

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

Decision notice

Date: 27 July 2015

Public Authority: Nottingham City Council
Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision (including any steps ordered)

1. The complainant has requested a copy of an agreement between Nottingham City Council and Nottingham Forest Football Club in the Community regarding the operation of a sports zone. Nottingham City Council disclosed some information but withheld other information under the exception for adverse affect to the confidentiality of commercial information (regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Nottingham City Council:
 - wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 and,
 - failed to demonstrate that the exception in regulation 12(5)(e) was engaged.
3. The Commissioner requires the public authority to disclose the information withheld under regulation 12(5)(e).
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 22 September 2014 the complainant wrote to Nottingham City Council (the "council") and requested information in the following terms:

"I understand that you are dealing with the matter of the arrangement made to give the running of the Sports Zone on the Forest to the Nottingham Forest Football Club Community Trust....Can you please send me a copy..."

6. The council responded on 27 November 2014 and provided a copy of the requested information (the "agreement"). Parts of the agreement were withheld under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
7. Following an internal review the council wrote to the complainant on 22 January 2015. It stated that it was maintaining its original position.

Scope of the case

8. On 24 March 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld some of the requested information.
10. At the outset of his investigation the Commissioner advised the council that, in view of the nature of the requested information, his initial view was that the information constituted environmental information as defined by regulation 2(1) of the EIR. He, therefore, invited the council to reconsider the request under the EIR. The council agreed with the Commissioner's position and issued a new response to the complainant under the EIR.
11. In this new response (issued 29 June 2015) the council confirmed that the information formerly withheld under section 43(2) of the FOIA was now being withheld under regulation 12(5)(e) of the EIR – the exception for adverse affect to the confidentiality of commercial information.
12. The Commissioner has considered whether the council has correctly applied the exception.

Reasons for decision

Is it Environmental Information?

13. At the outset of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR. The Commissioner has set down below his reasoning in this matter.
14. 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...'*
15. 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.
16. The Commissioner notes that the requested information relates to the management of and use of land. 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.
17. 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.

18. 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").
19. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

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.
22. As the council addressed this failing during the course of his investigation the Commissioner does not require to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

23. The council has withheld details of financial arrangements between itself and Nottingham Forest Football in the Community (NFFITC) and information relating to NFFITC's associated business and development plans.
24. 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".
25. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He

has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

26. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
27. The withheld information in this case relates to a business proposal submitted by Nottingham Forest Football in the Community in relation to the operation of the Forest Sports Zone (the "zone"), part of The Forest Recreation Ground which is owned by the council.
28. 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 provision of a service. This element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

29. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
30. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
31. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in

confidence, then this should suffice to impose upon him an equitable obligation of confidence."¹

32. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.
33. In applying the 'reasonable person' test the Tribunal stated:
34. *"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence) apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing."*²
35. The Commissioner notes that, in this case, the withheld information forms part of an agreement between the council and NFFITC. The information is not trivial and the council has confirmed that it is not in the public domain.
36. In relation to the 'reasonable person' test, another relevant question is whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that this can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
37. The Commissioner considers that, where information relates to the management of land as a commercial proposition, particularly where such processes are incomplete, it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the

¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, the Commissioner is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

38. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
39. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
40. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

41. The council has argued that disclosure of the withheld information *would be likely to prejudice* the commercial interests of NFFITC. The council has advanced arguments which explain the envisaged harm which might result from disclosure of the various elements of the withheld information.
42. In relation to details of financial arrangements between the council and NFFITC, the council has stated that disclosure of this information would result in damage to NFFITC's ability to negotiate best arrangements in other similar future contracts or place them at a disadvantage with potential competitors in future competitive exercises. The council has also argued that the disclosure of details of NFFITC's working practices could mean that competitors would gain an unfair advantage in similar future bids.
43. As noted above, in order for the exception to be engaged, it needs to be shown that any harm resulting from disclosure would be more probable than not to occur.
44. In submitting its argument to the Commissioner the council has not provided any explanation of how disclosure of specific information would

result in the ascribed damage. The Commissioner considers that the argument provided is generic in nature and does not show that a specific outcome would be more probable than not to occur as a result of specific information being disclosed. The Commissioner notes that even the wording used by the council signals the highly speculative nature of its arguments, with "could", "may" and "would be likely" appearing as qualifiers regarding the likelihood of any putative harm.

45. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. In this case, the Commissioner considers that the council has failed to do this.
46. The council has also argued that there is potential for disclosure of the information to harm its own commercial interests. The council has argued that disclosure of the information could well lead to a loss of confidence in the council's ability to maintain confidences, thereby impacting the number of potential bidders for such projects.
47. In relation to this "chilling effect" category of argument, the council has not provided any specific evidence or further arguments which give any weight to such speculation.
48. The Commissioner notes that the code of practice issued under regulation 16 of the EIR (the "EIR code") advises public authorities "...should refuse to include contractual terms that purport to restrict the disclosure of environmental information held by the authority and relating to the contract beyond the restrictions permitted by the EIR."³
49. The Commissioner considers that authorities should make it known to third parties that any information provided to it is subject to the EIR and might be disclosed in response to a request, unless it can be shown that a specific exception to disclosure is relevant.
50. Furthermore, the Commissioner considers it unlikely that disclosure would deter third parties from submitting bids for potentially lucrative public sector contracts. In view of these considerations the

³ Paragraph 46 of the EIR code: https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Commissioner considers that the council's arguments in relation to harm to its own commercial interests do not carry sufficient weight to engage the exception.

51. In order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. The Commissioner considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information.
52. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that he has a duty to generate arguments on its behalf.
53. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

54. 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

55. 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.
56. 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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