

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

Date: 7 November 2016

Public Authority: Salford City Council

Address: Salford Civic Centre
Chorley Road
Swinton
Salford
M27 5AW

Decision (including any steps ordered)

1. The complainant requested information relating to the sale or disposal of land at John William Street, Eccles, Manchester. Salford City Council ('the Council') disclosed some information and withheld other information in reliance of the exceptions at regulations 12(4)(e), 12(5)(e), 12(5)(f), 12(5)(b) and 13(2).
2. The Commissioner's decision is that the Council has appropriately applied regulations 12(5)(b), 12(5)(e) and 13(2) to the information it is withholding.
3. The Commissioner finds the Council to be in breach of regulation 5(2) of the EIR by failing to provide the requested information within 20 working days, and regulation 14(2) by failing to issue a refusal notice within 20 working days.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 14 September 2015, the complainant wrote to the Council and requested information in the following terms:

"All information held by the Council that relates to the proposed sale or disposal of land at John William Street in Eccles, including all Council papers and communications with stakeholders, Council Officers, Community Groups and all other interested parties."

6. The Council responded on 3 December 2015. It provided some information and stated that some information was withheld in reliance of regulations 12(4)(e) [internal communications], 12(5)(e) [commercial confidentiality] and 12(5)(f) [adverse effect on the interests of the provider of the information] of the EIR.
7. Following an internal review the Council wrote to the complainant on 19 February 2016. It stated that information initially withheld under regulation 12(4)(e) would be disclosed with a small amount of information withheld in reliance of regulation 12(5)(b) on the basis that it is legal advice and subject to legal professional privilege. In addition to relying on regulation 12(5)(e) and 12(5)(f) the Council relied on regulation 13(2) to redact personal information from the disclosed information.

Scope of the case

8. The complainant contacted the Commissioner on 7 March 2016 to complain about the way his request for information had been handled. He expressed his concerns about the nature of the withheld information, the Council's initial reluctance to provide information in response to his request and the length of time taken to provide an internal review.
9. The Commissioner considers the scope of her investigation is the consideration of the Council's application of the exceptions at regulation 12(5)(b), 12(5)(e), 12(5)(f) and 13(2).

Reasons for decision

Regulation 13(2)

10. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.
11. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1998 (the 'DPA').
12. Information is exempt from disclosure on the basis of regulation

13(1) if it is personal data of which the applicant is not the data subject and either the first or second condition at regulation 13(2) is satisfied.

13. 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 these Regulations would contravene—

(i) any of the data protection principles;

14. In this case the Council has relied on the first data protection principle. The first data protection principle states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

15. The Commissioner has examined the withheld information, comprising correspondence and emails and notes that the redactions cover names, addresses and contact details for several individuals which would clearly constitute personal data within the meaning of the DPA.

16. The Commissioner has determined that the Council's redactions relate to staff who do not hold senior roles at the Council. It is therefore correct to withhold the names and contact details of these employees in the various documents where redactions under regulation 13(2) have been made. The Commissioner considers that the disclosure of this personal information would be unfair as the individuals are junior members of staff without responsibility for decision making in the issues covered by the correspondence and as such would have no reasonable expectation that their names and contact details would be put into the public domain by the Council.

Regulation 12(5)(b)

17. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

18. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, "a set of rules

or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and lawyer.”

19. There are two types of privilege – legal advice privilege and litigation privilege. The council has confirmed that it considers that the withheld information attracts legal advice privilege. The information comprises legal advice provided by the Council’s Principal Solicitor for the City Mayor’s consideration.
20. Having viewed the withheld information the Commissioner is satisfied that it constitutes a communication between a lawyer and a client, in this case, the City Mayor, and that the substance of the advice has not been made public or lost the quality of confidentiality.
21. The Commissioner notes that information deemed to be covered by LPP falls within regulation 12(5)(b). She considered the very limited information withheld by the Council in this regard and has concluded that the specific four lines of information are covered by LPP.

The public interest

22. The Council provided a detailed submission on the application of this exception including a full consideration of the public interest test. The Council acknowledged the importance of transparency and accountability in favour of disclosing the information. However, the Council considered that disclosure of information which has attracted LPP would have an adverse effect of undermining the important common law principle of privilege. The Commissioner is cognisant of her own guidance noting that the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in communications between client and lawyer. In particular the Upper Tribunal¹(UT) has stated that it is relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on one particular case.
23. In this case the information is recent and concerns a live issue. The Commissioner notes that the information does not provide evidence of any lack of transparency in the Council’s actions nor any misrepresentation of the advice provided.

¹ DCLG v Information Commissioner & WR [2012] UKUT 103 (AAC) (28 March 2012),

24. Consequently the Commissioner finds that the Council has appropriately withheld the information in reliance of regulation 12(5)(b). Notwithstanding her decision here the Commissioner would seek to reassure the complainant that disclosure of this information would not significantly inform the public debate on this matter.

Regulation 12(5)(e)

25. Regulation 12(5)(e) states 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.
26. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

27. 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.
28. The council confirmed that the information relates to the proposed sale and development of land. In its submission to the Commissioner the Council explained that the withheld information comprised draft Heads of Terms, initial plans and financial data.
29. 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 sale and development of Council owned land in the specified location.

Is the information subject to confidentiality provided by law?

30. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or

statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.

31. The Council explained to the Commissioner that it considered the information to have the necessary quality of confidence in that it is not trivial and not in the public domain. The Council further explained that in the context of the on-going negotiations between the Council and developers and the nature of the information itself, the withheld information was shared in circumstances creating an obligation of confidence.
32. The Commissioner has not been provided with any evidence that an explicit contractual clause relating to confidentiality existed between the council and third parties. She is, however, satisfied that due to the nature of the withheld information, it is covered by a common law duty of confidence. It is not trivial in nature, has the necessary quality of confidence and was provided in circumstances where it was expected that the contents would be treated as private and confidential. She also notes that the Council has disclosed a significant amount of information by making redactions under this exception rather than withholding entire documents.

Is the confidentiality provided required to protect a legitimate economic interest and would that confidentiality be adversely affected by disclosure?

33. 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. 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.
34. The Council reiterated its response to the complainant, to the Commissioner by listing the economic interests requiring confidentiality:

"The confidentiality referred to above is protecting a legitimate economic interest, the developer's interest in purchasing and developing the land, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations and avoiding disclosures which would otherwise result in a loss of revenue or income."
35. The Commissioner's guidance notes that legitimate economic interests could relate to retaining or improving market position, ensuring that

competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

36. In this case the Council explained its serious concerns that disclosure would prejudice the on-going negotiations at the time of the request. The Council confirmed to the Commissioner that the decision recommending disposal of the site to the preferred bidder was published on 8 September 2016,. However, in October 2016 there was still no settled position as the sale was not concluded. In focussing on the adverse effect on the confidentiality of the commercial information the Council explained its opinion that the adverse effect would prejudice the fruition of the envisaged re-development and/or the cost of the project. This would result in a detrimental impact on the economic interests of the developer and the Council.
37. The Council explained that, prior to a public consultation, there is an expectation that the information regarding any bids will remain confidential. At the time of the request proposals to enable more consideration of the development issues surrounding the site were still in progress. Disclosure of the withheld information would alter the dynamic of the negotiations. The Council considers that disclosure of the information could result in the collapse of negotiations which in turn would result in the loss of a very significant capital receipt. The loss of investment in the specific location would negatively impact on the associated regeneration benefits.
38. The Commissioner accepts that the undermining of a relationship of trust will have significant weight when it relates to how that particular relationship of trust serves the public interest. In this case the Commissioner accepts that disclosure of the information could destabilise the Council's negotiations which in turn would risk the loss of the regeneration benefits, land receipts and revenue the council would receive as a result of the building and subsequent occupation of residential and commercial units.
39. The Commissioner notes that the Council has stated that when contracts are exchanged/signed a public consultation event will be held regarding the successful bidder's plans and proposals for the site and the public will be invited to comment on these. This will then be followed by the formal planning application process which will provide a further opportunity for public comment ensuring transparency and public participation.

The public interest

40. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn enables trust in public authorities.
41. The complainant expressed his concern that that the Council had delayed the release of information beyond the time when public concerns may be raised. The Commissioner has no evidence to indicate that the Council had an ulterior motive in deliberately delaying its initial response and internal review. However, she will consider these delays later in this notice.
42. The Council's public interest arguments in favour of disclosing the withheld information focussed on the desirability of transparency in informing the public about the Council's actions. Specifically in this case, to inform the public about proposals to sell Council owned land assets and the revenue generated from such a sale.
43. This public interest is particularly relevant when the sale will result in a change of land use. The land specified in the request for information is currently a car park and members of the public who use the facility will have an interest in the impact of this change on parking arrangements in the area.
44. There is also a weighty public interest in local residents being aware of any residential development and the impact on the local housing market, including the appearance of the local area.
45. In favour of maintaining the exception, the Council considers that there is substantial public interest in it being able to successfully complete commercial negotiations. The Council asserts that withholding the requested information is particularly important at a point in time when the information relates to a live development project which is not subject to a settled contract. Disclosure would significantly weaken the Council's negotiating position in today's competitive commercial environment.
46. The Council further explained that to disclose information and jeopardise transactions which offer significant revenue, regeneration benefits including housing and amenities which would benefit the public, is not in the public interest.

47. The Council also relies on the public consultation, detailed in paragraph 35, to demonstrate that the proposals will be subject to scrutiny through a transparent process which actively engages the public.

The Commissioner's decision

48. When weighing the need for transparency and accountability against the requirement for the Council to secure the most advantageous outcome for this development, the Commissioner has decided that greater weight must be given to those factors which favour maintenance of the exception.
49. The Commissioner acknowledges the timing of the complainant's request. The request was submitted at a point when the development was, and is yet, to be formalised by way of a settled contract. Therefore, the Commissioner's decision is that the Council is entitled to rely on regulation 12(5)(e) to withhold the requested information. She finds that the public interest favours maintaining the exception and that the withheld information should therefore not be disclosed.
50. In view of the Commissioner's conclusion above, it is not necessary for her to consider the Council's additional reliance on Regulation 12(5)(f).

Regulation 5(2) - Duty to make environmental information available on request, regulation 14(2) – Refusal to disclose information, regulation 11 – Representations and reconsideration

51. Regulation 5(2) of the EIR states that information should be made available:

"as soon as possible and no later than 20 working days after the date of receipt of the request".

In this case the request was not answered until 59 working days after receipt. The Council therefore breached regulation 5(2) in this regard.

52. The Commissioner also notes that the internal review was provided after 50 working days, outside of the 40 working days stipulated in regulation 11.
53. The complainant explained to the Commissioner that he had not been provided with information he expected to receive relating to matters mentioned in the disclosed information. He specifically noted that there was no information on the 'Marketing Exercise' and there appeared to be 'missing' email responses from Councillors in respect of the provision of car parking.

54. The Council explained to the Commissioner that the marketing exercise documentation was primarily the advertisement material for the sale of the land, which was provided. However, it had located relevant emails in relation to the exercise and the re-provision of car parking during the Commissioner's investigation. This information was subsequently disclosed to the complainant. It is of concern to the Commissioner that the Council located further documents in scope of the request during her investigation rather than in its initial response.

55. In accordance with regulation 14(2) any public authority wishing to withhold information in response to a request, is required to provide the requester with a refusal notice stating that fact within 20 working days after the date of the request. The Council failed to do so in this case resulting in a breach of regulation 14(2) of the EIR.

Right of appeal

56. 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

57. 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.
58. 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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