

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

Date: 18 June 2019

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the Sandwich Rail Infrastructure Project. Kent County Council disclosed some information and withheld other 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 Kent County Council has correctly applied regulation 12(5)(e) to withhold the information.
3. The Commissioner does not require the public authority to take any steps.

Background

4. Kent County Council (the "council") explained to the Commissioner that the request relates to a report it produced and submitted to the South East Local Enterprise Partnership's ("SELEP") Accountability Board for the purpose of seeking further funding from the Local Growth Fund for the Sandwich Rail Infrastructure Project (the "Project").
5. The council has stated that the Project is intended to deliver platform extensions and a second station footbridge at Sandwich Railway Station. The council confirmed that the purpose of the Project is to enable longer trains to stop at Sandwich Railway Station during the British Open Golf Championships and that, without the sought investment, the event could not be staged as the local transport infrastructure is currently insufficient. The council confirmed that there are a number of funding partners contributing to the Project, including R&A Championships Limited, a commercial organisation which has ownership of the British Open Golf Championship.

Request and response

6. On 15 June 2018, the complainant wrote to the council and requested information in the following terms:

"a copy of Annex A to the Sandwich Rail Infrastructure Project produced on 12/06/18 by KCC officer Stephanie Holt-Castle."
7. The council responded on 12 July 2018 and confirmed that it was withholding the requested information under the exemption for prejudice to commercial interests (section 43(2)) of the FOIA.
8. Following an internal review the council wrote to the complainant on 19 September 2018. It reconsidered the request under the EIR and withheld the information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).

Scope of the case

9. On 18 December 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. During the Commissioner's investigation the council disclosed a redacted version of the requested information. The Commissioner asked the complainant whether they would be willing to withdraw their complaint on the basis of this disclosure. The complainant asked the Commissioner to determine whether the council had correctly withheld the information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. The council withheld R&A Championships Limited's (R&A) funding contribution to the Project and the contributions of Network Rail and the Department of Transport.
12. 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".
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 notes that the information relates to the funding of a project by a commercial organisation, R&L. The Commissioner is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

15. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
16. In relation to the common law duty of confidence, the Commissioner considers that the key issues to consider are whether the information has the necessary quality of confidence, which involves confirming that the information is not trivial and is not in the public domain, and whether the information was shared in circumstances creating an obligation of confidence.
17. The council stated in its internal review that the information was obtained from a third party (R&A) and that it gave it assurances that it would keep the information confidential and not make it public. It clarified that, following a SELEP meeting in September 2017, where indicative negotiating figures were inadvertently placed in the public domain by the council, a third party sought that their investment sum not be placed in the public domain. The council has further confirmed that it considers the information is not trivial in nature.
18. Having taken all of the above into consideration, the Commissioner is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

19. 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.
20. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)* that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

21. 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.
22. 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".
23. The council has argued that disclosure would result in adverse effects to its own legitimate economic interests and to those of R&A.
24. In relation to R&A's interests, the council confirmed that it had consulted with R&A and sought its views as to the potential effects of disclosure. The council stated that, following this consultation, it was satisfied that disclosing its investment sum would harm their legitimate economic interest. The council explained that *"...withholding its detail is protecting a commercial negotiating position in the context of the third party's existing or future negotiations."*
25. In its submissions during the Commissioner's investigation the council provided copies of its correspondence with R&A, which included an explanation of why R&A considered the information should not be disclosed.
26. Having considered these submissions the Commissioner acknowledges that disclosing the investment provided in respect of this Project would have a direct impact on R&A's ability to conduct its negotiations with other potential hosts of British Open Golf Championships ("the Open"). On the basis of the arguments she has been provided with, the Commissioner is, therefore, satisfied that it is more likely than not that disclosure would harm R&A's legitimate economic interests.

Would the confidentiality be adversely affected by disclosure?

27. 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. She acknowledges that 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.

28. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public Interest in Disclosure

29. The council has acknowledged that regulation 12(2) of the EIR directs public authorities to apply a presumption in favour of disclosure. It has further accepted that there will always be some public interest in disclosure of information to promote transparency, accountability and awareness. The council further acknowledged that disclosure would facilitate public understanding of and participation in environmental matters.
30. The council has argued that, in this specific case, disclosure would allow the public to see exactly how public money is being spent on the Project and provide a breakdown of which agencies are contributing. The council has stated that this would enable the public to fully debate, knowing all the facts, how public money is spent on environmental activities. The council has submitted that this argument does not carry much weight as, in its view, there is already sufficient information in the public domain around use of public funds in the Project.
31. The complainant has argued that, as R&A is the sole provider of the Open, there are no rivals and, therefore, no commercial competition so disclosure cannot result in harm to its interests.

Public Interest in Maintaining the Exception

32. The council has argued that it has identified the specific harm that would result from the disclosure of R&A's funding contribution to the Project and that there is an inherent public interest in preventing adverse effects to a party's legitimate economic interests and to the principle of confidentiality.
33. The council has confirmed that it has given R&A a number of assurances that it will retain the commercial confidentiality regarding their funding contribution. It has argued that breaching those assurances would send a message to other funding partners that the council cannot be trusted and would result in damage to its reputation as a commercial partner. The council considers that this would impact on its future relationships with potential investors when funding is sought for projects which benefit the broader public interest. The council has further argued that

disclosure could (via a chilling effect) reduce the flow of voluntarily supplied information which could have a harmful effect on its ability to perform its public functions.

34. The council has also argued that it has a fiduciary duty to local taxpayers and needs to be able to seek out deals and investment from commercial companies in order to, in this instance, support the growth of the county's economy and to drive wider societal benefits. The council has confirmed that, if it is unable to maintain the confidentiality of the commercial information of partner companies, this will impact on its ability to do business with such companies, thereby impacting on its ability to reduce the cost to taxpayers of Kent and deliver outcomes in line with its legitimate purposes.
35. The council has highlighted that disclosing the information will seriously damage and undermine its relationship with R&A, undermine the Project and its ability to do business with R&A or other partners. It considers that this would have a significant impact on its ability to secure funding for sporting competitions, which deliver substantial direct and indirect economic benefits to the County. The council has stated that disclosure would seriously jeopardise its ability to secure any future Open and associated economic benefits.
36. The council has confirmed that it is forecast that the Open will bring a direct economic benefit of £26.8 million, plus further indirect economic benefit in the region of £50 million. It has further confirmed that it has negotiated with R&A for the return of the Open to Sandwich on two further occasions after 2020, bringing further economic benefit to the County. The council has suggested that, should the information be disclosed and R&A withdraw the 2020 Open from Sandwich, significant economic benefits to the County will be lost. In addition, it has submitted, money spent by the council on the Railway Station to date would also be lost.

Balance of the public interest

37. The Commissioner acknowledges that there is a general public interest in disclosure and, given that the Project involves public expenditure and involves impact on local amenities and wider environmental impacts there is a specific weighting in favour of disclosure in this case.
38. In relation to the complainant's argument that, as R&A is the sole provider of the Open, it has no competitor and cannot be prejudiced by disclosure, the Commissioner considers that this is based on a false premise. The identified harm in this case derives from R&A's commercial relationship with the council and other potential hosts rather than rival Open providers. The Commissioner has, therefore, not ascribed this argument any weight.

39. In relation to the harm to the council's relationship with R&A and its ability to attract future commercial partners, the Commissioner considers that public authorities cannot contract out of their responsibilities under the EIR and have a responsibility to inform potential investors or partners that any information can potentially be disclosed in response to a request. That said, whilst authorities should not accept blanket contractual or other restrictions on disclosure being made by third parties, the Commissioner recognises that, in specific cases, there may be legitimate grounds for withholding information. Furthermore, she recognises the importance of public authorities being able to develop and maintain good relationships with partners and attract future partners.
40. In this case the Commissioner has accepted that disclosure of the information would result in harm to R&A's legitimate economic interests and she further recognises that, in addition to the public interest in protecting such interests, there is a further public interest in enabling public authorities to engage effectively with commercial partners. She acknowledges that, at a time when local authority funding is under stress, there is an enhanced public interest in facilitating activities which reduce the burden on taxpayers and public authorities and, given the potential economic benefits identified in this case, she considers this carries significant weighting in favour of maintaining the exception.
41. Having considered the relevant arguments the Commissioner has concluded that, in the facts of the case, the public interest weighting is in favour of maintaining the exception. She has, therefore, concluded that the council has correctly applied regulation 12(5)(e) to withhold the information.
42. As she has concluded that the information has been correctly withheld under regulation 12(5)(e) the Commissioner has not gone on to consider the council's application of regulation 12(5)(f).

Right of appeal

43. 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

44. 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.
45. 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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