

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

**Date:** 22 May 2012

**Public Authority:** Stoke-on-Trent City Council  
**Address:** Civic Centre  
Glebe Street  
Stoke-on-Trent  
ST4 1HH

**Decision (including any steps ordered)**

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1. The complainant has requested the disclosure of an internal audit report regarding the demolition of Boothen Methodist Church. The Commissioner's decision is that Stoke-on-Trent City Council (the "Council") has failed to support its decision to withhold the majority of the report under regulations 12(4)(d), 12(4)(e), 12(5)(b), 12(5)(c), 12(5)(e) and 12(5)(f) of the EIR. He therefore requires the Council to disclose the withheld information to ensure compliance with the legislation.
2. 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**

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3. On 31 October 2011 the complainant requested information in the following terms –

*"Please release the summary of findings/internal audit report (prepared about June-August 2011 by Internal Auditor) regarding the Regeneration Department, Great Places and the demolition of the Old Methodist Church."*

4. The Council acknowledged the request on 2 November 2011. It wrote to the complainant again on 6 December 2011 to confirm that the request would be processed under the EIR. The Council added that, due to the complex nature of the request, under regulation 7(1) of the EIR it was extending the deadline for response to 28 December 2011.
5. Following a further exchange of correspondence with the complainant, the Council provided its substantive response to the request on 6 January 2012. This stated that the request had, in fact, been dealt with under FOIA rather than EIR. As required by the legislation, the Council confirmed that it held the requested information but considered it was exempt information pursuant to section 36 (prejudice to the effective conduct of public affairs) of FOIA.
6. The Council provided the outcome of its internal review on 18 January 2012, in which it maintained its reliance on section 36 of FOIA as grounds for withholding the requested information.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the Council's refusal to provide the requested report (the "disputed information").

### **Reasons for decision**

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8. The disputed information refers to an internal audit report detailing the circumstances in which a decision was made to demolish Boothem Methodist Church, before going on to focus on the funding of the demolition in the context of the North Staffordshire Housing Market Renewal Pathfinder<sup>1</sup>.
9. The first question that the Commissioner has had to consider is whether FOIA is the appropriate access-regime as claimed by the Council, or whether the disputed information represents environmental information and, as such, should be handled under the EIR.

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<sup>1</sup> <http://www.renewnorthstaffs.gov.uk/>

10. In order to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) – (f) of the EIR; constituting “any information...on” one or more of the subjects described by those six paragraphs. It is accepted 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 enacts.
11. The Council initially argued that FOIA applied because the disputed information does not deal with the demolition as such, but with the financial arrangements and processes operated by RENEW at the time. The Commissioner, however, considers that this analysis places too great a restriction on the information that the EIR covers.
12. Instead, the Commissioner is satisfied that that the disputed information falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This is because it is on a measure, namely the circumstances around the demolition of a building, which will ultimately affect the state of the environment, most notably the land and landscape as a result of the demolition. He has therefore asked the Council to reconsider the request under the provisions of the EIR.
13. In doing so, the Council has agreed to the disclosure of a limited amount of information contained in the report. It has, however, decided that the balance of the requested information should be withheld under, variously, regulations; 12(4)(d) (unfinished documents), 12(4)(e) (internal communications), 12(5)(b) (course of justice), 12(5)(c) (intellectual property rights), 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (voluntary supply).
14. The Commissioner has therefore gone on to test the arguments advanced by the Council to support its position under the EIR.

#### **Regulation 12(4)(d) – unfinished documents**

15. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
16. The Council has claimed that the information to which the exception has been applied forms part of a draft document that was awaiting formal approval by the Chief Executive. As such, the Council has stated that the content or recommendations contained in the report could be subject to change.
17. Based on this explanation, the Commissioner is satisfied the exception is engaged. Therefore, as required by regulation 12(1)(b) of the EIR, he has gone on to consider the public interest test associated with the application of the exception.

### **The public interest arguments in favour of disclosure**

18. The Commissioner recognises that the disclosure of evidence documenting a public authority's provisional views and findings on a subject can, in certain scenarios, be of assistance to the public. The fact that the withheld information is still in the course of completion may actually augment the public interest in disclosure rather than diminish it. This is because it will help the public understand what factors officials at the authority had considered when finalising a report.
19. It is clear that concerns have been raised by members of the public about the actions of the Council in respect of the demolition. It is these concerns that apparently acted as a driver for the Council's Audit Services to carry out a review and examination of the Council's involvement in, and the extent of its funding of, the demolition.
20. The Commissioner considers that disclosure of the information prior to its formal approval could help ease any anxiety that the public had about the completeness of the Council's review. Specifically, by providing the findings that had been put before the Chief Executive, the Council would remove any suspicion of spin. It could also help the public to understand, and engage with, the process by which a resolution was reached by the Council.

### **The public interest arguments in favour of maintaining the exception**

21. The Council has argued that disclosure of the information would have a prejudicial effect, expressing concerns that amendments may be required which could alter the content or recommendations contained in the report. It has therefore concluded that the public interest would be better served by the Council being able to conduct a fair and robust audit function with a view to improving the services which it delivers; an ability that, it suggests, would be impaired through disclosure.

### **The public interest test**

22. The Commissioner considers that it is not for him to argue a point on a public authority's behalf. Instead, it is the responsibility of the public authority to provide compelling arguments to support its position for the Commissioner to consider.
23. In this case it is the view of the Commissioner that the Council's arguments for the application of regulation 12(4)(d) are vague and do not go beyond largely generic submissions for withholding the disputed information. Arguments, in short, that are not of sufficient detail and depth to demonstrate why the EIR's presumption in favour of disclosure should be overridden.

24. In particular, the Commissioner has not been presented with any cogent arguments that demonstrate how the act of disclosure of the disputed information would have the effect of impeding an audit function. In the Commissioner's view, it is not enough simply to state that the one necessarily leads to the other.
25. In contrast, the Commissioner considers that some weight should be attached to the argument which says that officials carrying out an audit function should be strong enough to carry out their role in the public eye. This, in principle, should help fortify the public's trust in the accountability of the Council.
26. Accordingly, in weighing up the arguments connected to the application of regulation 12(4)(d), the Commissioner considers that a case has not been successfully made by the Council to justify its decision to withhold the requested information. It is on this basis that he finds the public interest favours disclosure.

#### **Regulation 12(4)(e) – internal communications**

27. Regulation 12(4)(e) will be engaged where a request involves the disclosure of internal communications.
28. The Commissioner observes that the disputed information consists of a report produced by the Council's audit department for internal consideration and vetting. He is therefore content that the exception is engaged.

#### **The public interest arguments in favour of disclosure**

29. The Commissioner is satisfied that the same public interest arguments in favour of disclosure apply to the information withheld under regulation 12(4)(d) and regulation 12(4)(e). He has not felt it necessary therefore to recite the same arguments here.

#### **The public interest arguments in favour of maintaining the exception**

30. The Council has argued that disclosure would lead to –
  - the inhibition of officers to provide their views for the purposes of audit functions. This could, in turn, prevent an audit officer being able to establish fair and robust recommendations; and
  - the inhibition of the audit officer to provide free and frank advice and recommendations.
31. Both of these arguments refer to the so-called 'chilling effect' that may arise through the release of information. This describes the idea that

disclosing information relating to a 'live' issue will affect the frankness and candour with which officials consider and discuss 'live' issues in the future.

### **The public interest test**

32. When deciding whether disclosure will have a 'chilling effect', and if so the nature and severity of the 'chilling effect', the Commissioner will be guided by the comments of the Information Tribunal at paragraph 75 of its decision on *The Department for Education and Skills v Information Commissioner* (EA/2006/0006)<sup>2</sup>, at which the Tribunal said –

*"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."*

33. For a 'chilling effect' argument to carry weight, a public authority must be able to demonstrate how the kind of impact being claimed would arise with reference to the particular disclosure being considered. This should overcome the contrary argument which says that knowing that discussions might be subject to future disclosure could actually lead to better quality advice being given.
34. The Council has failed to provide, in the judgement of the Commissioner, any evidence linking the contents of the disputed information to which regulation 12(4)(e) has been applied with the 'chilling effect' that it believes would occur. Consequently, in assessing the arguments both for and against disclosure, the Commissioner has found that the public interest sways in favour of disclosure.
35. In making this finding, the Commissioner is aware that there is a public interest argument inherent in regulation 12(4)(e) which favours the protection of internal decision making processes. However, as he has not received any specific arguments on this point, he considers that there are insufficient grounds to find he should alter his decision.

### **Regulation 12(5)(b) – the course of justice**

36. The exception provided by regulation 12(5)(b) of the EIR has three strands; the course of justice, the ability of a person to obtain a fair trial

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<sup>2</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>

or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The Council has argued that the disclosure of parts of the disputed information would adversely affect its ability to conduct an inquiry.

37. The engagement of the exception is dependent on a public authority being able to identify –

- the exact nature of the inquiry, including the basis upon which the Council has a duty or power to conduct the inquiry; and
- the way in which disclosure would impede the inquiry.

38. The Commissioner considers that information created before the commencement of an investigation may still engage the exception. However, a public authority must be clear about the nature of the inquiry to which the information may form part.

39. It is the Commissioner's view that, despite being prompted, the Council has failed to provide information that satisfies both the conditions listed above. In addition, the Commissioner has viewed the information and can see nothing in it that would lead him to finding, in the absence of arguments from the Council, that the exception is engaged. He has therefore concluded that the exception is not engaged.

### **Regulation 12(5)(c) – intellectual property rights**

40. Under the exception, a public authority may refuse a request for information protected by intellectual property rights. The published guidance<sup>3</sup> of the Commissioner describes intellectual property rights as follows –

*“Intellectual property rights’ are rights granted to creators and owners of works that are the result of human intellectual creativity. These works could be in the industrial, scientific, literary or artistic domain. Intellectual property rights include copyrights, patents, trademarks and protected designs. They may be in the form of, for example, an invention, a manuscript, a suite of software, or a business name. Intellectual property rights have more protection under the EIR than under the FOIA.”*

41. Regulation 12(5)(c) will be found to be engaged where a public authority can; firstly, successfully explain why it considers information is subject

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<sup>3</sup>[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Environmental\\_info\\_reg/Introductory/EIP076\\_GUIDANCE\\_FOR\\_PUB\\_DOC\\_VERSION3.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Introductory/EIP076_GUIDANCE_FOR_PUB_DOC_VERSION3.ashx)



to an intellectual property right and, secondly, demonstrate how disclosure would affect the intellectual property right.

42. The Council has stated that elements of the disputed information refer to another report commissioned by a third party and therefore copyright belonging to the third party in respect of its report similarly extends to the disputed information. It has further argued that the release of the information would adversely affect the Council because the act of disclosure would be in breach of copyright, thereby leaving the Council open to litigation action taken by the third party in which copyright is invested.
43. The Commissioner observes that a report is not necessarily afforded copyright protection upon its creation. Instead, section 1 of the Copyright Designs and Patents Act 1988<sup>4</sup> provides for the types of work that can attract copyright. Although the Council has asserted that the information attracts copyright, it has not explained in detail why it holds this view.
44. Furthermore, the Council has not adequately explained how disclosure would adversely affect intellectual property rights; its arguments focus on the possible repercussions that disclosure would have on the Council itself and not on the intellectual property rights described in the exception. Following on from this observation, the Commissioner is mindful that there is nothing immediately apparent in the disputed information itself which suggests that its release would have such an adverse effect.
45. On the basis that there is insufficient evidence to support a claim to regulation 12(5)(c), the Commissioner has concluded that the exception is not engaged.

### **Regulation 12(5)(e) – confidentiality of commercial or industrial information**

46. The exception provided by regulation 12(5)(e) of the EIR covers information where its release would adversely affect –

*“...the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”*

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<sup>4</sup> <http://www.legislation.gov.uk/ukpga/1988/48/contents>



47. Breaking down the constituent parts of the exception, the Commissioner considers that the disputed information must satisfy the following conditions in order for regulation 12(5)(e) to be engaged –
- The information is commercial or industrial in nature.
  - The information is subject to confidentiality provided by law.
  - The confidentiality is provided to protect a legitimate economic interest.
  - The confidentiality would be adversely affected by disclosure.
48. The Commissioner will normally test each of these conditions in turn when considering the application of the exception.
49. The Council, however, has not provided arguments that address each of these four conditions. Instead, the Council's justification for non-disclosure relies on the apparent assumption that the release of any information relating to breakdowns of pricing and a report commissioned by a contractor was enough to prejudice the commercial interests of that contractor. Also, it is claimed that the release of this information would indicate specific arrangements that may prejudice the Council's commercial position in respect of future negotiations with contractors.
50. The Commissioner believes that the arguments of the Council are too vague to be in any way persuasive, ultimately failing to make a clear link between the disclosure of the information that has been withheld and any adverse affect. In any event, the Commissioner is unable to reconcile even the generic arguments of the Council with much of the contents of the withheld information. As a result, the Commissioner has decided that the exception is not engaged.

### **Regulation 12(5)(f) – voluntary supply of information**

51. Regulation 12(5)(f) allows that information will be excepted information where disclosure would adversely affect the interests of an information provider. The exception covers the interests of a person who:
- supplied information voluntarily,
  - supplied it in the expectation that it would not be disclosed to a third party, and
  - has not consented to disclosure of the information supplied.
52. The Council has argued that the disputed information has been supplied for the purposes of the audit investigation, with an expectation that this information will remain confidential.

53. It is the view of the Commissioner, however, that there is not enough evidence for him to find that the withheld information included in the report was provided in the circumstances described by the exception. In many cases, the Commissioner considers that the contents of the disputed information appear to belie the claim to confidentiality argued by the Council.
54. Yet, even if such evidence had been supplied, the Commissioner considers there is insufficient proof to find that the interests of the information provider would be harmed through disclosure. He has therefore determined that the exception is not engaged.

### **The aggregation of the public interest**

55. Following the approach adopted by the European Court of Justice in *Office of Communications v Information Commissioner* [2011] EUECJ c-71/10<sup>5</sup>, the Commissioner recognises the need to aggregate public interest factors where more than one EIR exception applies. This means that the public interest in disclosure can be overcome by the combined weight of the various exceptions.
56. As outlined above, the Commissioner has determined that regulations 12(4)(d) and 12(4)(e) are engaged, although he has found that the public interest for each when considered in isolation favours disclosure. The Commissioner has therefore gone on to consider the aggregation of the public interest where the exceptions have been applied to the same parts of the disputed information.
57. The Commissioner has recalled that a principal reason for deciding that regulations 12(4)(d) and 12(4)(e) did not apply was the lack of substance and detail in the Council's arguments for withholding the information. Consequently, he does not consider that the aggregation of the public interest could materially affect his decision that the public interest favours disclosure.

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<sup>5</sup><http://curia.europa.eu/juris/document/document.jsf?docid=108326&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1326756>

## Right of appeal

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58. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

59. 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.
60. 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** .....

**Lisa Adshead**  
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