

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 11 October 2016

**Public Authority:** Homes and Communities Agency

**Address:** Fry Building  
2 Marsham Street  
London  
SW1P 4DF

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a lease agreement between the Homes & Communities Agency, Victoria Quay Estate Limited and Westcourt Real Estate (Europe) Limited and Camper & Nicholsons Marinas Limited. The Homes & Communities Agency provided some of the requested information and withheld other information under the exception for the confidentiality of commercial information, regulation 12(5)(e).
2. The Commissioner's decision is that the Homes & Communities Agency has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information to the complainant.
  - 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

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4. On 18 January 2016, the complainant wrote to the Homes & Communities Agency (HCA) and requested information in the following terms:

*"A copy of the lease agreement between HCA, Victoria Quay Estate Limited and Westcourt Real Estate (Europe) Limited and Camper & Nicholsons Marinas Limited."*

5. HCA responded on 18 January 2016. It disclosed some of the requested information and withheld other information under the exception for the confidentiality of commercial information – regulation 12(5)(e) of the EIR.
6. Following an internal review HCA wrote to the complainant on 4 March 2016. It disclosed some additional information but maintained its reliance on regulation 12(5)(e) to withhold other information.

## Scope of the case

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7. On 29 March 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation HCA disclosed additional information to the complainant but, in respect of the outstanding information, maintained its reliance on regulation 12(5)(e).
9. The Commissioner confirmed with the complainant that her investigation would consider whether HCA correctly applied regulation 12(5)(e) to the withheld information.

## Reasons for decision

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10. HCA has redacted parts of the requested lease agreement (the "Agreement"), withholding the information under regulation 12(5)(e).
11. 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".

12. 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?*

13. 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.

14. The information relates to the leasing of land by HCA to a developer and, therefore, relates to a commercial activity. The Commissioner is satisfied that this condition of the exception has been met.

*Is the information subject to confidentiality provided by law?*

15. 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.

16. HCA has stated that the confidentiality of the information is governed by the contractual arrangement between itself and the developer, under the Agreement. HCA has argued that, whilst there is no confidentiality clause in the Agreement, "...case law clearly says that duties of confidentiality can arise without any express agreement and that information obtained in circumstances that indicate an obligation of confidentiality should be handled as such."

17. HCA has suggested that, in this instance, the information used in order to create the Agreement attracts the duty of confidence as unauthorised disclosure "...could cause commercial harm and therefore confidentiality is implied."

18. Whilst the Commissioner considers that HCA's assertion that disclosure of the information could cause harm begs the question to be addressed below, she acknowledges the general point that the information is not trivial and relates to a significant commercial endeavour.
19. The Commissioner has not been provided with evidence that the information has been disclosed into the public domain and, having considered the nature of the information and HCA's submissions, in the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this condition of the exception is met.

*Is the confidentiality provided to protect a legitimate economic interest?*

20. 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.
21. 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.
22. 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".*
23. In this case HCA has argued that disclosure of the information would adversely affect the legitimate economic interest of the developer, Westcourt Real Estate (Europe) Limited (Westcourt). HCA has further argued that this, in turn, would result in adverse effects to its own legitimate economic interests.

24. HCA confirmed that, in keeping with the recommendations of the code of practice issued under regulation 16 of the EIR<sup>1</sup>, it consulted with Westcourt as a party potentially affected by disclosure of the information. HCA confirmed that it considered Westcourt's concerns alongside its own when formulating the grounds for applying the exception.
25. HCA has argued that, should the information be disclosed, harm would be caused to Westcourt's business as it would enable its competitors to exploit its financial position and utilise the information to their own commercial advantage. HCA further argued that Westcourt's ability to deliver the scheme proposed in the Agreement would be prejudiced due to the conditional nature of the Agreement and on-going negotiations with third parties and contractors.
26. In relation to HCAs legitimate economic interests it has submitted that disclosure *"would be likely to affect the HCA's ability to operate in a competitive market as it would disclose our position with regards to the negotiation process and the agreements we accept and reveal our commercial strategy to the world at large."*
27. HCA has also argued that disclosure would "jeopardise the value for money evaluations which helped to form the Agreement" and would cause harm to the way in which it could work with third parties in similar agreements as *"...contractors may seek that all clauses and agreements in future should follow the same model which is not possible without increasing the burden on the public purse."*
28. The Commissioner appreciates the general principle that prior to an agreement being reached, information relating to proposed pricings and other variables can be commercially sensitive. He understands that the publication of such information when a process is live can, for example, limit the range of options available in a negotiating position by "revealing the hand" of the parties involved. However, he is mindful that this is a generic principle and, in order to meet the evidential and explanatory threshold of this exception, specific harm needs to be identified and linked to specific information, the disclosure of which would generate such harm. The Commissioner is not convinced that

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)

HCA has met this threshold in its submitted arguments. In relation to the suggested adverse effects to Westcourt's legitimate economic interests, no explicit reference to specific sections of the withheld information or a link made between the disclosure of specific sections and resulting adverse effects is made.

29. In relation to the alleged adverse effects to HCA's own legitimate economic interests, no explanation has been provided of why disclosure of any of the withheld information or specific elements of the information would "...jeopardise the value for money evaluations that helped to form the Agreement" or what form this jeopardy would take. In relation to the argument that disclosure would result in third parties demanding that the same agreement terms be transposed to other, future agreements, the Commissioner considers this to be highly speculative. Rather than being an argument for the withholding of the specific information at the time the request was made, the Commissioner considers that, if one was to follow this logic to its ultimate conclusion, no agreements at any time would be placed in the public domain to avert such possible effects. The Commissioner considers that the likelihood of a third party being able to make such demands during the formulation of an agreement to be remote and she is not satisfied that HCA has made a case to the contrary.
30. In cases where a public authority has not provided arguments sufficient to demonstrate the engagement of an exception the Commissioner does not consider it her role to generate arguments on its behalf.
31. Having considered all the arguments provided by HCA the Commissioner has concluded that it has not been shown that disclosure of the withheld information would result in harm to the developer's or HCA's legitimate economic interests. She considers that a case might have been made for withholding the information but the nature of the arguments submitted by HCA do not make this case. As she has found that the confidentiality in this case does not protect a legitimate economic interest it follows that the confidentiality in this case would not be affected by disclosure.
32. As she has found that the exception is not engaged in this instance, the Commissioner has not gone on to consider the public interest test.

## Right of appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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**