

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: X

Public Authority: Manchester City Council
Address: Town Hall
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested information relating to pre-application planning advice. Manchester City Council withheld the information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that Manchester City Council has failed to demonstrate that regulation 12(5)(e) and regulation 12(5)(f) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.
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 7 May 2016, the complainant wrote to Manchester City Council (the "council") and requested information in the following terms:

"(In relation to Godfrey Ermen Fields)

1. Has a pre-planning meetings been held in relation to any planning application for this site, or has pre-planning advice of any other form been given? What advice was given?

2. Has the council's position changed with respect to section GO15 of the UDP for Gorton North and South or can we be assured that the Council will continue to protect this recreational space?"

6. The council responded on 19 May 2016 and, in relation to request part 1, stated that the information was not held. It also provided a response to part 2 of the request.
7. Following an internal review the council wrote to the complainant on 20 June 2016. It revised its position, confirming that it did hold the pre application advice specified in part 1 of the request and stating that the information was being withheld under regulation 12(5)(e) of the EIR.

Scope of the case

8. On 30 June 2016 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 her investigation would consider whether the council had correctly withheld the requested information.
10. During the course of the Commissioner's investigation the council confirmed that it was also applying the exception for adverse affects to the information provider (regulation 12(5)(f)) to the requested information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. The council has withheld the pre-application planning advice under regulation 12(5)(e).
12. Regulation 12(5)(e) 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”.
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

14. 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.
15. The council has stated that the withheld information relates to the possible development of land, involving significant economic expenditure in relation to land acquisition and a planning submission.
16. Having considered the council’s submissions and the withheld information the Commissioner has concluded that the information is commercial in nature and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

17. 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.
18. 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.
19. The Commissioner considers that confidence 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.
20. The council has stated that it was made clear at the time that the planning advice was submitted that there was an expectation that the information would not be disclosed.
21. The Commissioner notes that the information is not trivial in nature and understands that it has not been placed in the public domain.
22. Having considered the nature of the information and the council's submissions, in the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this stage of the test is met.

Is the confidentiality provided to protect a legitimate economic interest?

23. 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.
24. 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.
25. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".

26. In this case the council has argued that the confidentiality is designed to protect the legitimate economic interests of the applicant seeking pre application advice. The council has stated that disclosure of the information:

"...could have created an unfair commercial environment for the developer. Other possible developers and competitors could have used the withheld information to gain an unfair advantage and this would be contrary to the developer's interest in an open and competitive market in this particular instance."

27. Following the Information Tribunal decision in *Derry City Council v Information Commissioner* (EA/2006/0014; 11 December 2006), if a public authority believes that by responding to a FOIA or EIR request it will prejudice the commercial interests of a third party, then it should when necessary (for example to determine whether or not an exception applies) and wherever possible consult the third party for its view. The Commissioner considers that a public authority must not speculate as to whether there is any commercial detriment and the reasons why without any evidence or input from the third party.
28. In this case, the council has not provided the Commissioner with any evidence that it consulted with the relevant third party whose interests the exception (in this case) has been applied to protect.
29. The Commissioner notes that the council considers that disclosure "could" create an "unfair commercial environment", however, in order for the exception to be engaged it must be shown that some harm *would* result from disclosure. Aside from this semantic shortcoming the Commissioner considers that the harm identified by the council is vague and has not been linked to any specific elements of the withheld information. In the Commissioner's view, therefore, the council's arguments are highly speculative and do not meet the threshold required for the engagement of the exception.
30. The Commissioner has also considered an argument presented by the council at the internal review stage. This states:
- "A formal planning application has now been submitted. It appears to me that disclosure would adversely affect the developer's legitimate economic interest by drawing public attention to information that is out of date and causing it to be used in relation to the current planning application when it is no longer relevant. The formal planning process*

provides an opportunity for interested parties to comment on the application as it is. The non disclosure of the advice would not affect this process."

31. The Commissioner acknowledges that there is scope for disclosure to result in some confusion, particularly where there are divergences between the terms set out in the pre planning advice and those in the formal planning application. However, this does not in itself describe an adverse affect to the developer's legitimate economic interests, nor does the council explain the causal sequence which would result in a specified effect.
32. Having considered all the arguments provided by the council the Commissioner has concluded that it has not been shown that disclosure of the withheld information would result in harm to the developer's legitimate economic interests. She considers that a case might have been made for withholding the information but the nature of the arguments submitted by the council do not make this case. She also notes that the council has not provided evidence that it consulted with and sought the developer's views in relation to the disclosure of the information and any potential adverse effects. The Commissioner considers that this adds weight to her conclusion that the arguments presented are highly speculative in nature.
33. As the Commissioner has found that the confidentiality in this case does not protect a legitimate economics interest it follows that the confidentiality in this case would not be affected by disclosure. As she has concluded that the exception is not engaged the Commissioner has not gone on to consider the public interest.

Regulation 12(5)(f) – interests of the person who provided information to the public authority

34. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

35. The purpose of the exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. The Information Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273, 25 April 2012) considered that the exception can be broken down into the following five-stage test:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?
- In all the circumstances, does the public interest in maintaining the exception outweigh the public interest?

36. With regard to the first stage of the test, the Commissioner's guidance on regulation 12(5)(f) explains that the threshold necessary to justify non-disclosure, because of an adverse effect, is a high one¹. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

37. The Commissioner's guidance goes on to state that in considering whether there would be an adverse effect in this context, a public authority needs to identify harm to the third party's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause the harm. There is no requirement for the adverse effect to be significant, as the nature and severity of the harm will be reflected in the consideration of the public interest test. The public authority must, however, be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.

¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

38. In relation to this first stage of the test, the council has argued that disclosure would adversely affect the developer's interests in the following ways:

- The advice being sought was bespoke to the site in question and disclosure would give competitors a commercial advantage.
- Disclosure would, in all likelihood, result in objections being raised which would not necessarily have been based on the final application plans and which would act against the developer's interests. Being faced with significant objections the developer could have decided to delay an application resulting in costs being incurred.

39. In relation to the commercial advantages it is suggested that disclosure would give to competitors, the Commissioner notes that the council has not defined what form these advantages would take, nor has it clarified the specific nature of the competition. As the Commissioner found when addressing an equivalent argument provided by the council in its regulation 12(5)(e) submissions (see above), the potential effects alluded to by the council are not made sufficiently concrete and the likelihood of the effects occurring has not been demonstrated.

40. In relation to the possibility of disclosure resulting in objections being made and this, in turn, possibly resulting in the developer delaying an application, the Commissioner is unconvinced by the scenario presented by the council. Firstly, the chain of consequences presented is predicated on a number of speculative factors coming into play and secondly, the council has not set out the context within which objections would be submitted.

41. In relation to this latter point, the Commissioner is mindful that objections can be submitted as part of the formal planning application process so the same scenario might arise in that arena. As prospective applicants would be subjected to the same risks when engaging in the planning application process it is unclear why disclosure of pre application advice would result in objections which in turn would compel a developer to delay or cancel an application. The Commissioner considers that the council has not sufficiently explained what it is about the nature of pre planning application advice in general or, specifically, the withheld information, that disclosing it would result in this specific sequence of events.

42. Further to the above and, as noted earlier in this decision notice, the Commissioner has not been provided with any evidence that the council consulted with the developer when considering the request. In general, the Commissioner is less likely to accept arguments about the potential effects of disclosure on a party where the views of the party in question have not been sought. This is because any such arguments are likely to be speculative and not necessarily reflective of a party's concerns or position. In this specific instance the Commissioner considers that the arguments provided by the council do not sufficiently describe the adverse effects to the interests of the developer and do not explain why disclosure would directly cause such adverse effects.
43. In cases where an authority has failed to provide adequate arguments to engage an exception the Commissioner does not consider it her duty to formulate arguments on its behalf. On the basis of the submissions made by the council the Commissioner has, therefore, concluded that it has failed to demonstrate that disclosure of the information would adversely affect the interests of the developer.
44. As this stage of the test is integral to the operation of the exception the Commissioner has concluded that the council has failed to show that the exception is engaged. She has not, therefore, gone on to consider the public interest test.

Right of appeal

45. 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

46. 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.
47. 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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