

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 February 2023

Public Authority: Wigan Metropolitan Borough Council
Address: Town Hall
Library Street
Wigan WN1 1YN

Decision (including any steps ordered)

1. The complainant requested company accounts submitted with a planning application. Wigan Metropolitan Borough Council (the "council") refused the request, citing the exceptions for commercial confidentiality (regulation 12(5)(e)) and the interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that the council failed to demonstrate the exception in regulation 12(5)(e) was engaged but that it correctly withheld the information under regulation 12(5)(f).
3. The Commissioner does not required the council to take any steps.

Request and response

4. On 18 September 2022, the complainant made the following request for information to Wigan Metropolitan Borough Council (the "council"):

"With respect to an active planning application - A/22/94184/FULL We request copies of the three year accounts submitted to the council in support of the 2017 planning application A/13/77766, for Rothwell's Stud farm, Sennicar Lane, Wigan, WN1 2SN."

5. The council's final position is that the information is subject to the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).

Reasons for decision

Regulation 12(5)(e)- commercial confidentiality

6. 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.
7. The council is relying on regulation 12(5)(e) to withhold the requested accounts information.
8. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
- 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?
9. In this case the Commissioner is satisfied that the information is commercial in nature and that it was provided to the council with an expectation of confidentiality.

10. In relation to the question of whether confidentiality is protecting a legitimate economic interest, the Commissioner's guidance states that:

"The confidentiality must be "provided... to protect a legitimate economic interest". The 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 test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect."

11. In relation to adverse effects the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors."

12. In this case the council has argued that:

"there are clear statements that the accounts were supplied in confidence, the public interest in not breaching commercial confidentiality is very high; it is essential to the effective operation of the planning process to maintain trust in the local authority not to breach confidences when commercially confidential information is provided in support of an application. This fundamental need for trust in the Council outweighs on this occasion the presumption of disclosure that the Council recognises in the EIR."

13. The council confirmed that it also consulted with the applicant which provided it with the accounts information and provided the Commissioner with copies of correspondence which set out their concerns about the sensitivity of the information. Having viewed this correspondence the Commissioner considers that they are generic in nature and fail to identify specific harm which disclosure would cause.
14. The Commissioner recognises that a case might be made for withholding the information but he considers that the council has failed to make this case. Whilst he recognises the applicant's concerns about confidentiality it is the duty of public authorities to advise third parties that any information can be subject to requests and disclosure under the EIR. In each instance of a request it is the duty of public authorities to explain why an exception to disclosure applies and provide detailed arguments in support of this. It is not the role of the Commissioner to supply public authorities' deficiencies in this process.
15. In this case the Commissioner provided the council with an opportunity to make submissions regarding its application of regulation 12(5)(e). Having considered these submissions he has concluded that the council has failed to show that the exception is engaged.

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

16. Information can be withheld under regulation 12(5)(f) if disclosure would adversely affect the interests of the person who provided the information, where that person was under no legal obligation to supply it, did not supply it in circumstances which would entitle the public authority to disclose it (apart from the EIR) and has not consented to disclosure.
17. The council has stated that the information was provided without any expectation that it would be made public. The council consulted with the third party regarding the request who confirmed that they do not consent to public disclosure.
18. The Commissioner recognises that, whilst they would have a reasonable expectation that information they were required to provide could be the subject of an EIR request, the third party would equally have a reasonable expectations of confidentiality in respect of information relating to their business affairs.
19. The Commissioner has reviewed the withheld information to confirm that it comprises of information that was provided to the council by the applicant. The Commissioner is satisfied that, given the nature of the information, its disclosure would adversely affect the interests of the applicant. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.
20. When considering whether the public interest favours maintaining the exception or disclosing the requested information, the Commissioner has taken into account that there is a public interest in openness and transparency by the council. Disclosure of the information would provide transparency about the information that had been provided by the applicant to the council.
21. The complainant has suggested that the planning application to which the information relates was mishandled by the council.
22. However, in the Commissioner's view, the public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. Where there are concerns about the conduct of a public authority there are, similarly, other remedies for addressing this which do not necessitate the global disclosure of the information.
23. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that

facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.

24. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the applicant's provided information to be the stronger argument.
25. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
26. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(f) was applied correctly.

Other Matters

27. Although they do not form part of this decision notice the Commissioner would like to identify the following matters of concern.
28. Where requested information is being withheld it is the responsibility of public authorities to provide arguments to justify the application of exceptions.
29. In this case the council's submissions to the Commissioner were lacking in detail and appeared to assume that it was self-evident that the information should be withheld.
30. In view of the nature of the information in this case the Commissioner determined that it should not be disclosed, however, in a different situation he might not have upheld the council's application of exceptions.
31. The Commissioner expects that, in future, the council will ensure that its submissions are sufficiently detailed and make a clear link between specific information being withheld and the adverse effects of disclosure.

Right of appeal

32. 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

33. 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.

34. 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
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