

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 July 2020

Public Authority: Mid Ulster District Council

Address: Ballyronan Road
Magherafelt
BT45 6EN

Decision (including any steps ordered)

1. The complainant has requested information from the Council in relation to the interest expressed by certain businesses in locating within a business park, which is the proposed use for land being redeveloped by the Council. The Council refused to disclose the requested information, citing regulations 12(4)(b) and 12(5)(e) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(e) of the EIR to the requested information in parts 1 and 2 of the request, however it has incorrectly applied regulation 12(4)(b) to part 3 of the request.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to the complainant which does not rely on regulation 12(4)(b) in respect of part 3 of the request.
4. The Council must take this step 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. The complainant on 10 August 2018 made the following request for information to the Council:-

"The Council's report on the Redevelopment of the former Maghera High School Site, Maghera (May 2015) section 3.4 states "There has been significant interest from local companies in locating to the site which demonstrates a definite business need.

I am requesting information regarding the following:

- 1) A copy of all letters, emails and any other correspondence received by the council from businesses or agencies working on their behalf in regards to the former Maghera High School Site or locating to it. Each request noting and sorted by the date of receipt.
 - 2) A copy of all responses sent to the above businesses and agencies working on their behalf. Each request noting and sorted by the date of receipt.
 - 3) A list of all meetings and copy of minutes and attendees of all meetings held regarding the former Maghera High School Site or which included discussion of same on the agenda. Each meeting sorted by the date it was held."
6. The Council responded to the complainant's request on 19 September 2018, stating that it was refusing to disclose any of the requested information to the complainant, citing regulation 12(5)(e) of the Environmental Information Regulations 2004 (EIR) as a basis for non-disclosure. On the same date, the complainant re-sent his request, asking that the Council provide him with the requested information, with personal data and names of companies and other commercially sensitive information redacted. The Council responded on 18 October 2018 stating that regulation 12(5)(e) would still apply, even if it made the requested redactions.

7. The complainant sought an internal review of the Council's response on 28 January 2019. The Council responded to the complainant's request for internal review on 18 February 2019. The reviewer upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 26 March 2019 to complain about the way his request for information had been handled.
9. In the Council's response to the Commissioner, it stated that it now seeks to apply regulation 12(4)(b) to part 3 of the complainant's request.
10. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of regulations 12(4)(b) and 12(5)(e) of the EIR to the withheld information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

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. 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?

13. The request was for correspondence with businesses which have expressed an interest in locating within a business park which is soon to be developed. The Commissioner agrees that information about the prospective location of businesses is commercial in nature, therefore, having viewed the information withheld under regulation 12(5)(e), she accepts that it is commercial in nature.

Is the information subject to confidentiality provided by law?

14. 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. In considering this matter the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
15. The Council is of the opinion that the information does have the necessary quality of confidence because there is no public register of information relating to the desirability or necessity of small and medium manufacturing entities investing several hundreds of thousands of pounds in industrial units. In expressing an interest in the soon to be redeveloped land, businesses are providing the Council with an insight into their operational capabilities and market requirements. The Council points out that, even if a single business' desire or necessity to invest in a new industrial unit in Maghera was in the public domain, there would be no possibility of all similar commercial interests of equivalent interested businesses being in the public domain.
16. The Council states that, by sharing this sensitive information, each business has a legitimate expectation that the Council will owe them a duty of confidence. The Commissioner accepts this, and considers that the businesses would not expect their interest in the land to be disclosed into the public domain, but to remain in confidence. She also accepts that the information is not trivial in nature.

Is the confidentiality provided to protect a legitimate economic interest?

17. In considering whether the confidentiality is protecting a legitimate economic interest, the Council states that it is important to note that, as it has not yet determined how sites within the proposed Maghera Business Park will be released to interested parties, expressions of interest by businesses are highly significant matters. The Council in this instance has a degree of power over businesses which express an interest in acquiring a site within the Business Park that it would not normally have when engaging with the business community. This power manifests itself in the willingness of businesses, by submitting expressions of interest, to risk their competitors somehow gaining an understanding of their strategic weaknesses or strengths depending on whether the desire to acquire a location from which to trade would be perceived in the market as a sign of desperation or strength. The Council states that it is clear that none of the relevant businesses would voluntarily put their needs into the public domain, especially at a time when the development and construction of industrial units is uncommon. The Commissioner accepts these arguments and is satisfied that, in maintaining the exception, the Council is protecting the legitimate economic interests of the businesses in question.

18. The Council also states that, if the exception were not invoked, disclosure of the withheld information would significantly damage the interest in question and assist its competitors. This is because sites within business parks are in such short supply that competitors will be motivated to attempt to scuttle the opposition's efforts to secure an appropriate location from which to trade. As it takes several years for business park opportunities, once identified, to come to fruition, any business that needs to relocate needs to act quickly to secure any site that may become available. Failure to express an interest could result in either the site not being developed due to a perceived lack of interest or one or more competitors expressing an interest and obtaining an advantage with Council by engaging with it from the start of the Business Park's development. The Commissioner accepts these arguments and is satisfied that, in maintaining the exception, the Council is protecting the legitimate economic interests of the businesses in question.

Would the confidentiality be adversely affected by disclosure?

19. The Council considers that the information concerning the businesses being disclosed into the public domain would have an adverse impact on its confidentiality and would adversely affect how much such businesses would be willing to engage with the Council regarding future redevelopment of land.
20. The Commissioner considers that all four of the above conditions have been met and that therefore the exception as set out in regulation 12(5)(e) of the EIR is engaged in relation to the withheld information. She has now gone on to consider whether the public interest in maintaining the exception outweighs that in disclosure of the withheld information in all the circumstances of the case.

Public Interest Test

21. The test, set out in regulation 12(1)(b), is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
22. It is important to consider both the specific harm that disclosure would cause to the relevant economic interest at stake in the particular case, and whether there is any wider public interest in preserving the principle of confidentiality.
23. When carrying out the test there is a presumption towards the disclosure of the information, as set out in regulation 12(2).

Public interest factors in favour of disclosure

24. The Council has explained that it is aware of the need for openness, transparency and accountability in the way in which it conducts its business. It therefore considers that some factors lend weight in favour of the information being disclosed.
25. The Council is also aware that disclosure of the information would inform public awareness of the redevelopment and commercial negotiation process, and ensure that a transparent and equitable process is maintained throughout the allocation of Council resources between competing alternatives. This is particularly important when green spaces are being redeveloped and is a significant public interest factor in favour of disclosure.

26. The Commissioner agrees that the above factors lend significant weight in favour of the withheld information being disclosed.

Public interest factors in favour of maintaining the exception

27. As the Council has stated, the securing of a business park site can be critical to the sustainability of a legitimate economic interest. Disclosure of the information withheld under regulation 12(5)(e) would cause commercial and industrial information not in the public domain to fall into the hands of competitors who could be motivated to harm the commercial interests of the businesses that expressed an interest in the Maghera Business Park. Such harm could include the jeopardising of jobs and income from rates to the Council. The loss of jobs and reduction in rate income would, according to the Council, significantly damage the economy and social fabric within the Council area, which would not be in the public interest.

Balance of the public interest factors

28. Whilst the Commissioner is aware of the need for openness, accountability and transparency in the way in which Councils and other public authorities conduct their business, she considers that the information which has already been disclosed would serve to increase public awareness of the process of the allocation of sites within the business park. The Council has informed the Commissioner that it undertook extensive pre-application community consultation (PACC) in line with Section 27 of the Planning Act as part of the planning application for the redevelopment of the former Maghera High School site for mixed business units. The pre-application community consultation included:
- Door to door leaflet drop to 66 individual residents within the local area (i.e. 200m of the site boundary), including in particular all neighbours likely to be notified of the planning application and further expanded to include the wider community who may be impacted by the development;
 - Notification via leaflet drop to 8 local businesses within the locality of the development site; and
 - Notification to 50 elected representatives including the local MP, 5 MLAs and 40 local councillors.

29. The Council has informed the Commissioner that the notification to the individual residents, local businesses and elected representatives also provided details of where participants could relate their queries, or forward any queries on the project through the dedicated project email account. The Council's stakeholder database was treated as a fluid document which was kept under constant review for the duration of engagement to ensure that other stakeholders who emerged through the process could be added to the database.
30. The Council also states that information was provided to the community through a range of techniques to ensure that all project information was accessible to all sections of the community. These techniques included a community online survey, a public meeting, and comprehensive awareness raising with regard to the PACC process being undertaken by the Council on 'The Redevelopment of the Former Maghera High School site.'
31. Having considered all factors in favour of disclosure and of maintaining the exception as set out in regulations 12(5)(e) of the EIR, the Commissioner in all the circumstances of the case considers that the public interest lies in favour of maintaining the exception in respect of parts 1 and 2 of the complainant's request.

Regulation 12(4)(b): manifestly unreasonable request

32. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable. The term "manifestly unreasonable" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC*.
33. In *Craven* the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, save that the public authority must also consider the balance of public interest when refusing a request under the EIR.
34. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield*. The Upper Tribunal's approach, subsequently upheld in the Court of Appeal, established that that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious. The Commissioner is of the opinion that these concepts are equally relevant when assessing whether a request for environmental information is manifestly unreasonable.

35. The Commissioner notes that the main provision for dealing with burdensome requests under the EIR is regulation 7(1). This allows a public authority to extend the time for compliance from 20 to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to meet the 20 working day deadline. However, in *Craven* the Tribunal again commented that:

"...it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable."

36. In her guidance³ on this exception, the Commissioner says at paragraph 19 that in assessing whether the cost or burden of dealing with a request is too great, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considered this will mean taking into account all the circumstances of the case, including:
- the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
37. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test. Any exercise carried out to determine whether an exception applies must take into account the EIR's express presumption in favour of disclosure under regulation 12(2).

38. The considerations associated with the application of regulation 12(4)(b) of the EIR on the grounds of cost are broader than its closest relative in the FOIA, section 12, which applies when the “cost of compliance exceeds the appropriate limit”. However, while recognising the differences between section 12 of the FOIA and regulation 12(4)(b), the Commissioner considers that the “appropriate limit” in section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”), which have the effect of prescribing the “appropriate limit,” are taken to give a clear indication of what Parliament considers to be a reasonable charge for staff time.
39. The Fees Regulations state that a public authority’s estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in:
- determining whether it holds the requested information;
 - locating the information;
 - retrieving the information; and
 - extracting the information.
40. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For central government public authorities the cost limit is £600, and £450 for non-central government.
41. In addition, as noted in the Commissioner’s guidance referenced previously, the costs of considering whether information is exempt, and in preparing it for disclosure, may also be taken into account under regulation 12(4)(b), which is not the case under section 12 of the FOIA.
42. The Commissioner’s role in considering the application of regulation 12(4)(b) is simply to determine whether the Council has demonstrated that complying with the requests would be manifestly unreasonable.

The Council’s position

43. The Council has provided evidence to the Commissioner that it has responded to all of the complainant’s requests regarding this issue – eight in total. It has also stated that, if it were to aggregate all three parts of this current request, it would certainly take in excess of 18

hours of staff time in order to perform the four activities outlined in paragraph 39 above.

44. However, in this instance, the Council has not sought to aggregate all three parts of the complainant's request, but rather it has applied regulation 12(5)(e) to parts 1 and 2 of the request, which the Commissioner accepts is engaged in relation to those parts. It has only sought to apply regulation 12(4)(b) to part 3 of the request, which relates to lists and copies of minutes of meetings regarding the planning issue under discussion.
45. The Council has informed the Commissioner that, given the mix of Councils, Council staff and departments involved in this issue, it estimates that carrying out the aforementioned four activities in relation to the information requested in part 3 would take well in excess of 18 hours of staff time.
46. The Commissioner is not persuaded that the Council has sufficiently demonstrated that disclosing the requested information to the complainant would take such a lengthy amount of time, or create such a burden, for part 3 of the request to be considered manifestly unreasonable.
47. She has determined that the exception at regulation 12(4)(b) was not engaged with regard to the request. It has therefore not been necessary to consider any public interest test with regard to whether or not the exception should be maintained.
48. The Commissioner orders the Council to make a fresh response to the complainant, which does not rely on regulation 12(4)(b), with regard to part 3 of his request.

Other matters

49. In the Council's initial response to the complainant and in its subsequent internal review response, it stated that regulation 12(5)(e) applied to all three parts of the complainant's request. However, in response to the Commissioner's investigation letter, the Council stated that it considered that regulation 12(4)(b) applied to part 3 of that request.
50. Upon enquiry by the Commissioner as to whether the Council had actually seen the information requested in part 3 of the request in order to ascertain that regulation 12(5)(e) applied to it, the Council stated that it had applied that regulation to part 3 of the request in error, as it had assumed that it applied due to the requested information all being about the same issue.

51. The Commissioner wishes to emphasise the need for public authorities to correctly apply the FOIA and the EIR to requests for information in their initial stages in order to avoid complaints and problems occurring at a later stage. The Council is aware of its obligations and responsibilities under information rights legislation.

Right of appeal

52. 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

53. 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.
54. 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

Deirdre Collins

Senior Case Officer

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