repercussions of the project if it goes ahead. He argues that the tax payer will be tied to a long term contract of approximately 25 years, potentially with costs loaded towards the end of that term. He highlighted that in a previous case with this council this was exactly what had taken place. Effectively his argument is that in entering into such an agreement the council could be affecting the long term finances of the council for short term gains in the present. He also argues that in the previous project his analysis was that it would potentially never make a profit for the council due to failures to take all matters into account when considering the financial aspects of the deal.
30. The Commissioner recognises that the intention of the council to situate wind turbines in several different places along with the associated equipment is likely to cause damage to the environment. The placement of large wing turbines is likely to be both detrimental to the overall vista of the landscape as well as potentially causing noise disturbance (see for instance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69222/pb-13584-windfarm-noise-statutory-nuisance.pdf).

31. It is a stated intention of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (the Aarhus convention) that the public is allowed greater participation in decisions which are likely to have an effect upon the environment in larger developments. A stated aim of the convention is:

"Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,"

32. Whilst in this case the proposals are not large scale developments on each site, the number of sites under consideration and the overall costs for such developments to taxpayers leads to larger development considerations overall.
33. There is therefore an argument that the council should be transparent on the benefits of the proposal in order in order that he public can weigh this against the damage which would be caused to the environment from the developments. It is only in this way that the public can take an informed view of the intentions of the council and make its own mind up as to the full merits or otherwise of the proposals.
34. A disclosure of the information would also increase public trust in the council's decision making and demonstrate to the public the reasons why the council is seeking to develop the sites.
35. A disclosure would also inform the public of the likely costs of the project to taxpayers over the years of the contract. This would allow greater public participation in that it has greater information with which to question the council over the stated aims, costs and forecasted benefits of the project

The public interest in the exception being maintained

36. The council argues that a disclosure of the information could act as a disincentive to offer competitive prices, this lack of genuine competition could lead to the misspending of public funds or at the very least the council not getting value for money for the services it requires. Such consequences are not in the public interest and ultimately are detrimental to tax payers. There is a stronger public interest in ensuring the council can seek competitive prices when undertaking procurement processes. If less competitive prices or less favourable terms are

available, this will impact negatively on the expenditure of already strained public funds.

b. Likelihood of damage

37. The council argued that should planning consent be granted then the development would follow the European procurement process. A disclosure of the information could affect tenders as costs set aside for the development would be identified by potential tendering companies and they would take these into account in order to maximise their profit when formulating their tender.
38. As mentioned, the council has also argued that if the plans were to be disclosed at this stage there is the potential for other developers to jump ahead of the council and seek to use its intelligence to formulate competing plans in the areas concerned.
39. Although it did not specifically provide this argument, the Commissioner notes that as regards public participation, individuals have the right to place objections within the planning process and to request that the Planning Inspectorate considers the application in certain circumstances. Individuals also have the right to question and lobby their local councillor and make their views known to them. To this extent individuals already have a means to participate in the planning and decision making process over this project.

Conclusions

40. The Commissioner has considered the above arguments. There is a strong onus on the council to be as transparent as possible with the public over the development plans. They will cost the public on an ongoing basis over a long period of time. The introduction of the masts will cause damage to the environment, and affect the look of the landscape throughout that period of time.
41. There is also a strong public interest in the information being disclosed in order to allow the public to judge the intended benefits of the proposal and to weigh these against the cost to the public and the damage to the environment. From here they can make their arguments to the council either supporting the proposal from an informed position.
42. Nevertheless there is also a strong public interest in allowing the council to develop its plans with the financial budgets it has set aside kept from public view until the tendering exercise has been completed in order that this information is not used against the council, ultimately costing the council (and the tax payer) more than it would otherwise pay.

43. The Commissioner recognises that tendering companies will still need to submit competitive tenders in order to have a chance of being successful with their tender. Nevertheless there is a risk of the overall value of the tenders being raised as a result of a disclosure, and the costs of this would potentially be significant when extended over the 25 years of the contract.
44. Insofar as the public is concerned the major issue is that planning consent, and the decision to go ahead with the development will be passed before the public have full knowledge of the costs and benefits of the plan. It is difficult for the public to reach a balanced judgement without that information, and this in itself prevents knowledgeable public participation in the decision making process. Although the public will have rights to place objections to the planning application without knowledge of the likely costs they are not able to question the overall project, just the siting of the planned masts.
45. Whilst recognising this, the Commissioner also accepts that a disclosure of budgeting costs and the core financial details of the scheme are likely to be damaging to the councils future negotiations if it were to be disclosed at this time.
46. There are wider questions as to whether there is a need for the project (which relates to issues such as the council's financial position overall, and regarding any political obligations regarding renewable energy). There are also questions about whether the areas identified for turbines are actually suitable for them. These questions would not be furthered by a disclosure of this information particularly. Planning laws will address the suitability of the sites, and discussions surrounding the financial or political need for the sites are political questions which the electorate need to address with their local councillors.
47. As regards the question of the costs to the council for going ahead with the project this would be prejudiced by a disclosure of the information at this time. Ultimately, providing proof that the financial proposals are appropriate before submitting the development for tender would be likely to lead to the same project costing taxpayers more.
48. The Commissioner therefore considers that the balance of the public interest rests in maintaining the exception in this instance.

Procedural Issues

49. Regulation 5(2) provides that:

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

50. The complainant requested the information on 14 August 2014. The council provided its initial response on 30 September 2014. This falls outside of the period of 20 working days required by Regulation 5(2).
51. The Commissioner has therefore decided that the council breached Regulation 5(2) in this instance.

Right of appeal

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

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.

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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF