

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

Decision notice

Date: 23 May 2019

Public Authority: Lake District National Park Authority
Address: Murley Moss
Oxenholme Road
Kendal
LA9 7RL

Decision (including any steps ordered)

1. The complainant has requested a copy of the Whinlatter Mountain Centre Concept and Feasibility Study. The Lake District National Park Authority (the authority) refused to disclose the information, initially, citing section 41 of the FOIA. During the Commissioner's investigation the authority decided that the request should have been considered under the EIR and advised the Commissioner that it now wished to rely on regulations 12(5)(e) and 12(5)(f) of the EIR.
2. The Commissioner's decision is that the authority is entitled to refuse to disclose the requested information in accordance with regulation 12(5)(e) of the EIR. She therefore does not require any further action to be taken in this case.

Request and response

3. On 19 July 2018, the complainant wrote to the authority and requested information in the following terms:

"I am sorry to bother you with this but please would you send me details of the LDNPA's Gondola Feasability Study? It was mentioned last night, by [name redacted], at the Braithwaite Institute meeting,"

4. The authority responded on 9 August 2018. It refused to disclose the information citing section 41 of the FOIA.
5. The complainant requested an internal review on 10 August 2018.
6. The authority carried out an internal review and notified the complainant of its findings on 14 August 2018. It upheld its application of section 41 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 9 September 2018 to complain about the way her request for information had been handled. She stated that she finds it hard to believe that this information can be kept secret, considering it affects a National Park which has World Heritage Site Status and asked the Commissioner to consider whether the authority should disclose the requested information or not.
8. During her investigation the Commissioner asked the authority to consider whether the request should be considered under the EIR as opposed to the FOIA. The authority responded confirming that it considered the withheld information in its entirety is environmental information and it now wished to rely on regulations 12(5)(e) and (f) of the EIR.
9. The Commissioner is satisfied that the withheld information in its entirety is environmental information. It is a feasibility study detailing various proposals for the potential development of the Whinlatter Mountain Centre. The study is a plan as defined in regulation 2(1)(c) of the EIR which would be likely to affect the elements of the environment outlined in regulation 2(1)(a).
10. The Commissioner will first consider regulation 12(5)(e). She will only go on to consider regulation 12(5)(f), if she finds that some or all the information is not exempt under regulation 12(5)(e) of the EIR.

Reasons for decision

11. Regulation 12(5)(e) of the EIR states that a public authority can 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.

12. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and that the confidentiality would be adversely affected by disclosure.
13. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
14. Dealing with the first bullet point, the authority confirmed that the withheld information contains information of a confidential commercial nature, as it relates to the technical viability of a potential commercial development within the area. The Commissioner has reviewed the withheld information and she is satisfied that it is commercial in nature. It is a study looking into the viability of potential development in the area involving the authority, private third parties and the Forestry Commission.
15. Addressing the second bullet point, the authority explained that the withheld information is subject to a confidentiality agreement between all relevant parties. All relevant parties have agreed to and signed the confidentiality agreement which has strict limitations on the disclosure of the withheld information and who it can be shared with.
16. The Commissioner has had sight of the confidentiality agreement and accepts therefore that the withheld information is subject to a confidentiality clause.
17. However, the Commissioner notes that the confidentiality agreement itself permits each 'Founder' to disclosing confidential information to the minimum extent required by:

"the laws or regulations of any country with jurisdiction over the affairs of any company within its Group (provided that, in the case of any disclosure under the Freedom of Information Act 200, none of the exemptions to that Act applies to the information disclosed)."
18. Therefore, a confidentiality agreement will not in itself be sufficient to prevent the disclosure of information. The agreement recognises the

requirements of the FOIA and the EIR in this case and states that information may be subject to disclosure if it not covered by the exemptions in the FOIA or the exceptions in the EIR. Although this bullet point is met, it is therefore necessary to go to consider whether disclosure of the withheld information in this case would adversely affect the legitimate economic interests of the parties involved.

19. The authority informed the Commissioner that it was approached by a third party with the initial ideas relating to the proposed commercial undertaking. The initial feasibility study was obtained among other information to determine whether or not the project would be technically and financially viable, what work would be needed in terms of costings and the potential commercial value of such a development. It stated that if the proposal is physically possible and financially viable it could lead to some or all the parties investing in substantial infrastructure at Whinlatter from which they could derive an income.
20. At the time of the request (and the Commissioner understands it still remains the position now), the proposal was only at idea stage. It was a proposal that a third party brought to the authority and it was agreed amongst interested parties that it should be explored further. The third party's approach was not a request for pre-planning advice; the proposal and approach made was at an earlier stage than that. A confidentiality clause was signed by all interested parties at the same time to ensure that the proposal was protected, as are the commercial interests of the parties involved. The authority confirmed that if and when a firm idea or plan is put together the authority will informally consult with the public before planning. It stated that this will allow the public to consider the plans drawn up and put their points of view across. There would then be a further opportunity for the public to consider any firm plans if they progress to the formal planning process stage.
21. The authority stated that disclosure would adversely affect the legitimate economic interests of the authority itself and the third parties involved. If disclosure took place prior to any firm ideas being drawn up (if indeed this actually happens), competitors could steal those ideas and market them themselves, or produce opposing schemes with the benefit of the contents of the withheld information. It also stated that it was almost certain one third party would pull out of discussions if disclosure took place at this stage. The authority went on to say that the third parties involved and the authority itself had already invested time and resource into the discussions and proposals and it would be unfair for a rival to take advantage of that, to the detriment of the authority itself and the third parties involved. They are entitled to keep such information confidential until any firm plans are drawn up and there is a need to consult the public. It stated that third parties are entitled to

approach it to discuss ideas and proposals on a confidential basis and the authority welcomes such approaches both in terms of generating potential income for the authority and to aid any future formal planning process. It argued that there will be ample time for public consultation if and when a firm plan has been drawn up and if and when a formal planning application is made.

22. The Commissioner acknowledges the circumstances at the time of the request. She notes that the authority and relevant third parties were in very early discussions about a proposed scheme at Whinlatter. The withheld information discusses the feasibility of the project both in terms of the likelihood of the project going ahead and the costs and potential benefits to be obtained for the parties involved. Both the authority and the third parties involved had already invested time and resource into these plans and discussions and are very concerned that premature disclosure would adversely affect their commercial interests. The Commissioner accepts that disclosure at this stage would enable rivals to develop competing schemes and potentially outbid or take over the ideas or similar from the third parties involved; third parties which have already invested time and resource into investigating and producing proposals for the authority to consider.
23. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies.

Public interest test

24. The authority advised that disclosure would provide information to enable members of the public, businesses or organisations the opportunity to raise any concerns that they may have about the potential proposals for Whinlatter and that this is particularly important considering Whinlatter is in a National Park.
25. However, it stated that in this case it considered the public interest rested in maintaining the exception. It stated that public authorities are encouraged to be more commercial in their activities so as to provide funding for the essential work that they undertake and the authority is often approached by individuals and organisations with potential commercial projects. It stated that disclosure would discourage those individuals and organisations from coming forward with potential projects if they did not consider their interests would be suitably protected. This could result in the authority being unable to undertake work within the Park as it is unable to generate sufficient funds with which to maintain rights of way, toilet and car park facilities, maintain information centres etc.

26. The authority said that the withheld information contains sensitive commercial information and such information should not be disclosed to protect the economic interests of the parties involved. It argued that to ensure all members of the public and interested parties have a meaningful contribution to any future scheme it is necessary that the full and complete details of any proposals are made available as part of a formal consultation process rather than piecemeal at this early stage. It argued that the authority must be afforded time and space to consider proposals and obtain further information on technical feasibility and financial viability of such schemes both on its own and in collaboration with other parties. Members of the public will have an opportunity to comment once the scheme is sufficiently developed to be shared. It stated that any work undertaken in respect of the project would also require planning permission and the public will have an opportunity to put forward any concerns or comments as part of that formal process.
27. The Commissioner considers there is a public interest in openness, transparency and accountability. There is also a public interest in ensuring our National Parks are protected and that any development or potential ideas for development are in keeping with the area and in accordance with the relevant policies, procedures and guidance. It is understandable that members of the public will be concerned about any proposals for the area and will wish to be involved in those and be able to have their say at an early stage.
28. However, in this case the Commissioner considers the public interest rests in maintaining the exception. At the time of the request discussions were at a very early stage. The authority and third parties should be afforded the private space to discuss proposals and options without the fear of premature disclosure. It is in the public interest to maintain the confidentiality of early discussions both to protect the commercial interests of the parties involved and to encourage and support such informal engagement between the authority and individuals/organisations wishing to informally discuss plans and enterprises.
29. The Commissioner also notes that the authority has said that it will consult the public once there is a firm plan in place. It will also consult again if the plans move to the formal planning process stage. The Commissioner considers this goes some way to meeting the public interest in the disclosure of this information and recognises the need to be open, transparent and involve the public.
30. The Commissioner also does not consider it is in the public interest to disclose information which would adversely affect the commercial interests of the authority or the third parties involved. They are entitled to explore options in private prior to the formal planning process and

protect sensitive commercial information which could be used by competitors to their detriment. All parties have invested valuable time and resource into the plans and discussions that have already taken place and it would not be in the public interest to jeopardise that investment and the ability of the authority to hold informal discussions about future potential ventures. The authority will value the ability to discuss such matters on an informal basis, similar to the pre-planning advice function. It is a valuable resource which enables both parties to discuss options, whether a scheme is potentially viable and alter proposals (and indeed abandon some, if they are not suitable in planning terms) before committing to the formal planning process.

Right of appeal

31. 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

32. 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.
33. 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

Samantha Coward
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Wycliffe House
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