

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

Date: 26 March 2018

Public Authority: North Lincolnshire Council

Address: customerservice@northlincs.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information relating to the potential use of land at Ferriby Road, colloquially known as Top Field. North Lincolnshire Council disclosed some information and withheld other information under the exemption for commercial interests – section 43(2) of the FOIA. Following the Commissioner’s involvement the council disclosed further information and reconsidered the request under the EIR, withholding information under the exceptions for material in the course of completion (regulation 12(4)(d)) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner’s decision is that North Lincolnshire Council:
 - wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) of the EIR,
 - failed to demonstrate that the public interest in maintaining regulation 12(4)(d) outweighed the public interest in disclosure
 - failed to demonstrate that regulation 12(5)(e) was engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld 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 9 June 2017, the complainant wrote to North Lincolnshire Council (the "council") and requested information in the following terms:

Following our conference with Counsel in relation to proposed action concerning the land at Ferriby Road colloquially known as Top Field (upon which subject we have corresponded previously) we now have the following FOI requests.

- 1. A copy of the subject to contract agreement (whether in one document or correspondence) between Lidl UK GmbH and NLC in respect of purchase of Top Field in respect of which I undertake that I will not put in or cause it to be put in the public domain and which you may redact so far as the price is concerned. This is specific and not part of a previous request for general communication.*
 - 2. A copy of the decision (believed to be by Councillor J Briggs) to offer Top Field for sale by tender. (we have already asked Councillor Briggs without the document being produced)*
 - 3. A copy of the decision which was made (by elected representative or delegated together with a copy of that delegation) to sign or otherwise authorise the signing of the subject to contract agreement."*
6. The council responded on 7 July 2017. It disclosed some information in relation to parts 2 and 3 of the request and withheld the information in part 1 of the request under the exemption for commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 4 September 2017. It stated that it was maintaining its position.

Scope of the case

8. On 6 September 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the council disclosed further information to the complainant and, at the Commissioner's direction, reconsidered the request under the EIR. The council confirmed that it was withholding elements of the information from part 1 and 2 of the request under the exception for commercial confidentiality – regulation 12(5)(e). It also confirmed that it was withholding some of the information under regulation 12(5)(d) – the exception material in the course of completion, unfinished documents and incomplete data.

10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld information under exceptions.

Reasons for decision

Is it Environmental Information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. 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...'

13. 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.
14. In this case the withheld information relates to the purchase of and use of land. 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").

15. 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. As the council corrected this during her investigation, the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

16. 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.
17. In these circumstances the Commissioner believes that it is appropriate 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.
18. As the council subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

19. The council disclosed some of the requested information in a redacted form, withholding the information under regulation 12(5)(e). The documents in question are:
 - Draft Contract between the council and Lidl UK GmbH ("Lidl")
 - Property Transaction Schedule Report – 10 August 2016
 - Appendix 3 to the Property Transaction Schedule Feb 2016 Disposal Programme
 - Property Trading Account Rolling Plan – 03 March 2016

20. 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".
21. 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?
22. The Commissioner has considered whether the withheld information satisfies the conditions above.

Is the information commercial or industrial in nature?

23. 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.
24. The withheld information is associated with the sale of land and the Commissioner is, therefore, satisfied that it relates to a commercial activity.

Is the information subject to confidentiality provided by law?

25. 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.
26. 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.

27. 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.
28. The council has provided no detailed submissions in relation to this condition. The Commissioner is mindful that the information relates to the potential disposal and use of land and accepts that, prior to the finalising of any negotiations in these respects, there would be an expectation that information would be subject to an obligation of confidence.
29. Whilst the Commissioner considers that it should be for public authorities to make the case in these respects, in light of previous decision notices which have addressed equivalent scenarios involving non-trivial information, she accepts that, in this case, this condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

30. The council has stated that the information is commercially sensitive, because it is still in negotiations with Lidl, and that disclosure would be likely to harm its own legitimate economic interests and those of Lidl.
31. As regards the engagement of the exception, the council did not provide any submissions in relation to the specific adverse effects that disclosure would cause, however, in its consideration of the public interest it stated that disclosure would result in:

"...likely harm to legitimate economic interests of either the council or Lidl. The harm would be likely to arise because details of the negotiation, such as the price and terms of the deal being negotiated would be made public. This would to (sic) likely to affect the deal being negotiated upon. The standard details of a contractual arrangement that are usually made public once the contract is agreed will be published as usual at the point the contract is finalised."
32. The Commissioner first notes that the threshold for engaging the exception requires it to be shown that harm to legitimate economic interests *would* result from information disclosure. The council's arguments posit that harm would only be *likely* to result from disclosure.
33. The Commissioner is further struck by the absence of any detail in the council's submissions or any causal link being drawn between the disclosure of specific information and specific adverse effects. The Commissioner notes that the council's submissions do not identify any specific elements of the withheld information or discrete adverse effects.

The arguments provided by the council are too vague and generic to convey any confidence that the matter has been properly considered.

34. The Commissioner made it clear to the council that she does not generally accept speculation on the part of authorities in relation to potential effects disclosure might cause to a third party. She advised the council to ensure that its submissions reflect the actual views of the party in question and provide any relevant correspondence in this regard. Despite being given several opportunities to demonstrate that it had either consulted with or was otherwise directly aware of Lidl's views on the disclosure of information, the council provided the Commissioner with no such evidence. In the Commissioner's view this undermines further the validity of the arguments provided by the council in this respect.
35. The Commissioner is left with the impression that the council has sought to apply the exception on a general basis without regard for explicit reasons for withholding specific information. She is mindful that, during negotiations, making information public might have an impact on a party's or parties' tactics. However, this is not a given and it is the responsibility of public authorities to provide specific details of any impact in a given case and demonstrate that these meet requirements for engaging an exception.
36. In cases where a public authority fails to provide adequate arguments the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. The Commissioner considers that, in this case, the council has had ample opportunities to set out its position but that it has failed to demonstrate that the exception is engaged.

Would the confidentiality be adversely affected by disclosure?

37. The Commissioner has concluded that disclosure would not adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
38. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Regulation 12(4)(d) – Material in the course of completion

39. In addition to withholding the Draft Contract between the council and Lidl UK GmbH ("Lidl") under regulation 12(5)(e) (see above), the council also applied regulation 12(4)(d). The Commissioner notes that in their original request for this information the complainant stated that, should

it be disclosed, they would not share it more widely. The Commissioner must clarify that any disclosures made under the EIR are disclosures to the world and there is no provision for restricting access to disclosed information.

40. Regulation 12(4)(d) provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data.
41. The council has explained that the withheld information consists of:

"...draft documents expressed to be "subject to contract" between the three sets of solicitors involved and are commercially sensitive. The contract was not finalised and signed until 13 September 2017 and prior to that date any of the parties could have withdrawn from the transaction at any time. We are concerned that revealing draft documents prior to exchange of contracts to anyone who for whatever reason asks to see them would undermine all sensitive commercial negotiations in the future."
42. The Commissioner considers that a document may be unfinished because an authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it. Furthermore, draft documents will engage the exception because a draft of a document is by its nature an unfinished form of that document.
43. In view of the nature of the information and the submissions from the council the Commissioner is satisfied that the withheld draft agreement constitutes an unfinished document and that the exception is, therefore, engaged.
44. The Commissioner has gone on to consider the public interest test.

Public interest test

45. Under regulation 12(1)(b), public authorities can only withhold information if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2), a presumption in favour of disclosure must be applied to the consideration of the public interest.

Public interest arguments in favour of disclosure

46. The council has provided no public interest arguments in favour of disclosure.
47. The Commissioner considers that there is a general public interest in transparency and accountability in relation to public authority decision making. She considers that the interest is heightened where, as in the current case, the request relates to the use of and disposal of public land.

Public interest arguments in favour of maintaining the exception

48. The council provided arguments in relation to the engagement of the exception (set out above) but it has not submitted any specific public interest arguments.

Balance of the public interest

49. With reference to the council's submissions, the Commissioner considers that the fact that the council is "*...concerned that revealing draft documents prior to exchange of contracts to anyone who for whatever reason asks to see them would undermine all sensitive commercial negotiations in the future.*" does not, in itself, constitute a valid public interest argument. This is because it is not a given that disclosing commercial information will automatically result in prejudice. In short, it is an argument that stands in need of qualification.
50. The Commissioner has given some weight to the general principles of achieving accountability and transparency through the disclosure of information held by public authorities.
51. Disclosure of information can assist the public in understanding the basis on which public authorities make their decisions and this, in turn, may help foster greater trust in public authorities.
52. The Commissioner considers that there is a specific public interest in information relating to the use of land, which might in turn have an impact on local communities, being made available in order that the public understands and, if necessary, is able to hold decision-makers to account.
53. The absence of any specific public interest arguments from the council leads the Commissioner to conclude that the exception has been engaged on a general basis without regard for specific reasons or justification for its application.

54. The Commissioner notes that the council has had ample opportunities to set out its position and she does not consider it to be her responsibility to generate arguments on its behalf.
55. In the specific circumstances of this case, the Commissioner considers that the Council has not provided persuasive arguments that the balance of the public interest lies in maintaining the exception. She therefore considers the balance of the public interest in disclosure of the redacted information outweighs the public interest in maintaining the exception.

Other matters

56. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.

57. The code of practice issued under regulation 16 of the EIR (the "EIR code") provides guidance to public authorities as to the practice that would be desirable for them to follow in connection with discharging their functions under the EIR¹.

58. Paragraph 1 of the EIR code states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided."

59. During her investigation the Commissioner encountered confusion on the part of the council as to the extent of information falling within the scope of the request that was held at the time of the request. As a result of this, the Commissioner considers that her investigation was unnecessarily prolonged, an effect of which being that the complainant was denied access information to which they were potentially entitled.

60. In view of the council's handling of these matters the Commissioner has concerns that the council is either not taking its information rights responsibilities seriously and/or that staff involved have not been given sufficient training.

¹ The EIR code is available online here: https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

61. The Commissioner expects that in its future handling of requests the council will follow the recommendations of the codes of practice and have regard for her own guidance.

Right of appeal

62. 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

63. 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.
64. 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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