

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

Date: 21 November 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Department for Levelling Up, Housing and Communities (DLUHC) about a grant given to the Carbis Bay Hotel (the Hotel), Cornwall, in 2014 by the Coastal Communities Fund. DLUHC provided some information within the scope of the request but refused to provide the remaining information. It cited the exceptions under regulation 12(5)(e) of the EIR (the confidentiality of commercial information exception) and regulation 13 of the EIR (the personal data exception). There was also a dispute between the amount of information located by DLUHC and the amount of information that the complainant believed should be held by it.
2. The Commissioner's decision is that:
 - DLUHC has correctly applied regulation 12(5)(e) to some, but not all, of the information withheld on this basis.
 - DLUHC has correctly applied regulation 13 to the information withheld on this basis.
 - On the balance of probabilities, no further information falling within the scope of the request is held by DLUHC.

3. The Commissioner requires DLUHC to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e) for which the Commissioner has decided the exception is not engaged, as listed in paragraph 25 of this notice.
4. DLUHC 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 30 June 2021, the complainant wrote to DLUHC and requested information in the following terms:

"I am trying to find further information about the grant given to the Carbis Bay Hotel, Cornwall, in 2014 by the Coastal Communities Fund. As I understand the grant was for £525,000. I have attached a screenshot of the page from the Coastal Community Fund showing the grant.

I originally contacted the Coastal Community Fund who said 'The Coastal Community Fund was administered by the Big Lottery Fund at that time, so you will need to get in touch with them'.

I then contacted NLCF who, after three and a half weeks, said 'I can now confirm that the National Lottery Community Fund (NLCF) do not hold information pertinent to your request. As such all documentation is held by the Ministry of Housing, Communities & Local Government (MHCLG)'

Therefore I am contacting you after being pushed from pillar to post and am requesting the following information:

1. Details /paperwork of their application
2. The criteria for the application
3. What plans were submitted including any environmental surveys
4. Who the Hotel stated would benefit from the grant and/or the benefit for the community

5. Any subsequent paperwork to show any follow up information on how this public money has been spent.”
6. DLUHC provided some information within the scope of the request but refused to provide the remainder. It cited the commercial interests exemption under section 43(2) of FOIA and the personal information exemption under section 40(2) of FOIA as its basis for doing so. It upheld its position at internal review.
7. During the course of the investigation DLUHC reconsidered the request under the EIR and applied regulation 12(5)(e) (commercial confidentiality) to the information previously withheld under section 43(2), and regulation 13 of the EIR (personal data) in place of section 40(2) of FOIA.
8. The following decision notice will therefore consider whether the DLUHC was correct to apply regulation 12(5)(e) and regulation 13 to withhold the information. It will also consider whether DLUHC holds any further information falling within scope of the request.

Reasons for decision

Regulation 12(5)(e) - Confidentiality of commercial information

9. The following analysis sets out why the Commissioner has concluded that DLUHC was entitled to rely on regulation 12(5)(e) of the EIR to withhold some, but not all, of the information withheld on this basis.
10. The information withheld by DLUHC on this basis comprises:
 - a) Information provided by the Hotel in the “Results Achieved” section of the Annual Monitoring Survey from March 2016. This information comprises forecast figures and actual figures for the results achieved from the project start to March 2016 for a range of indicators.
 - b) Information redacted from the Hotel’s Coastal Communities Fund application form, specifically:
 - i) information about the Hotel’s financial position
 - ii) part of the information that the Hotel provided about what its project would involve
 - iii) the information provided by the Hotel about risks, liabilities and dependencies of the project

- iv) the project budget submitted as part of the application
 - v) details of other sources of funding
 - vi) the information submitted about the number of staff and volunteers required to work on the project.
11. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so 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 construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
13. For clarity, if the first three parts of the test are met, the final test will automatically be met as information disclosed under the EIR would cease to be confidential.

Is the information commercial or industrial?

14. The Commissioner is satisfied that all the withheld information is commercial in nature as it relates to the commercial activity of the Hotel, which is operated as a commercial business.

Is the information subject to confidentiality provided by law?

15. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
16. 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. For purely internal information, the question will be whether the employees or members of the public authority are under an obligation of confidence imposed by the common law, contract or statute.

17. In this case DLUHC argues that the information is subject to confidentiality provided by the common law duty of confidence.
18. For a common law duty of confidentiality to exist, it is required (a) that the information has the necessary quality of confidence, and (b) that it was imparted in circumstances which gave rise to an obligation of confidence.
19. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. DLUHC's position is that these two criteria are met.
20. Regarding (b), whether it was imparted in circumstances giving rise to an obligation of confidence, DLUHC's view is that the information was shared with the Department in circumstances creating an obligation of confidence due to the competitive nature of the bidding process and the commercial sensitivity of the information.
21. The Commissioner is satisfied that the information is subject to confidentiality provided by the common law duty of confidence for the reasons set out above.

Is the confidentiality required to protect a legitimate economic interest?

22. DLUHC provided the following arguments in its submissions to the Commissioner, "...confidentiality is required to protect a legitimate economic interest as disclosure would cause harm to the Hotel's commercial interests. The withheld commercial information is still current and comprises detailed costings and data which if released would present an unfair commercial advantage to competitor businesses. Competitors in possession of this information would be able to absorb business, tempt staff with improved wages, and act to reduce the competitiveness of Carbis Bay Hotel".
23. The Commissioner is not satisfied that DLUHC has demonstrated a clear link between the disclosure of all of the information it has withheld under regulation 12(5)(e) and the prejudice to the Hotel described in the paragraph above. He notes that the arguments provided by DLUHC related to the disclosure of, "detailed costings and data", however in his view, not all of the information withheld can be characterised as such.
24. The Commissioner accepts that disclosing the following data would harm the Hotel's commercial interests, as this information would be used by competitors of the Hotel to their advantage:
 - a) information about the Hotel's financial position on the application form

- b) the information provided by the Hotel about risks, liabilities and dependencies of the project on the application form
 - c) the project budget submitted as part of the application
 - d) details of other sources of funding on the application form
 - e) specific cost information from the staff posts section of the application form, given in the "total cost to the project for these posts" column.
25. However, the Commissioner's decision is that DLUHC has failed to demonstrate that the confidentiality is required to protect the Hotel's economic interest with regards to the following information:
- a) Information provided by the Hotel in the "Results Achieved" section of the Annual Monitoring Survey from March 2016. This information comprises forecast figures and actual figures for the results achieved from the project start to March 2016 for a range of indicators.
 - b) part of the information that the Hotel provided about what its project would involve (redacted from page 14 of the application form)
 - c) the information submitted about the number of staff and volunteers required to work on the project from the staff posts section of the application form, other than the specific cost information given in "total cost to the project for these posts" column.

Would the confidentiality be adversely affected by disclosure?

26. Regarding the information listed in paragraph 24, the Commissioner's decision is that the confidentiality would be adversely affected by disclosure and that therefore the exception is engaged. He has gone on to consider the public interest test below.
27. Regarding the information listed in paragraph 25, the Commissioner's decision is that the confidentiality would not be adversely affected by disclosure and that therefore the exception is not engaged. The Commissioner therefore requires the DLUHC to disclose this information, other than any sections where Regulation 13 is applicable to withhold personal data.

Public interest test

28. The Commissioner must consider the public interest test for the information for which he has decided the exception is engaged (that listed in paragraph 24).

DLUHC's position

29. DLUHC states that it took into account the following public interest factors in favour of the disclosure of the information, "the Department considers that there will always be some general public interest in disclosure to promote transparency and accountability of public authorities. The Department recognises the public interest in the public understanding of the activities of the Coastal Communities Fund programme and ensuring accountability for the spending of public money".
30. DLUHC states that it took into account the following public interest factors in favour of withholding the information, "the Department also considers the commercially sensitive aspects of the hotel's application to the fund were submitted with an expectation of confidentiality and if they were disclosed would result in an adverse impact on the hotel's commercial activities. The release of information which would cause significant prejudice to a business's economic interests would in turn make this type of stakeholder less likely to engage fully and frankly with Government in a voluntary capacity, which would clearly not be in the public interest".
31. DLUHC's position is that the public interest in withholding the information outweighs that in disclosure.

The Complainant's position

32. In addition to the more general public interest in transparency around how grants such as this are allocated and spent, the complainant has highlighted concerns about how the grant was used, specifically that it may not have been used for the purposes intended. They summarised their concerns as follows, "The Carbis Bay Regeneration project seemed to be initiated by describing the project to CCF to include a multi use venue, including a water sports centre, conference and wedding venue, restaurant, training facilities and a community hub. All that was actually delivered was a restaurant, hotel accommodation, entertainment space, and 8 apartments. What happened to the water sports centre and the community hub? Strangely enough, in the planning application form submitted to Cornwall Council, there was no mention of a watersport centre or a community hub". The complainant also highlighted a planning issue regarding development at the hotel.

The Commissioner's view

33. The Commissioner recognises the considerable public interest in understanding the activities of the Coastal Communities Fund programme and ensuring accountability for the spending of public money. He also acknowledges the additional interest in how this particular grant has been used and monitored for the reasons highlighted by the complainant.
34. However, in the Commissioner's view, the information that has already been disclosed, combined with that of which he has ordered disclosure in this notice, goes a long way in meeting this interest. In his view, the public interest in the disclosure of the information for which he has decided the exception is engaged is relatively limited.
35. In deciding the exception is engaged he has already acknowledged that to disclose this information would adversely affect the economic interests of the Hotel. In the Commissioner's view, a disclosure of this information would be likely to dissuade other businesses from making applications for similar grants in the future, which would not be in the public interest. He considers this to be a weighty factor in favour of maintaining the exception.
36. The Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, and therefore DLUHC was entitled to withhold the information listed in paragraph 24.

Regulation 13 - Personal data

37. The following analysis sets out why the Commissioner has concluded that DLUHC was entitled to rely on regulation 13 of EIR in this particular case.
38. The information withheld by DLUHC on this basis comprises:
 - The name and contact details of a Funding Officer at the Big Lottery Fund, redacted from the annual monitoring survey.
 - Details of two staff members at the Hotel, redacted from the Hotel's Coastal Communities Fund application form, including their names, contact details and dates of birth.
39. The Commissioner is satisfied that the withheld information both identifies and relates to the individuals described in the paragraph above, he is therefore satisfied that it is their personal data.

40. The Commissioner accepts that there is a legitimate interest in understanding who was involved in the bid and the administration of the grant.
41. The Commissioner accepts that disclosure of names of the individuals described in paragraph 38 is necessary in order to meet the legitimate interest of understanding who was involved in the bid and the administration of the grant. However, he does not accept that the disclosure of their contact details or dates of birth is necessary to meet this legitimate interest.
42. His decision is therefore that there is no lawful basis for the disclosure of contact details or dates of birth of the individuals described in paragraph 38 under FOIA. He has gone on to consider the balancing test in relation to their names only.
43. DLUHC recognises that this information relates to the individuals' public life (i.e. their work as employees) as opposed to their private life, however it argues that these individuals have a reasonable expectation of privacy. It also states that the individuals named do not consent to the disclosure of their personal data.
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
46. The Commissioner has therefore decided that DLUHC was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(1) – Duty to make environmental information available on request - Information held / not held

47. The following analysis sets out why the Commissioner has concluded that, on the balance of probabilities, no further information falling within the scope of the request is held by DLUHC.
48. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held,

and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

49. In response to the Commissioner's enquiries, DLUHC stated that the relevant policy team, which would hold any further information in scope of the request, has carried out searches of its records at the point of receipt of the request, at the internal review stage, and upon receipt of the Commissioner's enquiries and has not identified any further information held in scope of the request.
50. DLUHC also stated that it would not expect to hold further information in scope of the request, or have a business need to do so, as this would be the responsibility of the Big Lottery Fund, which was its delivery partner for this project, and as such, should hold the majority of the information. In addition, it stated that the criteria for the application would have been set out in the Guidance Note for Coastal Communities Fund Round 2. It said that it does not hold this, however, as this was distributed by the Big Lottery Fund.
51. DLUHC also stated that, in accordance with its regulation 9 duty to provide the complainant with advice and assistance, it has informed the complainant of this situation and directed them to the Big Lottery Fund who should hold this information.
52. DLUHC also stated there are no statutory requirements upon the Department to record or retain the further information requested.
53. In their complaint to the ICO the complainant stated that they had been informed by the Big Lottery Fund in June 2021 that all documentation relating to the project was held by the Ministry of Housing, Communities and Local Government (which has since become DLUHC). The complainant also stated that they believed DLUHC should hold further information monitoring the project for which the grant was awarded.
54. The Commissioner understands the complainant's frustration at the inconsistent information provided by different organisations regarding who would hold this information. However, he is satisfied by DLUHC's explanations as to how it has ensured that all information within the scope of the request has been identified, and why no further information is held. His decision is that, on the balance of probabilities, it was correct to state that it did not hold any further information.

Right of appeal

55. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Victoria James
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