

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

Decision notice

Date: 28 July 2022

Public Authority: Cherwell District Council
Address: Bodicote House
White Post Rd
Bodicote
Banbury OX15 4AA

Decision (including any steps ordered)

1. The complainant requested information regarding the use of and disposal of land owned by Cherwell District Council (the "council"). The council disclosed some information and withheld other information under the exemption for commercial interests – section 43(2) of the FOIA. During the Commissioner's investigation the council reconsidered the request under the EIR and withheld information under the exception for commercial confidentiality – regulation 12(5)(e).
2. The Commissioner's decision is that the council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 of the EIR and that it failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e).

4. The council 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 12 July 2021, the complainant wrote to Cherwell District Council (the "council") and requested the following information:

"...a copy of all minutes of Cherwell District Council and all committees, probably in 2013, considering and determining matters relating to the disposal of some land owned by Cherwell District Council to Banbury Rugby Club and the retention of other adjacent land (the reserved land), and the terms of any licence to Banbury Rugby Club to occupy the reserved land, and if Banbury United Football Club is referred to any such minutes. (Banbury United FC is not requesting information about the prices charged to Banbury Rugby Club for any of the disposals.).

any information about the sources of loans from public bodies awarded to Banbury Rugby Club, separate to any independently arranged by Banbury Rugby Club, to facilitate such disposals but not the amount of such funds."

6. The council responded on 16 August 2021 and confirmed that it held one relevant set of meeting minutes. It disclosed a redacted copy of the minutes, withholding some information under the exemption for commercial interests – section 43(2) of the FOIA. In relation to the part of the request which asked if "...Banbury United Football Club is mentioned in such minutes..." the council confirmed that it was refusing to confirm or deny whether this was the case, citing section 43(3). In relation to the request for "Sources any loans from public bodies to Banbury Rugby Club" it confirmed that this information was not held.
7. Following an internal review the council wrote to the complainant on 21 September 2021. It confirmed that it was maintaining its position.

Scope of the case

8. On 28 September 2021 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. In view of the nature of the request it occurred to the Commissioner that the information was environmental in nature. He, therefore,

directed the council to reconsider the request under the EIR and issue a new response.

10. On 27 July 2022 the council issued a new response to the request. In relation to the part of the request which asked whether "...Banbury United Football Club is mentioned in such minutes..." the council confirmed that it was mentioned. In relation to the request for "Sources any loans from public bodies to Banbury Rugby Club – separate to any arranged independently by the Club" the council confirmed that it did not hold any information. In relation to the request for a "Copy of any minutes of Cherwell DC and its committees considering/determining the disposal of land to Banbury Rugby Club, the retention of reserved land and the terms of any licence" the council referred to the minutes it had already disclosed and confirmed that information it had previously redacted under section 43(2) of the FOIA was now being withheld under the EIR exception for commercial confidentiality – regulation 12(5)(e).
11. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under regulation 12(5)(e).

Reasons for decision

Is it Environmental Information?

12. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR. The Commissioner has set down below his reasoning in this matter.
13. 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 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...”

14. 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.
15. In this case the requested information relates to the disposal of and use of land.
16. 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”).
17. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

18. 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.
19. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires 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 as the council actually dealt with the request under FOIA.

20. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

21. 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”.
22. The Commissioner considers that in order for this exception to be applicable, the following conditions must be met:
- 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?
23. In its response the council cited the following grounds for applying the exception:
- “This is because the Council, even given that the meeting was 8 years ago, considers the information to be commercial. The Council are still in the process of trying to work with Banbury United Football Club to facilitate a ground move. As such information about the sale of land remains commercially sensitive, as to release it to the Football Club, and to the public at large would negatively impact on negotiations around acquiring land assets from the Council. The Council considers that disclosure of the withheld information would prejudice the commercial interests of the Council, in that it would prejudice the Council’s position with regard to on-going discussions / negotiations with the same interested parties about the use of other sites.”
24. The Commissioner is mindful that disclosures under the EIR can result in information being placed in the public domain that would otherwise not be available. A result of this is that third parties who might be interested in entering into negotiations relating to land with a public authority might use the information to change their negotiating strategy in a way which is detrimental to the position of the public authority. In short, disclosing the information undermines a public authority’s ability to negotiate in a way that can cause prejudice to its legitimate economic interests.

25. However, this scenario is only a general principle. In order to engage the exception, an authority needs to explain how disclosing specific information would result in adverse effects and define the form that these effects would take. Whilst the Commissioner accepts that a case might be made for withholding the information he considers that the council has not made this case. The council's arguments make no reference to the specific information being withheld and do not explain how the information could be used to prejudice its discussions or negotiations regarding land.
26. It is not enough that disclosure might cause some harm to an economic interest. An authority needs to establish that disclosure would cause harm, that is, that it is more probable than not. The Commissioner considers that the level of detail in the council's arguments is not sufficient for it to conclude that disclosure would cause harm.
27. The Commissioner is left with the impression that the council has sought to apply the exception on a general basis, with a level of detail which fails to support its position.
28. Having considered the council's submissions and the withheld information the Commissioner has concluded that the exception in regulation 12(5)(e) is not engaged in this case. As the exception is not engaged he has not gone on to consider the public interest test. At paragraph 3 above the council is now required to disclose the withheld information.

Right of appeal

29. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

30. 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.
31. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF