

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

Date: 14 September 2016

Public Authority: Exeter City Council

Address: Civic Centre
Paris Street
Exeter
EX1 1JN

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed new leisure complex in Exeter. Exeter City Council disclosed some information and withheld other information under the exception for prejudice to commercial interests – section 43(2) of the FOIA. During the Commissioner's investigation the council revised its position, handling the request under the EIR and withholding the information under the exception for the confidentiality of commercial information - regulation 12(5)(e).
2. The Commissioner's decision is that the public authority breached regulation 5(1) and regulation 14(1) of the EIR and 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 information in parts (a) and (c) 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 8 November 2015, the complainant wrote to Exeter City Council (the "council") and requested information in the following terms:

"Please treat this further email from me as a request under Freedom of Information legislation to provide me with the business case for the leisure complex as shown to councillors. I am particularly (but not exclusively) interested in seeing:

(a) a breakdown of the expenditure elements which make up the quoted £26m estimated cost of the project;

(b) the phasing of this expenditure over the development period;

(c) the estimates of revenue income to the Council expected from the development once complete and operational;

(d) the estimated cost of borrowing by the Council to supplement the capital available from NHB and CIL;

(e) the assumptions made underlying the calculations at (a) – (d) above; and

(f) the risk assessment that has been carried out of the projected capital finance (NHB, CIL, etc) actually being provided within the timescale for the development."

6. The council responded on 9 December 2015. It stated that it was withholding the requested information under the exemption for information intended for future publication (section 22 of the FOIA).
7. Following an internal review the council wrote to the complainant on 4 February 2016. It provided the complainant with an "information sheet" containing "details of the business case for the proposed new leisure complex" and you withheld other information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.

Scope of the case

8. On 18 February 2016 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 withheld information. During the course of the Commissioner's investigation the council

reconsidered the request under the EIR and withheld the information under regulation 12(5)(e). The Commissioner has considered whether the council has correctly withheld information under this exception.

Reasons for decision

Is it Environmental Information?

10. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
11. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
12. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
13. In this case the focus of the withheld information is the potential building of a leisure complex. The information, therefore, relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.

14. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
15. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR
17. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
18. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

19. The council withheld the information specified in parts a and c of the request, namely *'a breakdown of the expenditure elements which make up the quoted £26m estimated cost of the project' and 'the estimates of revenue income to the Council expected from the development once complete and operational'*.
20. 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".

21. 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?

22. 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.

23. The council confirmed that the information relates to the provision of a supplier for the construction of a new leisure centre.

24. 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 engagement of suppliers for the construction of a new leisure centre.

Is the information subject to confidentiality provided by law?

25. 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.

26. It has clarified that the information was prepared by the council in order to carry out a procurement process and is the result of significant expenditure and expert advice as part of the due diligence phase of the procurement process. The council has explained that the information is unique and particular to the proposed leisure complex finances from its own perspective, including detailed information about costs and projected income of the project.

27. The council has confirmed that the information is not trivial and is not in the public domain. It has also confirmed that the information has been

treated confidentially within the council, being shared with a limited number of officers who are working on the project.

28. Having considered the nature of the information and the council's submissions, in the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this stage of the test is met.

Is the confidentiality provided to protect a legitimate economic interest?

29. 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.
30. 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.
31. 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".

32. In this case the council has argued that disclosure would adversely affect its own legitimate economic interests.
33. The council has stated that disclosure of the information prior to the tender process and the receipt of bids would result in a defective procurement process. The council directed the Commissioner to regulation 18 of The Public Contracts Regulations 2015 ('PCR 2015') which requires that:

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."
34. The council has argued that releasing the information into the public domain would result in a distortion of the bidding process, explaining that, in the event that only some of the bidders/operators came to know of such disclosures, this would undermine the entire bid process. The council has suggested that an outcome of this would be that it could be

demonstrated that, in disclosing the information it breached regulation 18 of the PCR 2015.

35. The council has argued that the corresponding harm would be the loss suffered by the council and the local taxpayer
36. Firstly, the Commissioner considers it a likely scenario that there is any amount of publically available information that some potential bidders might be aware of and others not. Secondly, the council could avert this potential breach of the PCR 2015 by ensuring that all potential bidders are made aware of the information at the outset of the tender process. Furthermore, the Commissioner considers that it could be conversely argued that disclosure of the information would serve the interests and transparency and proportionality by making the same information available to all bidders, thus promoting compliance with the PCR 2015.
37. In respect of the council's arguments regarding the impact of disclosure on its compliance with PCR 2015 and the possible effects this would have on the tendering process, the Commissioner is not convinced that the case for harm has been coherently made. She has gone on to consider the other arguments submitted by the council.
38. In its internal review responses to the request under the FOIA, the council argued it was unable to release detailed financial information because it *"...may have an impact on any future procurement exercise we undertake to appoint a leisure operator."* In its submissions to the Commissioner the council has argued that:

"...it is essential that the market dictates the cost to build the leisure complex as opposed to the council publishing in the public domain the amount that it would be prepared to pay as this would artificially alter the outcome of the procurement process and would prevent best value being achieved for the public sector through the tender process. Disclosure would adversely affect and undermine the tender process. This would be unacceptable to the council and would be in breach of The Public Contracts Regulations 2015."
39. The Commissioner appreciates the general principle that during or prior to a tendering process information relating to proposed pricing and revenue projections can be commercially sensitive. He understands that the publication of such information when tendering process is live can, for example, limit the range of options available in a negotiating position by "revealing the hand" of the tenderer. 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 the

council has met this threshold in the majority of the arguments she has considered thus far. .

40. The council has stated that it has considered whether the withheld information can be considered to be a "trade secret" and, therefore, afforded additional protection under common law.
41. Section 43(1) of the FOIA provides an exemption for information which constitutes a trade secret; however, there is no equivalent, specific exception in the EIR. In submitting its argument the council directed the Commissioner to the Information Tribunal decision in *The Department for Work and Pensions v Information Commissioner (EA/2010/0073, 20 September 2010)*¹. In this instance, the Tribunal defined a trade secret as, based on an ordinary understanding, *"...something technical, unique and achieved with a degree of difficulty and investment."*²
42. In the Tribunal case, the information was a Financial Model in a contract which was *"extremely detailed and provides information relating to the pricing structure, treatment of costs, profit margins, overhead recovery rates and a balance sheet."*³ The Tribunal found that the information constituted a trade secret as defined by section 43(1) of the FOIA.
43. The council explained that the withheld information was secured as a result of significant expenditure, consultation, input and expertise acquired by the council from a number of experts in preparing to undertake soft market testing for the project. The council has argued that the information was produced as a result of a derivative algorithm based on the combined views of many experts. It has stated that it considers that the insights in the information provide the council with a unique view of what the market position is with regard to the income, including profit and loss modelling and associated costs in relation to the project. The council has argued that the information would not be readily available without the algorithmic model so it is, therefore, proprietary in its nature and should be considered a trade secret.
44. The Commissioner considers that the question as to whether the information constitutes a trade secret is not directly relevant to the

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20\(0073\)%20Decision%2020-09-2010%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20(0073)%20Decision%2020-09-2010%20(w).pdf)

² Ibid.

³ Ibid.

engagement of regulation 12(5)(e). The operation of section 43(1) in the FOIA is such that there is no need for it to be shown that disclosure would or would be likely to result in prejudice. As a class-based exemption, engagement automatically follows the demonstration that information falls into the category of a trade secret. In contrast, for regulation 12(5)(e) to be engaged, specific harm to legitimate economic interests needs to be identified and shown to be a more likely than not outcome of disclosure. It is not enough for information to merely fall into a specific category such as a trade secret.

45. The Commissioner notes that the council's arguments in relation to the trade secret status of the information focus on the unique properties of the "algorithm" which produced the withheld costs and projected revenue information. However, this is not the information which was requested, nor is it the information which is being withheld. The Commissioner can understand why disclosure of the analysis which produced the figures in question might provide an insight into the council's position to the extent that bidders could understand and exploit the rationale behind the council's strategy.
46. However, having referred to the withheld information, the Commissioner does not consider that this is "extremely detailed" and does not reveal the algorithmic model referred to in the council's submissions. She also notes that the council has not explained what specific harm would result from this information being disclosed, beyond arguing that it constitutes a trade secret – a category of information that does not automatically result in the exception being engaged and arguing that it is information which should remain confidential.
47. In light of this and the council's arguments, the Commissioner does not consider that the information constitutes a trade secret and, more importantly for the engagement of this exception, does not consider that it has been shown that its disclosure would result in adverse affects to the legitimate economic interests of the council.
48. Having considered all the arguments provided by the council the Commissioner has concluded that it has not been shown that disclosure of the withheld information would result in harm to the council'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 the council do not make this case. As she has found that the confidentiality in this case does not protect a legitimate economics interest it follows that the confidentiality in this case would not be affected by disclosure.
49. As the Commissioner has found that the exception is not engaged she has not gone on to consider the public interest test.

Right of appeal

50. 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

51. 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.
52. 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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