

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 September 2015

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham

Decision (including any steps ordered)

1. The complainant has requested copies of the complete correspondence that Birmingham City Council received from the China Railways Group Limited in respect of the HS2 rail proposals.
2. The Commissioner's decision is that Birmingham City Council has properly applied Regulation 12(5)(e) to the information which the complainant seeks and it is therefore entitled to withhold that information.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 11 January 2014, the complainant wrote to Birmingham City Council requested information in the following terms:

"Chinese Rail Company correspondence relating to HS2

I note the article in the Wolverhampton Express and Star at this link.

<http://www.expressandstar.com/news/2014/01/09/we-will-only-back-hs2-if-city-benefits/>

I note that the city council has received correspondence from the China Railway Group in respect of the Hs2 rail proposals.

Under the provisions of the environmental information regulations, please provide all the information in this regard that is included in communications to and from the china railway group."

5. The Council acknowledged the complainant's request on 7 February 2014. The Council referred to a letter from the China Rail Group Limited ("the CRGL") and confirmed that the letter contained information relating to 'other proposed investment projects other than HS2'. Consequently, the Council advised the complainant that the information would fall outside the scope of his request.
6. Notwithstanding this, the Council also advised the complainant that, under regulation 12(5)(e) of the EIR, the Council is entitled to withhold 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. The Council informed the complainant that the information it holds is subject to the terms of a confidentiality agreement.
7. The Council also considered that the correspondence from the CRGL amounts to information that would attract the exception to disclosure provided by Regulation 12(5)(f), where disclosure of the information would adversely affect the interests of the person who provided the information where that person was not under any legal obligation to supply it; where it was supplied where there are no circumstances that would require the Council to disclose it, other than under the EIR; and, that the provider of the information had not consented to its disclosure.
8. The Council informed the complainant of its intention to consult with its solicitors and seek the views of the CRGL to determine what information can and cannot be disclosed.
9. The complainant wrote to the Council again on 8 February. He asserted that HS2, if it proceeds, is likely to result in substantial emissions and therefore the provisions of Regulation 12(9) would mean that the Council could not rely on Regulations 12(5)(e) and 12(5)(f), and consequently the information he seeks should be published.
10. On 10 February 2014 the Council wrote to the complainant to advise him that it was considering the public interest concerning the information he had requested. The Council advised the complainant that it would send its response to his request on 7 March 2014.
11. On 18 March 2014 the Council made its formal response to the complainant. The Council advised the complainant that it had not received any correspondence from the CRGL in respect of the proposed HS2 railway. It did however confirm that it holds a letter from the CRGL

which expressed its interest in being involved in a variety of rail infrastructure projects, including the proposal to build a branch line linking stations serving the proposed HS2 route.

12. The Council confirmed that it had consulted CRGL and that it had done so following the Court of Appeal decision in *Veolia v Nottinghamshire County Council*¹. The Council informed the complainant that it was withholding the information he seeks in reliance on Regulation 12(5)(f). The Council stated that the requested information is a 'speculative, unprompted letter from CRGL to the Council and that CRGL had refused to give consent for its disclosure.
13. The complainant responded to the Council's position on 22 March 2014 and asked it to review its handling of his request. In his email, the complainant made a second request for information².
14. On 24 March 2014, the Council acknowledged the complainant's request for an internal review.
15. The Council completed its internal review and informed the complainant of its final decision on 30 April 2014. The Council again confirmed that it held a letter from the CRGL and also confirmed that Regulation 12(5)(f) had been correctly applied. The Council also considered that the CRGL letter fell outside of the complainant's request.

Scope of the case

16. The complainant contacted the Commissioner on 15 March 2015 to complain about the way his request for information had been handled.
17. The Commissioner has investigated the Council's handling of the complainant's request and particularly the Council's reliance on Regulations 12(5)(e) and 12(5)(f) to withhold the information which the complainant seeks. This notice sets out the Commissioner's decision.

¹ *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Ors* [2010] EWCA Civ 1214 (29 October 2010).

² The Commissioner has considered the complainant's second request in his Decision Notice under reference FER0579698.

Reasons for decision

Is the requested information 'environmental information'?

18. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(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 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.'

19. 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.
20. In the Commissioner's opinion the information sought by the complainant can be considered as being environmental information: the information relates to the landscape – the possible development a branch railway line running to Birmingham International Airport. The information therefore falls to be considered under the EIR.
21. Having reviewed the withheld information the Commissioner is satisfied that Regulation 12(9) does not apply to it. This is contrary to the assertion made by the complainant.
22. The Commissioner adopts a narrow interpretation of Regulation 12(9) and restricts this to information that is 'on emissions', either current or in the future. In the Commissioner's opinion Regulation 12(9) does not apply to information that is only indirectly on emissions or where, as in this case, the information concerns a company's proposals which may result in possible and unidentified emissions.

Regulation 12(5)(e) – prejudice to the confidentiality of commercial information

23. 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.
24. When assessing whether this exception is engaged the Commissioner will consider the following points:
 - 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?

Is the information commercial or industrial in nature?

25. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
26. The Council considers that the information is of a commercial nature as it relates to a commercial activity – namely development of a branch line to Birmingham International Airport.
27. The Council has advised the Commissioner that the letter it received from the CRGL is an initial sounding concerning a development proposal.
28. The Council considers that the exclusivity and control of the information contained in the submission, which encapsulates and summarises the outline of the proposal, are valuable assets.
29. The CRGL, having invested time and resources in its proposal, would be adversely affected if the information contained in its letter was subjected to disclosure to the world at large. Specifically, the CRGL would lose its investment in the development of its exclusive proposal: Its competitors would be alerted to the opportunity it had identified and would be able to do so at a stage when the CRGL had not been able to 'lock down' the proposal and reduce the impact of its rivals from hijacking it.
30. The Commissioner accepts that the information is commercial in nature: It relates to the Council's business activities and those of the CRGL. The

proposal put forward by the CRGL has clear commercial implications for both the Council and the CRGL.

Is the information subject to confidentiality provided by law?

31. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law; including where the confidentiality is imposed under a common law duty of confidence, by a contractual obligation or by statutory provision.
32. The Council asserts that the CRGL letter was sent on the basis that it would be treated in confidence. It believes that the CRGL will have undertaken a considerable amount of work and expended sizable resources in the development of its proposal in order to be able to discuss it with the Council.
33. In the case of the CRGL letter, the Council consider that the common law of confidentiality applies. The Council maintains that the letter has sufficient value to warrant protection as confidential material; it contains information which is not in the public domain and it was provided by a third party – the CRGL.
34. The Council maintains its position that proposed projects and investment plans are treated in confidence. Such confidentiality is provided explicitly or implied under the common law understanding of confidentiality.
35. Taking this into account the Commissioner is satisfied there is a duty of confidence associated with the information sought by the complainant. He is further satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

36. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
37. The Council has argued that it is both its own commercial interests that would be prejudiced by disclosure as well as those of the potential developer – the CRGL.
38. Under the EIR the test is whether the confidentiality is designed to protect the legitimate economic interests of the person(s) who the confidentiality is designed to protect.

39. On the basis of the Council's submissions, the Commission is satisfied that the confidentiality of the information sought by the complainant is required to protect the economic interests of both the Council and the CRGL.
40. The Commissioner has taken in account the current on-going nature the HS2 scheme and the ancillary proposals, such as this one, which are associated with that scheme. This consideration leads the Commissioner to find that the sensitivity of the information sought by the complainant remains high.
41. The Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact on the Council's and the CRGL's commercial interests.
42. He finds that disclosure of the requested information would adversely affect the Council's ability to benefit from inward investment.
43. The possible detriment to the Council could adversely affect the Council's tax paying constituents and therefore the Commissioner accepts that disclosure of the withheld information would prejudice the commercial interests of the Council.
44. Likewise, the Commissioner finds that disclosure could adversely affect the CRGL's ability to approach a public authority to outline a development proposal without losing a valuable asset and with the prospect of its proposal being acquired by others.
45. In consideration of the above, the Commissioner is satisfied that a disclosure of the CRGL letter would likely have adverse effects on the interests of the CRGL. The Commissioner is therefore satisfied that all of the criteria for Regulation 12(5)(e) have been met by the Council. The Commissioner finds that confidentiality is required to protect these legitimate economic interests.

Would confidentiality be adversely affected by disclosure?

46. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the Council and the CRGL. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information.
47. The Commissioner is now required to carry out a public interest test to determine whether the letter should be disclosed. This test is required by Regulation 12(1) and the Commissioner is required to determine

whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed: If it does not then the information should be disclosed in spite of the exception being engaged.

48. Regulation 12(2) also provides a specific presumption in favour of the information being disclosed.

The public interest test

Arguments which favour disclosure of the withheld information

49. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in their understanding of how public authorities make their decisions and in turn fosters trust in public authorities. In many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.
50. In this case, the Council recognises that disclosure of the CRGL letter would promote transparency concerning the approach made to it by the CRGL.
51. The Council is mindful of the overarching objectives of the Aarhus Convention of June 1998, from which the EIR derive. The Council accepts that in order to participate in decision-making and to have access to justice in environmental matters, citizens must have access to information in order to exercise their rights. The Council recognises that access to environmental information provides the public the opportunity to express its concerns and enables the Council to consider those concerns. Further accountability and transparency in decision-making helps strengthen public support for decisions in matters concerning the environment.

Arguments in favour of withholding the requested information

52. In this case the Council points out that no decision has been made in respect of the CRGL proposal. This was even more the case when the complainant made his request and therefore the Council asserts that the public interest in favour of disclosure must be significantly tempered.
53. The Council believes that, should the CRGL proposal progress to formal consideration, there would be requirements for either a planning enquiry and/or a public enquiry: At that point, the Councils accept that there would be greater and more compelling reasons for the appropriate planning proposals to be made public. That necessary and appropriate disclosure of information, being part of the formal planning process,

would allow the public to have its involvement in the decision-making process at the appropriate juncture.

54. The Council considers that disclosure of the CRGL letter at the time the complainant made his request would expose the Council to inappropriate public scrutiny. Such scrutiny would hinder the Council's ability to consider the CRGL's proposal, and where appropriate, to seek further information to help the CRGL to refine its proposal to make it suitable.
55. The Council fears that placing commercially sensitive information into the public domain, without taking into account the impact of disclosure on the CRGL, would result in the CRGL being less likely to freely provide similar information in the future. The Council believes this would adversely affect its ability to secure inward investment into the City from outside the Country: Essentially, significantly diminishing the 'safe space' the Council enjoys, which allows it to consult with companies to ensure that their proposals better fit the requirements of the City Of Birmingham and the surrounding area.
56. The CRGL sent the Council its letter before it was able to lock down sources of finance and external advisors. Consequently the Council considers that the premature disclosure of the CRGL letter would be detrimental to the company's negotiating position and may assist its competitors to unfairly compete with its proposal. It considers that there is a strong public interest in preventing others from obtaining a developer's expertise, or expertise which it has paid for, for free.
57. The Council has advised the Commissioner that the CRGL had instructed its experts to work on its proposal before the approach was made to the Council. The Council accepts that some information relating to the CRGL proposal was leaked to the public by persons unknown to it. Nevertheless the Council maintains the position that disclosure of the letter in full would be of detriment to the CRGL because it contains an outline of the company's proposal.

Conclusions

58. At the time of the request no formal planning application had been submitted in respect of the CRGL's proposal and such an application would need to be based on formal, fully considered proposals rather than the speculative approach which the CRGL made.
59. The early stage of the CRGL's approach and the on-going nature of the HR2 and ancillary proposals must be given significant weight and the Commissioner must give weight to the commercial value of the advance which the CRGL made.

60. When weighing the need for transparency and accountability against these factors, the Commissioner finds that greater weight rests with the factors which favour the Council's continue withholding of the information requested by the complainant.
61. The Commissioner's decision is therefore that the Council is entitled to rely on Regulation 12(5)(f) to withhold the requested information on the grounds that the public interest arguments favouring the exception outweigh the public interest in the information being disclosed.
62. In view of the Commissioner's conclusion above, it is not necessary for him to consider the Council's additional reliance on Regulation 12(5)(f).

Right of appeal

63. 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@hmcts.gsi.gov.uk

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

64. 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.
65. 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

Andrew White
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