



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2016/0006**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0584873  
Dated: 8 December 2015**

**Appellant: Paul Charman**

**Respondent: The Information Commissioner**

**On the papers**

**Before  
HH Judge Shanks  
and  
Henry Fitzhugh and Suzanne Cosgrave**

**Date of decision: 06 June 2016**

**Date Decision Promulgated: 06 June 2016**

**Subject matter:**

Environmental Information Regulations 2014 (EIR)  
Regs 12(4)(a) and 12(5)(e)

**DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal considers that the Decision Notice dated 8 December 2015 was not in accordance with the law and issues the following substituted Decision Notice.

**SUBSTITUTED DECISION NOTICE**

**Public authority:**            **LB Hackney**

**Name of Complainant:**    **Paul Charman**

**The Substituted Decision**

For the reasons set out below LB Hackney held no information answering to paragraph [3] of the request dated 4 September and were entitled to rely on regulation 12(4)(a) of EIR.

**Action Required**

None.

HH Judge Shanks

06 June 2016

## **REASONS FOR DECISION**

### **Background**

1. Future Cinema staged a “Dirty Dancing” event on Hackney Downs between 26 August and 5 September 2013. They paid LB Hackney £16,000 for the use of the Downs.
2. Mr Charman is a local resident. He was clearly unhappy about a number of aspects of the event and complained to the Council. He also made a request for information on 4 September 2013, seeking to find out among other things [1] the total amount received by the Council for the use of Hackney Downs and [3] an “... explanation of how the fee was calculated, ie how was it derived from area used, size of audience, duration etc.”
3. Hackney dealt with the request under the Freedom of Information Act 2000 and refused to supply the information requested. Mr Charman complained to the Information Commissioner. In the course of the Commissioner’s enquiries the Council wrote to him on 1 July 2014 stating that the fee was £16,000 and, in response to question [3] they said:

**For large scale events the Council negotiates with each individual event organiser, there is no specific set fee. Negotiation was based on type of event, similar previous events held, area used, size of audience, duration etc.**

The Commissioner decided in a notice dated 4 September 2014 that the information requested was environmental and that the council ought therefore to have dealt with the request under the Enviromental Information Regulations 2004.

4. On 13 October 2014 the Council wrote to Mr Charman again refusing to supply the information in reliance on regulation 12(5) (e) which protects confidential commercial and industrial information. In the course of their letter under the heading “Is the

withheld information commercial or industrial in nature?” the Council said “The information in question is the hire fee ... and correspondence on the fee negotiations. The information is commercial in nature.”

5. Mr Charman complained to the Commissioner again. In the course of his enquiries the Council wrote to the Commissioner on 11 September 2015 repeating what they had said on 1 July 2014 about the fee and how it was reached and they supplied him with a series of emails from Future Cinema to the Council between 29 July and 1 August 2013 relating to the negotiation of the fee, confirming in due course that these comprised the entirety of the “withheld information” in relation to question [3]. The Commissioner persuaded the Council to disclose the amount of the fee to Mr Charman but decided in a Decision Notice dated 8 December 2015 that the withheld information did not have to be disclosed by reason of regulation 12(5)(e).

#### **The issue**

6. Mr Charman has appealed to this Tribunal against the Decision Notice of 8 December 2015. The parties have taken issue on whether the withheld information is covered by regulation 12(5)(e) and whether the public interest in maintaining that exception outweighs the public interest in disclosure of the information.
7. In our view this issue is not relevant for the simple reasons that the withheld information did not come within the terms of the request. Having seen the withheld information we are quite satisfied that the Council was right to tell the Commissioner on 1 July 2014 that the fee in this case was individually negotiated with the event organiser. The fee arrived at was therefore not a matter of *calculation* based on specific criteria but rather the outcome of a *negotiation*, albeit that any such negotiation would inevitably be influenced to some extent by the matters identified by Mr Charman as potential criteria for calculation.
8. Based on his own reply submissions dated 2 March 2016 it is clear that Mr Charman himself is alive to this point. However he says in effect that it does not matter

because the parties have proceeded on the basis that the withheld information is covered by the request. We do not think that is a satisfactory answer to the point. The operation of FOIA and EIR requires there to be a request for information before any obligation to supply that information arises under the legislation and before the Commissioner has any jurisdiction to consider whether it is covered or not covered by any exemption (under FOIA) or exception (under EIR). The statutory question for this Tribunal under section 58 of FOIA is whether the Decision Notice appealed from was "... in accordance with the law". If it is clear to us that the Decision Notice was not in accordance with the law we must act accordingly.

### **Conclusion**

9. In those circumstances we consider that the Council never held any information answering the request and that they were therefore under no obligation to make any such information available to him (and were entitled to rely on regulation 12(4)(a) which provides an exception for information which is not held when the request is received). It follows that Mr Charman had no substantial basis for his complaint and the Commissioner should have so found. We will issue a formal substituted decision notice reflecting this conclusion but in substance Mr Charman's appeal is dismissed.

### **In case we are wrong**

10. In case we are wrong in that conclusion we should say something about the withheld information and whether it was covered by regulation 12(5)(e). We note that it consists only of emails from Future Cinema to the Council and that there are no internal Council documents; we therefore doubt that it comprises everything held by the Council relating to how the fee was negotiated between Future Cinema and the Council.
11. However, we are satisfied that it is covered by regulation 12(5)(e) since the emails contain obviously confidential information about Future Cinema's business which was provided to the Council in the course of a negotiation. And, given that there is no great public interest in disclosure of that material, we are satisfied that the public

interest in maintaining the exception would have outweighed that in disclosure of the withheld information.

12. Had it been relevant we would therefore have upheld the Commissioner's decision on regulation 12(5)(e).

13. Our decision is unanimous.

HH Judge Shanks

06 June 2016