

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

Date: 9 October 2018

Public Authority: Isle of Wight Council
Address: County Hall
High Street
Newport
Isle of Wight PO30 1UD

Decision (including any steps ordered)

1. The complainant has requested information about the proposed development of Heights Leisure Centre, Sandown. Isle of Wight Council disclosed a redacted version of the information, withholding other information under the FOIA exemption for commercial interests (section 43(2)). During the Commissioner's investigation the council reconsidered the request under the EIR, withholding the information under the exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Isle of Wight Council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 of the EIR and that it correctly withheld information under regulation 12(5)(e).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 21 March 2018, the complainant wrote to Isle of Wight Council (the "council") and requested information in the following terms:

"I would like to see the business case you used to justify this largesse for Sandown."
5. The council responded on 13 April 2018. It stated that it was withholding the information under the exemption for commercial interests – section 43(2) of the FOIA.
6. Following an internal review the council wrote to the complainant on 9 May 2018. It stated that it had revised its position, disclosing a redacted version of the requested business case. The council withheld some of the information under section 43(2) of the FOIA.

Scope of the case

7. On 11 May 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld some of the requested information.
9. During her investigation, it appeared to the Commissioner that, due to the nature of the request, which related to the proposed development of a leisure centre, the information was likely to be environmental in nature. She invited the council to, therefore, reconsider the request under the EIR. The council took this step and confirmed that it was now withholding the information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.

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 withheld information relates to the use of land. 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").
14. 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. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

15. 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.
16. In these circumstances the Commissioner believes that it is appropriate 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 as the council actually dealt with the request under FOIA.
17. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

18. The council confirmed that it was withholding certain elements of the business case, specifically “Mosaic data, which details information on the latent demand and general demographics and profiling of the surrounding area for the Leisure Centre” under regulation 12(5)(e).
19. 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”.
20. 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?

21. The council confirmed that the Mosaic information was provided to the council by Pulse, its partner responsible for running the Heights Leisure Centre (the "Leisure Centre"). It explained that the information was generated by the Leisure Database Company (LDC) on behalf of Pulse, under the terms of a contract. The council confirmed that the information is of commercial value to Pulse, as it informs the drafting of their business case for the Leisure Centre and to LDC, as one of its products accessible to anyone on payment of a fee.
22. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

23. 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.
24. 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.
25. The council confirmed that the information was provided under contract on a confidential basis. It stated that it considered that the information has the necessary quality of confidence as it is not in the public domain and it was provided to the council on the understanding that it would only be used for the purpose of considering and supporting the business case to expand the Leisure Centre and it would be held in confidence. The council confirmed that there was a clear understanding between the parties that the information would not be shared more widely.
26. 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.
27. 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?

28. 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.

29. 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.
30. 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".

31. The council confirmed that it consulted with Pulse and LDC prior to deciding how to handle the request – both parties potentially affected by disclosure of the information. The council shared the submissions provided by both parties with the Commissioner and confirmed that it agreed with the views provided. The council further argued that disclosure would result in adverse effects to its own legitimate economic interests.
32. The council explained that LDC has a licence agreement with Experian to use Mosaic Segmentation System within its work and that it pays it a considerable fee to use this data. It further explained that LDC charges clients for each report it generates using this data and all reports are bespoke to a specific client. It confirmed that, in this instance, the information was created explicitly for Pulse to use in relation to the Leisure Centre and it was not intended for distribution to a wider audience.
33. The council confirmed that disclosing the information would undermine LDC's business model as it would be of use to potential local competitors in the leisure industry who would have access to the information without paying LDC a fee.
34. In relation to Pulse, the council confirmed that the information would be of benefit to private operators/individuals involved with the leisure industry on the Isle of Wight. It explained that the leisure industry is highly competitive and knowledge of latent demand and demographics would assist competitors in deciding whether to launch rival leisure services in the region. Access to the information, therefore, would

provide a competitor with knowledge which would result in it changing its business model and approach in such a way that there would be detriment to Pulse's commercial interests. The council has argued that, as Pulse is providing leisure services as its partner, the resulting adverse effects would similarly impact on the council's own legitimate economic interests.

35. The Commissioner's guidance on the application of this exception states that legitimate economic interests can relate to retaining or improving market position, ensuring that competitors do not gain access to commercially sensitive 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 income¹.
36. Having considered the council's submissions the Commissioner acknowledges that the information would directly benefit rivals in the leisure industry market, a market that is notably competitive. She accepts that disclosing the information would assist rivals in formulating a strategy that would challenge and undercut the relevant parties.
37. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies to the withheld information. She will therefore go on to consider the public interest test.

Public interest in disclosure

38. The complainant has argued that the council has invested significant public money in the Leisure Centre and they have concerns that the expenditure might be profligate or based on an unsound business model. Disclosing the information would provide reassurance that the council's decision making was sound or, in the alternative, provide accountability where there has been poor governance.
39. The council acknowledged that there is a general public interest in public authorities being open and transparent in their activities and this is particularly important where public funds are being used.

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https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

40. The Commissioner acknowledges the general public interest in transparency and accountability in relation to public authority decision making and, as the information in question relates to public expenditure, considers that this provides a weighting in favour of disclosure.

Public interest in maintaining the exception

41. The Commissioner has given due weighting to the effects which the exception is designed to protect, namely adverse effects to parties' legitimate economic interests.
42. The council has argued that it considers that the public interest in accountability and transparency in this case has been met by disclosure of the majority of the business case and the list of all expenditure published on its website on a monthly basis. It also explained that full details of the associate planning application are available on the council's website so its decision-making can be challenged via the planning process.
43. The council has argued that it must ensure it gains the best value for money for public funds and disclosing the information would directly jeopardise its ability to do this in relation to the Leisure Centre. Disclosing the information in the context of an increasingly competitive leisure market, the council has argued, would assist rivals and inhibit its ability to maximise the potential of the Leisure Centre.

Balance of the public interest

44. The Commissioner has given some weighting to the complainant's concerns about the council's business practice in relation to the allocation of funds to the Leisure Centre. She acknowledges that disclosing the information would provide the complainant and no doubt the wider community with reassurance that spending has been prudent or provide accountability where it has not.
45. The Commissioner is mindful that the exception is designed to protect legitimate economic interests from harm and that, in this case, the ascribed harm would affect the council's ability to utilise public funds in an effective way. The Commissioner is alive to the complainant's concerns, however, she does not consider that there to be compelling, specific reasons for these elements of the business model to be disclosed, at least not reasons that warrant overturning the public interest in protecting the Leisure Centre from the harm that disclosure would cause.
46. The Commissioner further acknowledges that the fact that much of the requested information has been disclosure goes some way to serve the public interests in transparency in this case. In addition, she notes that the associated planning application provides a further avenue for the

public to scrutinize and participate in the decision making process and, ultimately, the planning appeal process provides a further remedy for public concern.

47. Having considered the withheld information and the relevant factors, the Commissioner has determined that, in this case, the public interest favours maintaining the exception.

Right of appeal

48. 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

49. 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.

50. 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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