

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 13 September 2018

**Public Authority:** Kirklees Council

**Address:** Civic Centre  
3 Market Street  
Huddersfield  
HD1 1WG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about land adjacent to a housing development in Huddersfield. Kirklees Metropolitan Borough 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 Kirklees Metropolitan Borough Council did not respond in time and breached regulation 5(2) and failed to demonstrate that regulation 12(5)(e) and regulation 12(5)(f) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The public authority 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 the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 24 January 2018, the complainant wrote to Kirklees Metropolitan Borough Council (the "council") and requested information in the following terms:

*"Copies of all correspondence, e-mails and documents exchanged between all Council services and / or councillors and any other party, relating to the sale (or proposed sale) of a 'ransom strip' of land adjacent to the Redrow housing development site to which planning application ref 2013/93441 relates. This to include all correspondence, whether written by or on behalf of the council itself or on behalf of any charity for which the council are corporate trustee."*

6. The council responded on 13 March 2018. It disclosed a copy of a surveyors report with some elements redacted under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
7. Following an internal review the council wrote to the complainant on 22 May 2018. It stated that it was maintaining its position.

## Scope of the case

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8. On 22 May 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council responded in the statutory time limit and correctly applied exceptions to withhold some of the requested information.

## Reasons for decision

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### Regulation 5(2) – time for compliance

10. Regulation 5(1) and regulation 5(2) of the EIR state:

*5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*

*(2) 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.*

11. In this case the complainant submitted their request on 24 January 2018 and the council responded on 13 March 2018
12. As the council failed to issue a response within the statutory time limit, the Commissioner finds that it breached regulation 5(2) of the EIR.

### **Regulation 12(5)(e) – commercial confidentiality**

13. Clayton Swimming Bath and Recreation Centre is a facility within the council's purview, which is owned and run by a registered charitable trust ("the Trust"), of which, the council is the sole trustee. The Trust owns land that a developer wishes to purchase for the purpose of access to land which it intends to develop. Such plots are often referred to as "Ransom strips", a term implying an enhanced value resulting from a strategic location. A valuation of the land was obtained by the council from a surveyor in the form of a report. The withheld information consists of elements of the report, a redacted version of which was disclosed to the complainant<sup>1</sup>.
14. 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".
15. 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?

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<sup>1</sup> Further details can be found in this First-Tier (Information Rights) Tribunal decision: [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2134/Hutchinson,%20Ian%20EA-2017-0194%20\(29.01.18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2134/Hutchinson,%20Ian%20EA-2017-0194%20(29.01.18).pdf)

- 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?*

16. The council has stated that the information is clearly commercial in nature, being the valuations of land assets and valuations following development of that land, including the percentage calculations to achieve those valuations.
17. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the information is commercial in nature.

*Is the information subject to confidentiality provided by law?*

18. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
19. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
20. The council has stated that the redacted information is not trivial because it "...directly relates to the profits to be realised by the developer and it is not in the public domain".
21. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.
22. In view of the above, the Commissioner is satisfied that the withheld information is subject to confidentiality provided by law.

*Is the confidentiality provided to protect a legitimate economic interest?*

23. 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.

24. 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.
25. 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".*

26. The council provided the following submissions to the Commissioner:

*"The Council believes that this point is engaged because at the times of the requests, and associated appeals, complaints and tribunal, the issue was still live, the sale of the ransom strip having only recently taken place and the price achieved from the sale of the ransom strip being made public. The Council maintains that disclosure of the redacted financial information would adversely affect the legitimate economic interest of the organisation which provided it because the disclosure of information through the EIR is deemed to be into the public domain rather than just to the individual requesting the information. The development of the land is ongoing and so the issue is live and relevant in today's market. The Council considers that disclosure of this financial information would reveal commercially valuable information to competitors as it would be in the public domain."*

27. The Commissioner notes that the council's arguments are generic in nature and, whilst identifying potential harm, do not relate this to specific elements of the information or explain the causal process. The Commissioner further notes that the council does not identify who the "competitors" in this case are, nor does it explain how the information would benefit competitors to the detriment of the interests of the Trust.
28. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

*"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no*

*evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable....”<sup>2</sup>*

29. In paragraph 55 the Tribunal goes on to say:

*“The Commissioner had highlighted the need for a much greater level of specificity. Peel’s response that it does not consider the Commissioner’s request for a more “granular explanation” is reasonable, misses the point. The need for the explanation does not arise from the Commissioner’s request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual.”*

30. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party’s commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects would follow as a direct result of

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Bo rough%20Council%20EA-2017-0057%20\(14-03-18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Bo rough%20Council%20EA-2017-0057%20(14-03-18).pdf)

information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.

31. In her letter of investigation the Commissioner clearly set out the level of detail required in order to justify the engagement of the exception. Having considered the council's submissions the Commissioner is left with the impression that the exception has been applied on a general basis without a link being made between specific adverse effects and discrete elements of the withheld information.
32. Having viewed the withheld information the Commissioner considers that a case might be made for engaging the exception but that the council has, in this instance, failed to make this. Whilst recognising that it might be that a case could be made for withholding the information, the Commissioner does not consider it to be her role to generate arguments on behalf of public authorities. In this case the Commissioner's letter of investigation clearly set out the level of detail required for engaging the exception and the council has failed to meet this threshold and has, instead, sought to withhold the information on a speculative and generic basis.
33. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

#### **Regulation 12(5)(f) – interests of the information provider**

34. The council withheld the same information refused under regulation 12(5)(e), above, under regulation 12(5)(f).
35. Regulation 12(5)(f) sets out a number of criteria which must be met for this exception to be engaged. These criteria have been drawn from the Tribunal decision in *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012)<sup>3</sup> and include the following:

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012\\_04\\_25%20Mr%20Kuschnir%20decision.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf)

- the person was not under any legal obligation to supply that information to any public authority;
  - the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
  - the person supplying the information has not consented to its disclosure.
36. The council did not provide any submissions in relation to its application of regulation 12(5)(f), instead directing the Commissioner to its position as set out in its refusal notice.
37. In its refusal notice the council stated that the:
- "...author of the document from which the financial details in the surveyor's report was derived, was not under any obligation to submit it and did so on a voluntary basis and that the author has not consented to its disclosure and has in fact expressly stated that they do not agreed to the disclosure to the viability information and documentation."*
38. The Commissioner is mindful that the report in question was produced by a surveyor for the council on behalf of the Trust. That the surveyor was not under any obligation to provide the information to the council is, in the Commissioner's view, a moot point.
39. However, in addition to the 3 conditions which must be satisfied for the exception to be engaged, it is also necessary for public authorities to demonstrate that disclosure would result in harm to the interests of the information provider.
40. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
41. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.
42. As the Tribunal in the *Kuschnir* case (cited above) noted, there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must



be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.

43. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
44. The Commissioner clearly sets out in her correspondence that public authorities will have one opportunity to set out their final position in relation to the handling of a request. In relation to harm to the Trust's interests, the council relied on the same arguments provided in respect of regulation 12(5)(e). As the Commissioner has found that these arguments did not successfully demonstrate that disclosure would result in adverse effects to legitimate economic interests, she accordingly finds that they fail to engage regulation 12(5)(f) for the same reasons.
45. In this instance the Commissioner considers that the council has failed to provide adequate submissions in this regard and as his her standard approach in such cases, she does not consider it to be her role to generate arguments on its behalf. She is further concerned that the council's arguments, as set out in its internal review, do not provide confidence that it understands how the exception operates or, at any rate, that it has not given due consideration to demonstrating this.
46. For the reasons set out above the Commissioner has concluded that the council has failed to demonstrate that disclosure would result in adverse effects to the interests of the information provider and the exception is, therefore, not engaged. As the exception is not engaged the Commissioner has not gone on to consider the public interest test.

## Right of appeal

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47. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**