

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 September 2018

Public Authority: City of York Council

Address: West Offices

Station Rise

York

YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information relating to the Mount School playing field sale of land and proposed development. City of York Council confirmed that some information was not held and withheld other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that City of York Council:
 - complied with regulation 5(1),
 - in failing to carry out an internal review, breached regulation 11(3) and regulation 11(4) and,
 - failed to demonstrate that the exceptions in regulation 12(5)(e) regulation 12(5)(f) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in parts 3, 4 and 5 of the request (excluding the personal data of third parties).
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 14 November 2017, the complainant wrote to City of York Council (the "council") and requested information in the following terms:

"With reference to the Mount School playing field sale of land and proposed development....

1 When was the council first informed of the proposed sale of the school playing field for development?

2 When were elected members first informed of the proposal (including which members and a copy of the briefing note used to inform them)

3 When did officers discuss the proposal with Sport England (to include a copy of all briefing notes used and background research notes which formed the basis of the briefing notes)

4 A copy of all impact assessments done relating to the sale and proposed development - including the impact on the Local Plan with the change of use from playing field to housing, the impact on the Playing Field strategy for the adjacent Holgate ward, the proposed access to the site, the preservation of the character of the site in terms of trees, pond and wildlife and any others

5 Copies of correspondence, including internal email and briefings, which make reference to the sale of the land and/or the proposed housing development and which have not been provided in answer to the first 4 questions/requests."

6. The council responded on 11 December 2017. It stated some of the information was not held. The council withheld other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
7. On 17 December 2017 the complainant asked the council to carry out an internal review. At the time that the complaint was submitted to the Commissioner and at the time of drafting this decision notice, the council had not carried out an internal review.

Scope of the case

8. On 24 January 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed that she would investigate the council's handling of request parts 2 -5.
10. During her investigation the Commissioner noted that the withheld information contained a small amount of personal data, i.e., names and contact details, of third parties unconnected with the substantive matters identified in the request. The complainant confirmed that they were content for this information to be excluded from the scope of their request and from the Commissioner's analysis in this decision notice.

Reasons for decision

Regulation 5 – duty to provide environmental information

11. Regulation 5 of the EIR requires authorities to provide any environmental information held on request.
12. Part 2 of the complainant's request asked for the following information:
"When were elected members first informed of the proposal (including which members and a copy of the briefing note used to inform them)"
13. In its response the council stated that no relevant information was held. The complainant has asked the Commissioner to investigate whether this is correct.
14. 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.
15. 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).

16. In order to assist with this determination the Commissioner approached the council with a range of standard questions routinely asked in such cases. The questions and the council's responses are summarised below.

What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?

17. The council stated that it was known that only a pre-application enquiry had been received by the Planning Authority on 26 October 2016. It confirmed that council officers corresponded with elected members via email and a search of emails was conducted.

Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

18. The council stated that councillors are not informed about pre-application enquiries and so it was known that there would not be any relevant held information. However, the council stated that the relevant medium for communicating with councillors (email) was checked and this confirmed that no relevant information was held.

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

19. The council confirmed that, if the information was held, it would be retained electronically as emails.

Are there any statutory requirements upon the council to retain the requested information?

20. The council confirmed that there is no statutory requirement for it to inform councillors of pre-application enquiries.

Conclusion

21. In their submission to the Commissioner, the complainant stated (in relation to question of whether information is held):

"I would be surprised if officer briefings to the Executive Member did not include some reference to additional sites or windfall sites in the period after October 2016 and these must have included the proposed site. Executive Member briefing would normally include written preparation in advance or post-meeting summaries."

22. Having considered the council's submission, the Commissioner notes its explicit confirmation that councillors are not ordinarily briefed about pre-application enquiries. In view of this and the council's explanation of

searches conducted in this specific instance, the Commissioner has determined that, on the balance of probabilities, is likely that the council has correctly confirmed that information identified in part 2 of the request is not held.

23. In light of the above the Commissioner has concluded that the council's handling of part 2 of the request complied with regulation 5(1).

Regulation 11 – internal review

24. Regulation 11(1) provides that a requester may make representations to a public authority in relation to their request for environmental information if it appears to them that the authority has failed to comply with a requirement of the EIR in relation to the request. This is commonly referred to as the right to an "internal review".

25. Regulation 11(3) states:

"The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement."

26. Regulation 11(4) requires that any authority in receipt of a request for internal review *"...shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."*

27. In this case the complainant submitted their request for internal review to the council on 17 December 2017. The council failed to carry out an internal review.

28. In failing to carry out a review, the Commissioner has concluded that the council breached regulation 11(3) and regulation 11(4) of the EIR.

Regulation 12(5)(e) – commercial confidentiality

29. The council has withheld all the following information under regulation 12(5)(e) of the EIR:

3 When did officers discuss the proposal with Sport England (to include a copy of all briefing notes used and background research notes which formed the basis of the briefing notes

4 A copy of all impact assessments done relating to the sale and proposed development - including the impact on the Local Plan with the change of use from playing field to housing, the impact on the Playing

Field strategy for the adjacent Holgate ward, the proposed access to the site, the preservation of the character of the site in terms of trees, pond and wildlife and any others

5 Copies of correspondence, including internal email and briefings, which make reference to the sale of the land and/or the proposed housing development and which have not been provided in answer to the first 4 questions/requests."

30. 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".
31. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

32. The information relates to the proposed development of the Mount School playing fields. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the withheld information is commercial in nature.

Is the information subject to confidentiality provided by law?

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 stated that it considers disclosure of the information would result in an actionable breach of commercial confidence provided by law. It confirmed that the confidentiality in this case relates to the school, Savills and the ecological consultancy.

35. 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.
36. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.
37. In view of the above, the Commissioner is satisfied that the withheld information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

38. The council has stated that disclosure of the information would adversely affect the legitimate economic interests of the school, Savills and Whitcher Wildlife Ltd. Ecological Consultants ("the ecological consultancy").
39. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
40. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
41. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".
42. The Commissioner has considered the council's submissions regarding the alleged harm that disclosure would cause to each of the parties in turn.

Adverse effects to the interests of the school and Savills

43. The council has confirmed that the information relates to proposed developments that are designed to sustain the school in a competitive market. It has argued that, if the proposals were made public this would *"...clearly be an advantage to competitors who may then make proposals of their own."*
44. The council has further argued that, as well as being commercially detrimental to the school, disclosure would also have a:

"...significantly detrimental impact on the agency working on behalf of the school. They are an organisation offering specialist services regarding property issues on a commercial basis. They had completed work to prepare the proposals, detailing how they could be implemented to reduce any difficulties and maximise benefits. This work could then not only be used by other schools, sports and recreation organisations, but also by other developers and agencies providing support with planning proposals and applications. It is considered that this would be significantly detrimental to Savills and would not be in the public interest to provide this information."
45. The Commissioner notes that the council does not identify any specific elements of the withheld information or specify how the withheld information might be used by a putative competitor. The Commissioner understands that the land which is the focus of the proposed development is owned by the school so it is unclear what form the competition in this case might take. Similarly, the council has not explained how disclosure of the information that is specific to this proposed development might be of use to applicants considering developments at other school or recreation sites. The council has not made the case that the information is transposable to other contexts or that it would otherwise be utilized in a way that would undermine Savills' ability to provide its services in a commercial environment.
46. The council confirmed that, on receipt of the request, it did not undertake any further consultation with the school or Savills as it did consider this to be necessary. It explained that this was because it was clear the information had been submitted as a confidential pre-application enquiry and this remained the situation at the time of the enquiry. The council stated that it understood the risks the confidentiality was intended to protect and therefore did not contact the third parties to seek their views about this.
47. In the Commissioner's view it may sometimes be necessary to consult with third parties potentially affected by the disclosure of information to seek their views and identify any specific concerns. Part VII of the code

of practice issued under regulation 16 of the EIR (the "EIR code") clarifies the situations in which such consultation might be appropriate¹.

48. Whilst the Commissioner acknowledges that the council considers it understood the concerns of Savills and the school, the absence of detail in its submissions suggests otherwise. That the council did not consult with the parties in question in this case combined with the lack of specific details suggests that it has sought to apply the exception on a general basis. In the absence of adequate arguments the Commissioner has, therefore, concluded that it has not been shown that disclosure of the information would result in adverse effects to the legitimate interests of the school or Savills.

Adverse effects to the interests of the ecological consultancy

49. In relation to the interests of the ecological consultancy, the council has suggested that the information could also be used by competitors and would therefore be commercially detrimental to this company. The council has argued that the information could be used to inform work for potential developments in the surrounding area and could be used in any proposed development or related project.
50. The Commissioner first notes that the council has argued that the ascribed harm "could" result from disclosure. This immediately suggests to the Commissioner that the likelihood of the harm occurring does not meet the threshold required for the engagement of the exception.
51. The Commissioner further notes that any proposed development, as per planning law, would need to demonstrate that appropriate environmental or ecological surveys had been carried out and relevant standards met. Any such surveys would need to be site-specific and specific to the time at which proposals are submitted. It is not plausible that a prospective developer could simply base an application on a plagiarised survey created by a consultant for the purposes of a previous application proposal.
52. The Commissioner also understands that any ecological survey submitted with pre-application advice or in support of a planning application should be recent and preferably from the most recent survey

¹ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

season. The council's own "Validation requirements for Planning and Other Applications" clarifies that Biodiversity/Geological surveys will, where relevant, explain how a developer will mitigate any environmental impacts². It follows, therefore, that ecological and similar surveys, therefore, are bespoke and explicitly relevant to a specific proposed development and are not, as the council suggests, transposable to other applications or proposed developments.

53. As noted above, in addition to the generic nature of the council's arguments, the Commissioner considers that its failure to directly consult with the ecological consultant in relation to the request suggests that the arguments provided are largely speculative. For the same reasons, the Commissioner considers that the council has failed to demonstrate that disclosure would result in harm to the interests of the ecological consultant.

Further Conclusions

54. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

*"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."*³

55. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the

2

https://www.york.gov.uk/downloads/download/2228/validation_requirements_for_planning_and_other_applications

3

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20\(14-03-18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20(14-03-18).pdf)

point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."

56. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects would follow as a direct result on information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.
57. Having viewed the withheld information the Commissioner considers that a case might be made for engaging the exception but that the council has, in this instance, failed to make this. The absence of detail in its arguments suggests to the Commissioner that the council has sought to apply the exception on a general basis without regard for the specific factors or the level of scrutiny required. The Commissioner also considers that, in failing to directly consult with any of the parties following receipt of the request, the council's arguments regarding potential harm do not reflect matters as they stood at the time of the request and, therefore, carry significantly less weight.
58. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letter of investigation clearly set out the level of detail required for engaging the exception and the council has failed to meet this threshold.

59. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person. As the Commissioner has found that the exception is not engaged she has not gone on to the considered the public interest test.

Regulation 12(5)(f) – interests of the information provider

60. The council also withheld parts 3, 4 and 5 of the request under regulation 12(5)(f).

61. Regulation 12(5)(f) sets out a number of criteria which must be met for this exception to be engaged. These criteria have been drawn from the Tribunal decision in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012)⁴ and include the following:

- the person was not under any legal obligation to supply that information to any public authority;
- the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
- the person supplying the information has not consented to its disclosure.

the person was not under any legal obligation to supply that information to any public authority

62. The council confirmed that there is no legal requirement for people to submit pre-application enquiries to public authorities.

the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and

63. The council has stated that the developer (Savills on behalf of the school) did not supply it with the information in circumstances in which the council was entitled, apart from under the EIR, to disclose it. The

4

http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

council confirmed that the developer submitted the request for advice in the expectation that it would not be disclosed more widely.

The person supplying the information has not consented to its disclosure

64. Public authorities must consider whether, at the time a request is made, the person who supplied the information has not consented to its disclosure. This will often be determined at the time the information was supplied. It is a matter of good practice that a public authority should advise the supplier at the time the information is supplied to what uses the information will be put, including any likely disclosures. This should help to establish whether the supplier consents to disclosure and also provide the authority with the opportunity to encourage the supplier to provide such consent
65. The Commissioner considers that, as circumstances can alter, it is equally a matter of good practice, where possible, to revert to the supplier following receipt of a request in order to confirm whether or not there is consent to disclose. This will be especially relevant where circumstances have changed since the information was first supplied to the authority.
66. The council has stated that the developer has not consented to the disclosure of the information.

Adverse Affect

67. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
68. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.
69. As the Tribunal in the Kuschnir case (cited above) noted, there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
70. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a

greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

71. The council confirmed that, in relation to harm to the developer's interests, it was relying on the same arguments provided in respect of regulation 12(5)(e). As the Commissioner has found that these arguments did not successfully demonstrate that disclosure would result in adverse effects to the developer's legitimate economic interests, she accordingly finds that they fail to engage regulation 12(5)(f) for the same reasons.
72. In its submissions the council also suggested that disclosing the information would create a "*...likelihood of damage to confidence in seeking informal advice from the Local Public Planning Authority in respect of development proposals prior to formal proposals.*" As the council has not explained how this putative outcome would adversely affect the interests of the developer the Commissioner has discounted this arguments.
73. The Commissioner is mindful that pre-application advice is not part of the formal planning process and not subject to associated statutory obligations to make it publically available. However, the Commissioner considers that pre-application advice or any other category of information is not automatically excepted from disclosure under the EIR. It is for public authorities to demonstrate that, where an exception is being applied, the relevant facts meet the criteria for engaging the exception.
74. The Commissioner clearly sets out in her correspondence that public authorities will have one opportunity to set out their final position in relation to the handling of a request. In this instance the Commissioner considers that the council has still failed to provide adequate submissions in this regard and as his her standard approach in such cases, she does not consider it to be her role to generate arguments on its behalf.
75. For the reasons set out above the Commissioner has concluded that the council has failed to demonstrate that disclosure would result in adverse effects to the interests of the information provider and the exception is, therefore, not engaged. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Right of appeal

76. 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

77. 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.

78. 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