

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

Date: 8 January 2014

Public Authority: Tendring District Council

Address: Town Hall
Station Road
Clacton on Sea
Essex
CO15 1SE

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed transfer of land. Tendring District Council (the "council") refused the request, citing the FOIA exemptions for prejudice to commercial interests and information intended for future publication. During the Commissioner's investigation the council reconsidered the request under the EIR and withheld the information under the exceptions for material in the course of completion (regulation 12(4)(d)) and the confidentiality of commercial information (regulation 12(5)(e)).
2. The Commissioner's decision is that Tendring District Council:
 - Wrongly handled the request under the FOIA and breached regulation 5 and regulation 14 of the EIR;
 - correctly withheld the information under regulation 12(5)(e)
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 27 June 2013, the complainant wrote to Tendring District Council (the "council" and requested information in the following terms:

"Please could you, as a request under the Freedom of Information Act 2000, disclose headline details of the proposed transfer of land off Kirby Road, Walton on the Naze to Tesco and/others?"

5. The council responded on 26 June 2013. It stated that it was refusing to provide the requested information, citing the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
6. Following an internal review the council wrote to the complainant on 6 August 2013. It stated that it was maintaining its decision to refuse the request under section 43(2). The council confirmed that, in refusing the request, it also wished to rely on the exemption for information intended for future publication (section 22 of the FOIA).

Scope of the case

7. On 5 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had handled the request under the correct legislation and whether it was entitled to withhold the requested information.
9. The Commissioner presented the council with his initial view that the requested information was environmental information as defined by regulation 2(1) of the EIR. The Commissioner invited the council to reconsider the request under the EIR.
10. The council agreed with the Commissioner's initial view and confirmed that it now wished to withhold the requested information under the EIR exceptions for material in the course of completion (regulation 12(4)(d)) and the confidentiality of commercial information (regulation 12(5)(e)).
11. The Commissioner has considered whether the council has correctly withheld the information under the EIR.

Reasons for decision

Is it Environmental Information?

12. The Commissioner has considered whether the council correctly handled the request under the FOIA or whether the requested information constitutes environmental information as defined by the EIR.

13. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'

14. The Commissioner considers 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 enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
15. The Commissioner notes that the withheld information relates to decisions regarding the proposed disposal of land for possible development. He has considered whether this information can be classed as environmental information, as defined in Regulation 2(1)(a)-(f), and he has concluded that it can for the reasons given below.
16. In this case the subject matter of the withheld information relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
17. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as 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").
18. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA.

19. During the course of his investigation the Commissioner invited the council to reconsider the request under the EIR. The council agreed to do this and confirmed that it considered that the requested information should be withheld under the exceptions for material in the course of completion (regulation 12(4)(d)) and the confidentiality of commercial information (regulation 12(5)(e)). The Commissioner has gone onto consider whether the council has correctly withheld the requested information.

Regulation 14 – refusal to disclose information

20. 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.
21. In these circumstances the Commissioner believes that it is appropriate for him to find that the council breached regulation 14(1) of EIR which requires that 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 because the council actually dealt with the request under FOIA.

Regulation 12(5)(e) – confidentiality of commercial information

22. Information is exempt on the basis of regulation 12(5)(e) if 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. Therefore, in order to engage the exception, the following four requirements must be met:
- The information is commercial or industrial in nature,
 - Confidentiality is provided by law,
 - The confidentiality is protecting a legitimate economic interest, and
 - The confidentiality would be adversely affected by disclosure.

Is the disputed information commercial or industrial in nature?

23. This exception only protects the confidentiality of “commercial or industrial” information.

24. For information to be commercial in nature it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
25. In this instance, the withheld information relates to the council's intention to dispose of its land, a process involving negotiation with parties to ensure the best price is obtained. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information relates to a commercial transaction, namely the sale of land. This element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

26. "Confidentiality" in the context of this exception means a duty of confidence imposed on any person by the common law of confidence, contractual obligation or statute.
27. In contrast to the "information provided in confidence" exemption provided by section 41 of the FOIA, under regulation 12(5)(e), there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party or information created by the public authority itself.

Common law of confidence

28. In order for information to be subject to the common law of confidence it must have the necessary quality of confidence, that is, it must not be trivial in nature and it must only have been shared with a limited number of people.
29. The council has explained that the information in question relates to details for the prospective sale of council land. In selling the land, the council has a legal obligation to ensure that section 123 of the Local Government Act 1972 is met, namely, that it achieves the best price obtainable.
30. The council has confirmed that its negotiations with the prospective land purchaser have been conducted on a "subject to contract" and "without prejudice" basis. Negotiations have proceeded on the basis that parties have full and open discussions with a view to meeting an agreement in a confidential environment.
31. The council confirmed to the Commissioner that that the information has not been publicly disclosed and its dissemination within the council has been restricted.

32. Having considered the council's submissions and the withheld information itself, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

The confidentiality is protecting a legitimate economic interest

33. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the party that confidentiality protects.

Whose interests?

34. The Commissioner considers that legitimate economic interests relate to, amongst others, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage or avoiding disclosures which would otherwise result in loss of revenue or income.
35. The council has confirmed that confidentiality in this case is designed to protect its own interests and its statutory duty to obtain best price consideration.
36. The council has argued that its ability to negotiate the best price, in respect of the specific piece of land but also future market value negotiations are likely to be impacted upon by disclosure. Should the information be released, the council would be under significant risk of not achieving best value for the land.
37. The council has stated that, in addition to achieving best price consideration, its reputation and ability to maintain a strong negotiating position would be significantly impacted upon if potential purchasers were aware that, even when negotiating subject to contract, the council is willing to disclose headline terms prior to completion.
38. The council has explained that, until the terms of the land sale are agreed, the transfer is completed and the contracts signed there is no commitment for either party to complete the sale. Disclosure prior to these matters being finalised creates a high risk that the sale of land could fall through with the potential purchaser walking away from the sale.
39. The council confirmed that it consulted with the third party about the request to disclose the information and, whilst it did not provide consent for disclosure, it did not provide any evidence of any harm to its own interests. The council's arguments have, therefore, focussed on harm to its own economic interests.

40. The council has confirmed that it considers that, should the terms currently being negotiated be disclosed, the third party could withdraw from the transaction to acquire the land from the council or seek to reduce the price being sought, harming the council's ability to achieve best value in disposing of its assets.
41. In view of the above, the Commissioner accepts that the confidentiality in this case is protecting the legitimate economic interests of the council, as disclosure of the information would harm its ability to negotiate best value in disposing of its land assets.

The confidentiality would be adversely affected by disclosure.

42. As the Commissioner has found that the confidentiality of the information is required to protect the council's legitimate economic interests, he also accepts that the confidentiality would be adversely affected by the disclosure of this information.
43. Regulation 12(5)(e) is subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.

The Public Interest Test

Public interest in disclosing the information

44. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
45. In this instance the Commissioner notes that the requested information relates to the sale of council land. There is a public interest in transparency in relation to the sale of public assets and disclosure would enable the public to see that the council is securing best value and acting in the best interests of the public purse.

Public interest in maintaining the exception

46. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.

47. In this case the council has argued that, at the time of the request (and currently), it was in a strong negotiating position in relation to the sale of the land. It has stated that it is under a fiduciary duty to protect public money and disclosure at this time would damage its negotiating position and adversely affect its ability to secure best value.
48. The council has further argued that, once the terms of the sale have been agreed, the public interest will be served by the details being made available via the Land Registry.
49. The Commissioner considers that there is a strong public interest in maintaining the confidentiality of information which reveals a party's bargaining position during ongoing negotiations. The council has confirmed that, until the sale is completed, parties will not be exchanging contracts and, at any time before completion, neither party is committed to complete the sale. The council contends that disclosure of the information before negotiations have ceased will damage trust between the council and the third party.
50. The Commissioner further considers that, in view of the provisional nature of the current headline terms, disclosure of the information at this time would not serve the public interest in knowing how much the council has obtained for the disposal of a public asset. Disclosure at this stage in the negotiations, in addition to having a negative impact on the council's bargaining position would only serve to reveal intermediary total and conditions, information which would not provide a complete or accurate picture of the transaction.

Balance of the public interest

51. In weighing the balance of the public interest, the Commissioner has given due weight to the inbuilt presumption in favour of disclosure which the EIR provides. He also recognises that there is a particular public interest in promoting public understanding and (potential) public participation in planning matters. The Commissioner considers that these factors are particularly important where information relates to the disposal of public assets.
52. However, the Commissioner is mindful that the timing of the disclosure of information is an important public interest consideration, particularly where commercial negotiations are involved. A balance has to be struck between how transparent a public authority can be about its commercial dealings before such transparency begins to actually undermine the public interest, given the harm that such disclosures can cause to a public authority's economic interests.

53. The complainant has asked the Commissioner to consider the time that has elapsed since the request was made and any resulting impact this has had on the sensitivity of the information and the balance of the public interest. However, the Commissioner is only able to reach a decision based on the circumstances at the time a request was received so he has not considered this further.
54. The Commissioner recognises the value of providing the public with information in order that it can have a greater understanding of council decisions which will affect the area and the environment around it. Although the requested information would help to formulate and inform individuals' opinions about the proposed sale it is not absolutely necessary in order to understand the central aspects of the sale, what impact to the environment may occur and what the benefits of the proposed sale might be.
55. Based on the facts of this case the Commissioner does not see that there is a specific public interest in accessing the information which would justify the damage which disclosure would do to the process it illuminates.
56. In view of the likely damage which disclosure of the information would cause to the council's legitimate economic interests and, taking into account the significance of the timing of the request, the Commissioner considers that the balance of the public interest favours maintaining the exception.
57. As he has concluded that the council has correctly applied regulation 12(5)(e) to the requested information the Commissioner has not gone on to consider the council's application of regulation 12(4)(d) in this case.

Right of appeal

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: GRC@hmcts.gsi.gov.uk

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

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

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