

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 March 2016

Public Authority: Liverpool City Council

Address: Liverpool Town Hall
Dale Street
Liverpool
L2 2DH

Decision (including any steps ordered)

1. The complainant has requested information about a draft report relating to bus lanes. Liverpool City Council confirmed that some of the information was not held and withheld other information under the exceptions for adverse affect to the confidentiality of commercial information (regulation 12(5)(e)) and adverse affect to the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that Liverpool City Council:
 - Correctly confirmed that it does not hold the information in part 2 of the request and complied with regulation 5(1) and,
 - failed to demonstrate that the exceptions in regulation 12(5)(e) and regulation 12(5)(f) are engaged by the information specified in part 1 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the report requested in part 1 of the request.
4. The public authority 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 the Act and may be dealt with as a contempt of court.

Request and Response

5. On 10 July 2015, the complainant wrote to Liverpool City Council (the "council") and requested information in the following terms:

"1. Please provide a suitably redacted copy of the draft report by Mott McDonald dated 5th September 2014 as referred to at page 5 here:

<http://councillors.liverpool.gov.uk/documents/s140386/Appendix%203%20-%20Mott%20McDonald%20Bus%20Lane%20Review%20Documents.pdf>

%20Mott%20McDonald%20Bus%20Lane%20Review%20Documents.pdf

2. Please provide suitably redacted copies of all correspondence between Liverpool City Council and Mott MacDonald for the period 1st July 2014 to 31st December 2014."

6. The council responded on 13 August 2015. It stated that the information in part 2 of the request was not held and refused to provide the information in part 1, citing the exceptions for adverse affect to the confidentiality of commercial information (regulation 12(5)(e)) and adverse affect to the interests of the information provider (regulation 12(5)(f)).
7. Following an internal review the council wrote to the complainant on 30 September 2015. It stated that it was maintaining its position.

Scope of the case

8. On 19 October 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied exceptions to withhold the information in part 1 of the request and correctly confirmed that the information in part 2 was not held.

Reasons for decision

Regulation 5 – duty to provide environmental information

10. Under regulation 5(1) a public authority that holds environmental information has a duty to provide it on request.
11. In this case the council stated that it did not hold any information falling within the scope of part 2 of the request. The complainant disputes this.

12. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. To assist with this determination the Commissioner approached the council with a number of standard questions which he routinely asks in such scenarios. The questions and answers are set out below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

15. The council explained that, as the complainant asked for copies of all correspondence, the relevant manager was conducted searches of both electronic and manual departmental files. The council confirmed that the relevant department in this case, Highways and Transportation, has responsibility for all matters relating to the terms of the request.
16. The council also directed the Commissioner to a previous request for the same information (submitted in October 2014) which prompted an identical response, namely that the information was not held. The council confirmed that, in handling this new request, it had double-checked that this remained the case.

In the case of electronic data, what search terms were used?

17. The council stated that the terms "Mott McDonald" "bus lanes report" and "bus lanes suspension" were used.

If information were held would it be held as manual or electronic records?

18. The council confirmed that it would be held in both media.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted / destroyed and if yes, when was it deleted / destroyed?

19. The council confirmed that its email retention policy dictates that emails are only held for a maximum of 90 days. It stated that any relevant emails which may have been held would be in excess of 18 months old.

It explained that all emails over 90 days old are automatically deleted and cannot be retrieved from corporate ICT systems.

20. The council directed the Commissioner to the following wording from its intranet guidance for staff:

"On every email which is stored in your mailbox there is a 90 day deletion rule applied. After 90 days, the email which was sent or received will be automatically deleted from your mailbox with no warning.

At the bottom of each email, there is a message which states 'Retention Policy' followed by an expiry date. The expiry date is the date on which the email will be removed from your mailbox.

Once emails have been deleted through this automatic policy, Connect2ICT are not able to retrieve them."

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

21. The council confirmed that copies are not hold in other locations and that this was established via the departmental searches made.

Is there is a business or statutory requirement for retaining the requested information?

22. The council confirmed that there was neither a business nor a statutory purpose for retaining the information.

Conclusions

23. The Commissioner notes that the complainant considers it implausible that the council would hold no correspondence associated with a matter of such significance. The Commissioner accepts that it would be reasonable to expect there to be some associated correspondence, perhaps even a covering email for the withheld information.
24. However, in such cases the Commissioner must consider all the available evidence, including explanations of the searches conducted by authorities and associated retention conventions. In this case, having analysed the council's response to his enquiries, the Commissioner is satisfied that, on the balance of probabilities, it is likely that the requested correspondence is not held by the council.
25. In concluding that it correctly confirmed that the information is not held, the Commissioner finds that the council has complied with regulation 5(1) of the EIR.

Regulation 12(5)(e) – commercial confidentiality

26. The council withheld the information specified in part 1 of the request, namely a report produced by Mott MacDonald relating to the suspension of bus lanes.
27. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
28. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

29. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
30. The council has stated that the withheld information contains details of potential amendments to bust routes and their anticipated affect upon the current revenue streams of private bus operators.
31. Having considered the council's position and referred to the withheld information the Commissioner is satisfied that it relates to a commercial activity, namely the provision of a bus service.

Is the information subject to confidentiality provided by law?

32. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

33. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
34. The council has confirmed that the information is subject to a confidentiality agreement which prohibits the information being shared with parties other than the council or Mott MacDonald.
35. The Commissioner considers that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, the Commissioner is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

36. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
37. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
38. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

39. In this instance the council has stated:

"The confidentiality is required to protect a commercial interest as the relevant stakeholders are all profit making organisations. As a consequence any disclosure of the report would reveal commercial information to their competitors and place them in a position whereby the confidentiality initially agreed had been compromised by the City Council."

40. The Commissioner notes that the council's arguments in respect of the adverse effects of disclosure are extremely brief, high level and largely identify principles which the council considers to be self-evident. The

Commissioner considers that, in order for the exception to be engaged it is not enough to rely on general principles – it is necessary for specific adverse effects to be identified and a causal link to be established between the harm and the disclosure of specific information. It does not necessarily follow that, by virtue of information being commercial in nature, its disclosure would result in adverse effects. As set out above, the burden is on authorities to demonstrate that some harm to the interests in question would be caused.

41. The Commissioner considers that, in this case, the council has done no more than identify generic effects, that it has failed to make these effects sufficiently concrete and failed to identify the causal link with the withheld information. He acknowledges that there might well be a case to be made for withholding the information under regulation 12(5)(e) but he does not consider that the council has made it in this instance.
42. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that he has a duty to generate arguments on its behalf
43. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Regulation 12(5)(f) – adverse affect to information provider

44. The council has also withheld the information in part 1 of the request under regulation 12(5)(f).
45. Regulation 12(5)(f) states:

“...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

the interests of the person who provided the information where that person-

(i) was not under, and could not have been under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances that that or any other public authority is entitled apart from under these Regulations to disclose it; and

(iii) has not consented to its disclosure”

46. In the Commissioner's view the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

Was the information supplied on a voluntary basis?

47. The council explained that the report was commissioned by the council following an agreement being reached with third party private sector bus operators. The agreement takes the form of a 'Data Sharing Agreement For The Bus Lane Suspension Trial' (the "Agreement") which the Commissioner has had sight of and which sets out the 'rights and obligations' of relevant parties in respect of the sharing of associated information. The council confirmed that Mott McDonald was under a contractual obligation to provide it and the participating bus operators with the report, subject to the terms of the Agreement.
48. The council provided further submissions setting out its consultation with bus operators and their objections to the disclosure of the information; however, these are not relevant to this aspect of the exception so the Commissioner has not considered them further.
49. The exception is quite clear that information falling within its scope must have been provided to a public authority on a voluntary basis. In this instance, the council has confirmed that the organisation commissioned to produce the report, Mott McDonald, was contractually obliged to provide it with the information. It is unclear, therefore, on what basis the council considers that the information satisfies this element of the exception.
50. The Commissioner also notes that, whilst not the bodies which directly provided the information to the council, and, therefore, not strictly relevant for the purposes of the exception, the bus operators who contributed information to the report were also obliged under the terms of the Agreement to provide such information.
51. Having considered the relevant facts the Commissioner has concluded that the council has failed to demonstrate that the withheld information was provided on a voluntary basis. As this pivotal element of the exception has not been satisfied, it follows that the exception is not engaged.

52. As the Commissioner has found that the exception is not engaged in this case he has not gone on to consider the public interest arguments.

Right of appeal

53. 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

54. 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.
55. 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
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