

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 July 2019

Public Authority: London Borough of Merton
Address: Information Governance Team
Merton Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information regarding income streams for the Parks and Green Spaces Department of the London Borough of Merton (the Council). The Council disclosed some information but withheld specified information under regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the exception at regulation 12(5)(e) is engaged with regard to the withheld information and the public interest favours maintaining the exception. However, as the Council disclosed information outside the statutory timeframe, it breached regulation 5 of the EIR. The Commissioner does not require the Council to take any steps.

Request and response

3. On 3 August 2018, the complainant wrote to the Council and requested information in the following terms:

"Page 234 of the Council's Corporate Plan gives details of actual and forecast income for Parks and Green Spaces.

- 1) *Please provide an itemised list of income received to date by Parks and Green Spaces or contractually committed to in 2018-19, including*

separate figures for parking in Morden park during Wimbledon tennis fortnight, the English¹ Electrics event on 4 and 5 August and the Diynamic Festival on 8 September (I'm aware the licence application for this is to be determined on 13 August).

2) Please provide a similar itemised list of income received by Greenspaces in 2017-18, including separate figures for parking in Morden Park during Wimbledon tennis fortnight and the English Electrics event in Morden Park."

4. On 29 August 2018, the Council provided its response under the Freedom of Information Act 2000 (the Act). It refused to provide the requested information on the basis of section 43(2). It explained that disclosure of the information would be likely to prejudice the Council's commercial interests because it relates to a commercial negotiations with commercial organisations that could, if the numbers are revealed, undermine the Council's negotiating position of these and other/future commercial opportunities in terms of securing the best deal.
5. The Council accepted that there is a general public interest in openness and transparency to promote accountability but stated that in this case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
6. The complainant requested an internal review on 1 September 2018 and disputed the balance of the public interest.
7. On 21 September 2018, the Council provided the outcome of the internal review. It upheld its reliance on section 43(2). The Council also provided the complainant with a copy of decision notice FS50455878 which it considered supported its arguments. This decision notice was issued by the Commissioner in 2012, and dealt with a request for similar information. In that case the Commissioner found that the Council was entitled to refuse the request.

Scope of the case

8. The complainant contacted the Commissioner to complain about the handling of his request for information. Specifically, he disputed that the information should be withheld.
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¹ The complainant subsequently confirmed this was an error and should read "Eastern".

9. The Commissioner wrote to the Council and invited it to review the request again. She asked the Council to reconsider the appropriate access regime, as well as the interpretation of the request (the complainant had requested an itemised list of income in addition to the named events income).
10. The Council confirmed to the Commissioner that the request should have been handled under the EIR and it therefore wished to rely on regulation 12(5)(e) to withhold the requested information.
11. The Council also confirmed that it hold further information which fell within the scope of the request. The Council originally withheld this under section 12(5)(e) but subsequently provided the complainant with an itemised income list broken down by Allotments, Cemeteries, Outdoor events, Rental Income and Sports. The Council confirmed that the Diynamic Festival did not take place in Morden Park and therefore no income was received.
12. The Commissioner therefore considers the scope of this case is to determine whether the Council is entitled to withhold the income from the named events under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e): Confidentiality of commercial or industrial information

13. Regulation 12(5)(e) provides an exception to the extent that disclosure of the information in question would adversely affect:

"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"

14. The wording of the exception sets out a number of tests or conditions that must be met before the exception can be engaged, namely:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is this confidentiality provided to protect a legitimate economic interest?
 - Will the confidentiality be adversely by disclosure?

15. The Commissioner has considered each in turn below.

Is the withheld information commercial or industrial in nature?

16. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity.

17. The Council explained that the withheld information is commercial in nature as it relates to renting, and obtaining revenue and income in respect of, land. The Commissioner accepts that the information in question is clearly commercial information.

Is the information subject to confidentiality provided by law?

18. The Commissioner considers that 'provided by law' will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.

19. The Council set out that the common law of confidentiality applies. The withheld information is information which was jointly created or agreed with a third party and relates to income streams which are not in the public domain. It is information that is known only to a limited number of people at the Council. In the Council's opinion the obligation of confidence has therefore been created by the parties.

20. The Council confirmed that it has considered the following two key tests of the common law of confidence:

- *Does the information have the necessary quality of confidence?*
The Council set out that the information is not trivial, as the monies represent income on green space and parks land owned by the local authority. In addition, the information is not already in the public domain.
- *Was the information imparted or created in circumstances creating an obligation of confidence?*
The Council believes the withheld information was created in circumstances creating an obligation of confidence as part of commercial negotiations; therefore, the expectations of both parties led to the withheld information being created in circumstances requiring confidentiality. This has been standard practice by the parties involved (being the Council, AETC and the Eastern Electrics Festival). It is usual practice for commercial deals to be agreed on a confidential basis with the expectation that the commercial deal will remain confidential. In deciding whether the disclosure of this information would be subject circumstances in which the withheld information a duty of confidence provided by law, the Council confirmed that it had also

taken into account the expectations of the AETC and the Eastern Electrics Festival, who have both confirmed in the course of the Council's dealing with them that they would want any commercial information with the Council to remain confidential.

21. The Commissioner accepts that the circumstances in which the withheld information was created, ie during commercial negotiations, impart a duty of confidentiality and therefore this condition is met.

Is the confidentiality provided to protect a legitimate interest?

22. The First Tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, disclosure would cause some harm.
23. The Council explained that confidentiality is required to protect the economic interest of the Council and its taxpayers in achieving the best price for Eastern Electrics Festival and Wimbledon Tennis Fortnight, and also future events. It would prevent other parties from taking advantage of this information being in the public domain by using it to undercut the fees being secured by the Council for the benefit of the community.
24. The Council provided the following arguments in relation to criterion (iv), however, the Commissioner considers that they are more relevant to this criterion.
25. The Council set out that disclosure of the withheld financial information would be commercially advantageous to its competitors. The negotiations between the Council and the third parties were undertaken in the expectation that they would not be made public. The Council has received confirmation from the AETC and the Eastern Electrics Festival that they had an expectation of confidentiality.
26. The Council also explained that the withheld information relates to commercial negotiations with various organisations. Disclosure of the figures would undermine the Council's negotiating position on these and other/future commercial opportunities in terms of securing the best deal. It may also prevent the Council from getting the highest income for the hire of the sites in future negotiations with other parties. Public knowledge of the price of hire would set a "yard stick". Every event fee is subject to negotiation and a yard stick could disadvantage the Council and inhibit its ability to obtain a higher income in future negotiations.

27. The Council explained that with regard to the parking income received during Wimbledon Tennis Fortnight, disclosure would be likely to prejudice its commercial interests in negotiating and obtaining a similar contract with the AETC in the future. Should information about the cost of hire and income received enter the public domain, other potential suppliers of car parking would be able to undercut the Council's bid for the contract. A comparable park and ride service could be provided by a number of other sites not owned by the Council but of equivalent distance from AETC to Morden Park.
28. The Council explained that with regard to income received during the Eastern Electrics Festival in Morden Park, disclosure would prejudice its commercial interests in negotiations and obtaining a similar contract with the relevant event organisers and with regard to any other future event or festival at Morden Park. It is common knowledge that many local councils are now investing in this area as more and more councils are hosting events in their green spaces in order to fund maintenance of their parks. Consequently, there is much local competition, particularly as there are many councils with attractive parks within central London and the Greater London area. Should information about the cost of hire and income received enter the public domain, other potential suppliers of car parking land or other local councils with available green spaces would be able to undercut the Council's bid for the contract.
29. The Council set out that the risk arising from disclosure of this information is real and significant. With regard to parking income received during Wimbledon Tennis Fortnight, the Council was aware that other sites have been considered by the AETC before Morden Park was chosen. With regard to the income received during the Eastern Electrics Festival, events and festivals are now held in many other boroughs in London, and by other councils nationally. The Council believed that the Dynamic Festival, which did not proceed at Morden Park, was originally scheduled to take place in Greenwich Peninsula. The Council explained that disclosure of the income and hire costs would provide competitors with an advantage not available to the Council during its own negotiations and would, therefore, prejudice its ability to progress its own commercial interests.
30. The Commissioner is persuaded that disclosure would harm the commercial interests of the Council. She is satisfied that the competition for parking sites during Wimbledon Tennis Fortnight and festival sites is sufficiently high that disclosure would place the Council at a disadvantage. The Commissioner considers that it is the nature of competitive commerce that businesses will use what information they can obtain about a competitor in order to gain an advantage and, ultimately, the contract. Disclosure of the income from the two named events will

allow competitors to bid lower than the Council, with the Council having no such knowledge of their competitors' bids.

31. The Commissioner is therefore satisfied that the third condition is met.

Will the confidentiality be adversely affected by disclosure?

32. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.

33. Therefore, the Commissioner accepts that this condition is met in relation to the withheld information and, as such, the exception at regulation 12(5)(e) is engaged.

Public interest test

34. Regulation 12(5)(e) is subject to the public interest test contained at regulation 12(1)(b) of the EIR. The Commissioner must, therefore, determine whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. Regulation 12(2) provides that public authorities should apply a presumption in favour of disclosure.

Public interest in favour of disclosing the information

35. The Council accepted that there is a general public interest in openness and transparency. Disclosure of the information would promote accountability in the ways the Council utilises its assets and the spending of public money.

36. The complainant argued that there is substantial public interest in disclosing the information. The complainant set out that it was particularly topical in Merton given the recent interest in the Eastern Electrics Festival in Morden Park and the rejection of the proposed Diynamic event. The complainant provided a link to a media article on the increasing commercial use of public spaces.²

² <https://www.theguardian.com/cities/2018/aug/31/londons-parks-accused-of-creeping-privatisation-of-public-spaces>

37. The Council explained that it had considered the complainant's arguments that there was substantial public interest in disclosure in light of recent events held in Morden Park. The Council had also considered whether disclosure may benefit the Council by increasing the competition in the market. It confirmed that it did not believe this to be the case. The Council explained that it is in zone 4 of London and is not a well-known London borough. It does not have a monopoly or popularity in terms of venues in comparison to central London venues such as Hyde Park or Leicester Square. It explained that other London boroughs could easily host events at an undercut price should the Council's income be disclosed.

Public interest arguments in maintaining the exception

38. The Council argued that, overall, disclosure would have a significant impact on its ability to operate in the relevant marketplace. It would inhibit the Council's ability to negotiate a best value deal for the hire of Morden Park.

39. The Council explained that there is a potential loss of income which would result from disclosure. It explained that in a competitive market such as the events industry, operators will use as much information as possible to ensure that the lowest possible outgoings are incurred while running an event. The Council set out that it has a duty to achieve best value, whether monetary or benefits to the local area, from its assets.

40. The Council explained that the loss of rental of Morden Park to AETC each year, and the loss of income from hosting the Eastern Electrics Festival, would affect its ability to generate revenue which would have a clear impact on council tax payers. It considered that this impact could not be in the public interest.

41. The Council set out again that there are a number of other rival sites which would be able to compete for the AETC contract and it has been confirmed that other site owners have offered to fulfil this contract in the past.

42. The Council explained that there is a potential loss of funds in respect of other event contracts for hire of the site. It stated that there are many other parks who may instead host the Eastern Electrics Festival. The Council stated that there is increasing local competition with other council running and hosting similar events throughout London. The Council

explained that it relies on this income to maintain its parks and green spaces for the use of residents and visitors. Any loss of income could result in services being reduced or cut and the Council considered that this would not be in the public interest.

43. The Council set out that disclosure would prevent it from conducting its commercial affairs in a way that ensures council tax payers receive the most benefit from publicly owned property.

Balance of the public interest

44. The Commissioner considers that there is a clear public interest in disclosure of the information. As well as the presumption in favour of disclosure and general public interest and in transparency and accountability, there is a public interest in knowing whether the Council is attaining value for money and whether it is obtaining acceptable recompense for the potential disruption to the environment and to residents.
45. However, the Commissioner considers that there is a weighty public interest in ensuring that the Council is able to engage in commercial activities without its commercial interests being harmed. It is well known that local government funding has been reduced in recent years and councils are more reliant on commercial incomes to supplement budgetary shortfalls.
46. The Commissioner considers that that is a finely balanced case but that the public interest lies in protecting the Council's ability to raise revenue and, ultimately, continue funding its parks and green spaces. The Commissioner has accepted that disclosure of the withheld information would have a detrimental effect on this function. The harm anticipated, and the likelihood of prejudice, carries over into the public interest test. Having balanced the competing arguments she is satisfied that the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 5(2): Statutory time for compliance

47. Regulation 5(2) of the EIR states:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

48. The Council disclosed some of the requested information during the course of the Commissioner's investigation, thus clearly falling outside the statutory timeframe set out above. The Commissioner therefore records a breach of regulation 5(2).

Right of appeal

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

50. 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.
51. 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

**Sarah O’Cathain
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Information Commissioner’s Office
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