

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

Decision notice

Date: 14 June 2023

Public Authority: Forest of Dean District Council
Address: High St
Coleford
GL16 8HG

Decision (including any steps ordered)

1. The complainant requested information relating to a development. Forest of Dean District Council (the "council") initially handled the request under the FOIA but reconsidered it under the EIR during the Commissioner's investigation and withheld the information under the exception for the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the council initially wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 and that it failed to demonstrate that the exception in regulation 12(5)(f) is engaged.
3. The Commissioner requires the council to disclose the requested information to the complainant.
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 31 October 2022 the complainant wrote to Forest of Dean District Council (the "council") and requested the following information:

(In relation to a report dated 11 October from Wotton Tree Consultancy relating to Covent Garden)

"Please can you provide documentation that FODDC inspected the property and foundations and approved plans and engineering drawings to build the property close to these trees."
6. The council responded on 24 November 2022 and confirmed that it was refusing to provide the information because "The Developer and his agents hold the copywrite for these reports and would need to be approached separately for copies."
7. On 24 November 2022 the complainant wrote to the council and reiterated their request.
8. On 15 December 2022 the council responded and directed the complainant to submit their enquiry to the Developer.
9. On 16 December 2022 the council issued a further response which confirmed that it was relying on the FOIA exemptions for information provided in confidence (section 41) and commercial interests (section 43(2)).

Scope of the case

10. On 3 January 2023 the complainant contacted the Commissioner to complaint about the council's handling of their request.
11. Having considered the nature of the request the Commissioner's initial view was that the information was likely to be environmental in nature and that the request fell to be considered under the EIR. The Commissioner, therefore, directed the council to reconsider the request under the EIR and to issue a new response to the complainant.
12. On 21 March 2023 the council issued a new response to the request which confirmed that it was withholding the information under the exception for the interests of the information provider (regulation 12(5)(f)) of the EIR.

13. The Commissioner has considered whether the council correctly withheld the requested information.

Reasons for decision

Is it environmental information?

14. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR.
15. In this case the requested information relates to decisions regarding a planning matter. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that 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").
16. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

17. 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.
18. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires 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.

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

19. Regulation 12(5)(f) provides an exception from the duty to make information available if this would adversely affect the interests of someone who supplied the information, and that person:
- was not under, and could not be put under, any obligation to supply it;
 - supplied it expecting that it would not be disclosed to a third party; and
 - has not agreed to the information being supplied.

How the exception works

20. 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.
21. 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 to explain why disclosure would, on the balance of probabilities, directly cause the harm.
22. 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.
23. Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided. However, there may be instances in which it is necessary to consult the information provider at the time of the request.
24. In situations where a person states that disclosure would harm their interests, but does not articulate the nature of this harm, a public authority will need to enter into discussions with the provider in order to establish whether there is any substance to the concerns expressed. This will allow the authority to decide whether disclosure, at the time of the request, would lead to an adverse effect or not and so whether further consideration of the exception is necessary. It is important to

acknowledge the importance that the person providing the information attaches to it and the harm that would be suffered if it was disclosed.

25. Whilst consultation with the person who provided the information is encouraged in the majority of cases, the Commissioner recognises that there will be instances where, due to its knowledge of the particular circumstances of a case and its overall experience of the context in which the information was provided, the public authority will be able to explain the harm to the provider without such consultation.
26. In all cases, the onus is on the public authority to demonstrate how disclosure of the requested information would lead to the adverse effect based on the circumstances at the time of the request¹.

The council's position

27. In applying the exception the council stated the following:

"The information requested was provided to the Council on an entirely voluntarily basis by the Property Developer. There was no legal obligation for the site investigation report to be provided. The information was provided to the Council without any expectation of the information being shared further and no explicit consent was given for any publication or release of the information. The Property Developer as such had a reasonable and legitimate expectation that the report was provided in confidence."

28. In relation to the harm which disclosure would cause the council stated:

"There is the potential that the release of this information would adversely affect the interests of the Property Developer. This is further demonstrated by the fact that the Council had been advised that the Property Developer's solicitor had refused release."

¹ This is confirmed in the code of practice issued under regulation 16 of the EIR:
https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

29. In investigating this complaint the Commissioner gave the council several opportunities to provide submissions in support of its position. He also asked the council to provide him with a copy of the withheld information but the council failed to do this.
30. In this case the Commissioner considers that the arguments provided by the council are entirely generic. While he acknowledges the general points presented, there is no explanation of the causal relationship between disclosure and the adverse effects to be incurred by the information provider. The conclusions reached by the council do not appear to be predicated on any specific argument or linked to a particular context.
31. The Commissioner notes the council's confirmation that, in response to a direct enquiry from the complainant, the Property Developer refused release of the information. However, this reveals nothing about the nature of any harm which disclosure would cause. Moreover, private bodies are not subject to the EIR and do not have to demonstrate any harm or otherwise provide reasons for not disclosing information. This argument in itself, therefore, carries no weight.
32. The Commissioner has not been provided with any evidence that the council sought the views of the information provider in this and it is clear from the generic nature of the council's arguments that it does not have direct knowledge of any specific harm that disclosure would cause. In view of this the Commissioner considers that the council has sought to apply the exception on a general basis and has failed to demonstrate that disclosure of the information would result in any specific harm.
33. The Commissioner does not consider that it is not necessary to view the withheld information in this case in order to reach his conclusions. It is self-evident from the council's arguments alone that it has not been shown how disclosure would result in adverse effects to the information provider. It is also not the Commissioner's duty to generate arguments on the council's behalf. He also does not consider that it is appropriate to provide the council with further opportunities to generate arguments when it has been given ample time to set out its position.
34. In view of the above the Commissioner has concluded that the council has failed to demonstrate that regulation 12(5)(f) is engaged. He has not, therefore, gone on to consider the public interest test.

Other matters

35. Although they do not form part of this decision notice the Commissioner would like to comment on the following matters of concern.

Regulation 16 – EIR code of practice

36. The code of practice issued under regulation 16 of the EIR (the “EIR code”) contains recommendations as to best practice in the handling of requests.
37. Paragraph 1 of the EIR code recommends that authorities should ensure that staff responsible for handling requests for information receive adequate training².
38. Having considered the council’s practice in relation to the request which is the subject of this decision notice the Commissioner has concerns that the council does not understand its obligations under the EIR and/or that staff handling requests have not received adequate training in this regard.
39. In order to ensure its practice conforms with the recommendations of the EIR code, the council should ensure that staff are reminded of their obligations in respect of requests and that they are provided with sufficient training in this regard.
40. In addition, the Commissioner considers that authorities should assist him in his investigations, including providing him with such information as he requires in a timely manner. In this case the Commissioner was met with repeated delays as the council failed to respond to his enquiries on time. He expects that, in future, the council will ensure that it provides timely and adequate responses to his investigations.

² https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Right of appeal

41. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF