

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

Date: 14 December 2011

Public Authority: Yorkshire Forward
Address: Head Office
Victoria House
2 Victoria Place
Leeds
LF11 5AE

Decision (including any steps ordered)

1. The Commissioner's decision is that Yorkshire Forward (YF) appropriately relied on regulation 12(4)(b) of the EIR in this case but incorrectly relied on regulation 12(5)(e).
2. The Commissioner requires YF to take the following steps to ensure compliance with the legislation.
 - YF should release all information previously withheld under regulation 12(5)(e) to the complainant.
3. YF 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted an information request to YK on 13 May 2010 (the exact details of this request can be found in Annex A attached to this notice).
5. YF responded on 11 June 2010. It informed the complainant that it was refusing to deal with the request under section 12 of the Act, as it

considered the cost to comply with all five elements would exceed the appropriate limit.

6. Further correspondence was exchanged between the complainant and YF on this matter between June and September 2010. During this time the complainant was informed where the requested information was likely to be held and recommended to submit a refined request. YF also increased its original estimation of 36 hours to comply with the request to 77 – 111 hours having identified further locations for the requested information.
7. The complainant submitted a refined request on 22 October 2010. (Again please refer to Annex A for the exact details of this request).
8. During October and December 2010 further correspondence was exchanged between the complainant and YF. The crux of this correspondence was the delays the complainant was experiencing in receiving a response to his refined request.
9. YF responded on 10 and 13 December 2010. It released some information in a redacted format, which it had collated as a result of the initial searches it had undertaken up to the cost limit. In respect of the redactions it had made, YF informed the complainant that it had withheld this information under sections 40(2) and 43 of the Act. In relation to all other requested information, YF informed the complainant that it was refusing to deal with the remainder of his refined request under section 12 of the Act, as it still considered the cost to comply with the entire request would exceed the appropriate limit. YF estimated that it would take 77 hours to locate, retrieve and extract all the requested information.
10. The complainant requested an internal review on 20 December 2010.
11. YF completed its internal review on 26 January 2011. It upheld the previous decisions it had reached but acknowledged that on reflection the requests should have been considered under the EIR. Under the EIR, it confirmed that it wished to rely on regulation 13, 12(4)(b) and 12(5)(e).

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. He asked the Commissioner to consider whether both requests exceed the cost limit, as YF claimed and whether YF had acted appropriately by withholding the information it had redacted from the information it did disclose within the cost limit under the exemptions or exceptions cited.

13. Although YF dealt with the requests under the FOIA and the EIR, it was established during the Commissioner's investigation that both requests should be considered under the EIR only. The Commissioner decided that the requested information was environmental information. Both requests relate to information concerning the Northern Wind Innovation Programme and the potential development of one of the suitable sites along the Humber for the manufacture of large turbines which will be required for the offshore wind farms. The Northern Wind Innovation Programme and the potential development of sites alongside the Humber for the construction of the turbines that are required for this programme are both measures or plans as defined in regulation 2(1)(c) of the EIR that affect or are likely to affect the elements of the environment outlined in regulation 2(1)(a) i.e. the land, landscape and coastal areas.
14. As the requests in their entirety should be considered under the EIR this notice will focus on the application of 12(4)(b) to both requests and the application of 12(5)(e) of the EIR to the information YF redacted from the disclosures it did make under the cost limit when the requests were being considered under the FOIA.
15. During the Commissioner's investigation the complainant agreed to withdraw his complaint in relation to YF's application of regulation 13 (personal data) of the EIR. This notice will therefore not address the personal data redacted from the disclosures YF made or YF's application of this exception.
16. The Commissioner will first consider regulation 12(4)(b) and its application to the refined request the complainant made on 22 October 2010. If the Commissioner considers 12(4)(b) applies to this request it follows that 12(4)(b) will apply to the more voluminous request the complainant made for the same information on 13 May 2010. Obviously, if the Commissioner decides that regulation 12(4)(b) does not apply to the refined request, he will then go on to consider the application of this exception to the complainant's earlier request of 13 May 2010.
17. Once the Commissioner has considered the application of regulation 12(4)(b) he will then go on to consider the application of regulation 12(5)(e) to the redactions made to the information YF released.

Reasons for decision

Regulation 12(4)(b)

The refined request

18. Regulation 12(4)(b) states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. The EIR does not define the term “manifestly unreasonable” but the Commissioner’s view is that the word “manifestly” implies that a request should be obviously or clearly unreasonable.
19. There is no single test for what sorts of requests may be manifestly unreasonable. Rather, it is to be judged on each individual request bearing in mind all of the circumstances of the case. The Commissioner is of the view however that Regulation 12(4)(b) will provide an exception to the duty to comply with a request where that request is vexatious, where it would incur unreasonable costs for the public authority or where responding would be an unreasonable diversion of resources.
20. From YF’s reasons for applying Regulation 12(4)(b) the Commissioner notes that it is claiming that responding to the request would incur unreasonable costs, as it estimated that it would take it 77 hours to comply with all elements of the request.
21. Although the cost limit prescribed by the FOIA Fees Regulations may be a useful starting point to ascertain what costs would be involved in answering a request for environmental information, the fact that a similar request may be rejected under the provisions of section 12 of the FOIA is just one factor to consider and does not, in itself, render a request made under the EIR manifestly unreasonable by virtue of regulation 12(4)(b). There are other important factors that must always be taken into consideration before concluding that environmental information can be withheld under this exception:
 - 1) under the EIR, there is no statutory equivalent to the “appropriate limit”;
 - 2) proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority;
 - 3) the presumption in favour of disclosure under regulation 12(2);
 - 4) the public interest test under regulation 12(1)
 - 5) the requirement to interpret the exceptions restrictively; and
 - 6) the individual circumstances of the case.
22. In addition to the above factors it was noted in the Information Tribunal case of DBERR v Information Commissioner (EA/2008/0096) that public

authorities may be required to accept a greater burden in providing environmental information than other information (paragraph 39).

23. As stated above YF estimated that it would take 77 hours to comply with the complainant's request of 22 October 2010. YF confirmed that the requested information would be held across three of its Directorates and these Directorates had confirmed that they hold a significant amount of information which may fall within the scope of the request.
24. In its refusal notice to the complainant of 10 December 2010 YF informed the complainant that these Directorates confirmed that it held the following information:

"Urban Renaissance and Property Team:

- 377 files

Foreign Direct Investment Team:

- over 1500 emails
- 22 folders containing at least 300 documents
- Over 100 other documents relating to enquiries and industry communications within the scope of your request.

Environmental Technologies Sector Team:

- 1236 emails
- 1135 documents".

25. YF informed the complainant that:

"we estimate that we hold a total of 4648 emails and documents within the scope of your request, which would take approximately 77 hours to review on a rate of 1 minute per-mail/document".

26. In its internal review of 26 January 2011 it also informed the complainant that it had already taken 38 hours to comply with his requests and if this is added to the estimated 77 hours of further work that would be required this brought the overall total cost of compliance to 111 hours.
27. The Commissioner made further enquiries to YF to establish what searches had been undertaken and what activities had been taken into account within the cost calculation it supplied.
28. YF explained that it operates a standard file structure for its electronic records but each Directorate is responsible for maintaining its own records within this structure in a manner that it meaningful to that Directorate. It confirmed that three Directorates were identified as

holding relevant requested information and each of these were asked to locate, retrieve and extract any information it holds that falls within the scope of the complainant's request. Each Directorate responded as detailed above (paragraph 24) and confirmed that they hold a large amount of information of the description specified in the complainant's request. YF then added these estimates together to arrive at the total of 77 hours that was quoted.

29. YF confirmed that this request was the result of it asking the complainant to submit a more refined request following the decision it reached in respect of the complainant's first request. However, when it actually began the process of identifying exactly what recorded information it did hold in relation to this refined request it became evident that this request was of a broad nature too and encompassed a significant amount of information spanning a period of at least 2.5 years and three different Directorates which are involved in the overall plans of development in different ways.
30. It stated that it has made attempts to assist the complainant on several occasions and even released some information that was identified by the Corporate Information Manager as a result of her own searches in order to be as helpful as possible.
31. The Commissioner questioned the estimates quoted by YF and asked it to explain in more detail exactly what searches were undertaken and how these figures (77 hours and 38 hours) were arrived at.
32. Dealing with the main element of YF's estimate first i.e. the total of 77 hours quoted in its refusal notice to the complainant, YF explained that the three Directorates reviewed all electronic information held on both central and team specific filing systems and folder structures considered to be in the scope of the complainant's refined request using key words from the request in these searches. The result of these searches is outlined in paragraph 24 above.
33. YF stated that a total of 4648 emails and documents were retrieved and deemed relevant to the complainant's request and at a rate of 1 minute per email or document it estimated that it would take 77 hours to comply with the refined request.
34. The Commissioner questioned whether the 77 hour estimate included the time taken by the Directorates to carry out the searches. YF confirmed that it did not and the 77 hour estimate was purely the time it estimated it would take it to review each email and document in order to extract relevant information from non relevant information. The time taken to carry out the electronic searches is incorporated in the additional 38 hours that were quoted in YF's internal review.

35. The Commissioner also questioned the additional 38 hours quoted in YF's internal review and asked YF to explain in more detail exactly how this figure was arrived at.
36. YF confirmed that these additional 38 hours were the total amount of hours YF had spent dealing with the complainant's requests – his first request and refined request up to and including the electronic searches outlined in paragraph 24 above. It stated that this 38 hour estimate was made up of the following:

International Business Development Manager, Foreign Direct Investment Team	10 hours
Sector Manager, Environmental Technologies Sector Team	4 hours
Area Manager, Urban Renaissance and Property Team	2 hours
Assistant Director, Business	6 hours
Senior Manager Environmental Technologies Sector Team	8 hours
Corporate Information and Data Manager, Legal Services Team	8 hours

37. YF confirmed that if these additional 38 hours are added to the 77 hours already estimated to comply with the refined request this brings the total amount of hours to 115 hours.
38. The Commissioner asked YF to explain in more detail exactly how this additional figure of 38 hours was arrived at and to provide a further breakdown for each Directorate listed above to demonstrate more clearly how this estimate was reached and what specific activities were taken into account.
39. Although YF did explain that each Directorate only took account of the time it took it to determine if it held the requested information, to locate, retrieve and extract it, it failed to explain in more detail exactly how this additional estimate of 38 hours was arrived at and to provide the detailed breakdown the Commissioner required.
40. It is the Commissioner's view that an estimate needs to be supported by cogent evidence – evidence which demonstrates exactly how these individual hours were accumulated and on what types of activities. Without such evidence and detailed breakdown the Commissioner is unable to accept that this additional estimate is reasonable. He is

therefore unable to take it into account when reaching his decision on YF's application of regulation 12(4)(b) of the EIR.

41. The Commissioner must therefore now consider whether he agrees YF's estimate of 77 hours alone is enough to deem the refined request manifestly unreasonable.
42. Firstly it is evident that YF has explained in detail how it arrived at this estimate and provided evidence of the electronic searches undertaken by the three Directorates to support it. It is clearly evident that the complainant's refined request covered a significant amount of recorded information and was still therefore broad in scope despite the complainant's attempt to narrow it to correspondence exchanged between four main parties relating to the funding of the South Humber Gateway and the developments proposed on its south bank.
43. However, as stated above in paragraph 21, the estimated time it would take YF to comply with the refined request is just one of several factors that need to be considered when establishing whether a request is manifestly unreasonable. Other factors need to be considered, for example, the proportion of burden on the public authority concerned, the effect complying with the request would have on resources and other services offered by that authority, the size of the public authority itself, the presumption in favour of disclosure under the EIR and the public interest test.
44. In terms of burden and the diversion of resources, YF stated that it considered complying with the refined request would require an unreasonable diversion of resources from the provision of public services YF is mandated to provide. It stated that it is a small public authority (around 400 staff in May 2010) which was in the early stages of being abolished at the time of the complainant's request. At the time of the complainant's refined request redundancies had been announced and the overall resources available to YF were being scaled down. YF confirmed that although plans were in place to deal with FOI and EIR requests during the closure process, it still considered the exceptional demands of this request could not be accommodated.
45. The Commissioner accepts that YF is a small public authority and that in general smaller public authorities are less able to accommodate the burdens EIR requests may place on them when compared to larger public authorities or central government departments. At the time of the request the closure of YF had been announced and plans had already been implemented to scale down its functions. He considers a request that would take YF 77 hours to comply with would place a disproportionate burden on it as an authority at a time when resources were being scaled back. The time it would take YF to comply with this request would divert a disproportionate amount of its remaining

resources away from the core functions it still needs to meet prior to its final closure.

46. As the Commissioner is satisfied that YF's estimate of 77 hours is reasonable and that in these circumstances the amount of time it would take YF to comply with this request would be a disproportionate burden on the authority, he has concluded that the refined request is manifestly unreasonable. He is therefore satisfied that regulation 12(4)(b) of the EIR is engaged.
47. The Commissioner must now go on to consider the public interest test.

Public interest test

48. YF stated that compliance with the refined request would release a significant amount of information into the public domain relating to the South Humber Gateway and the development proposals currently under consideration on the south bank. This would promote the overall transparency and accountability of YF and assist the public in understanding more clearly these current activities.
49. It stated that disclosure of the requested information would also facilitate public debate over the future of the South Humber Gateway, which is a potentially important site for the development of the alternative energy sector in the UK.
50. However, in this case YF confirmed that it considered the public interest in maintaining the exception outweighed any public interest in complying with the request and the potential disclosure of the requested information.
51. YF stated that it felt there was little public interest in the disclosure of this information other than the promotion of the overall transparency and accountability of YF. YF confirmed that the complainant is one of two landowners with a suitable site in the area of the development proposal and requires access to the requested information to gain a commercial advantage.
52. The Commissioner has considered the public interest test and the arguments supported by YF. He accepts that there is a public interest in the disclosure of this information to promote the overall transparency and accountability of YF. He also accepts that disclosure would enable members of the public to scrutinise and understand more clearly the development proposals put forward by the company concerned and promote public debate.
53. However, in this case, it is the Commissioner's view that there are more compelling arguments in favour of maintaining this exception.

54. The Commissioner considers there is a public interest in protecting the integrity of the EIR and ensuring that it is used responsibly. While public authorities are encouraged towards acting in a transparent and accountable nature which benefits the public as a whole, it is not the intention of the legislation to require public authorities to devote excessive amounts of time to one particular request. YF has a responsibility to respond to other requests that are made as well as carrying out its statutory functions and there is a public interest in ensuring resources are not diverted away from this.
55. He is satisfied that if the YF was required to respond to this request it would place a significant burden on it in terms of time and expense and distract it away from its statutory functions. The Commissioner considers that to require YF to respond to this request would disrupt the everyday work of YF, diverting a disproportionate amount of resources from its remaining functions.
56. For the reasons explained above, the Commissioner has decided that in the circumstances of this case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The first request

57. The first request the complainant made was much wider in scope and essentially requested all recorded information held on the South Humber Gateway, the Northern Wind Innovation Programme and the proposals for development put forward by one of its competitors in the area.
58. The Commissioner decided above that the revised request had appropriately been refused under regulation 12(4)(b) of the EIR. It therefore follows that the Commissioner considers 12(4)(b) of the EIR also applies to the first request the complainant made and that the public interest in maintaining this exception is outweighed by any public interest in the disclosure of the requested information.

Regulation 12(5)(e)

59. Regulation 12(5)(e) of the EIR states 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.
60. For the Commissioner to agree that regulation 12(5)(e) applies YF must demonstrate that the information redacted from the disclosures it did make is:
 - commercial or industrial in nature;
 - is subject to confidentiality provided by law;

- that confidentiality is required to protect a legitimate economic interest; and
 - disclosure would adversely affect this confidentiality.
61. Regarding the first bullet point, YF confirmed that it regarded the redacted information to be commercial in nature, as it relates to discussions and negotiations between a company along the Humber and an Original Equipment Manufacturer (OEM) looking to locate to a suitable site in this area to construct large turbines in order to develop offshore wind farms. YF stated that the contents of the remaining information discuss the potential purchase of the land, planning permissions, the services that will be required, environmental factors, any envisaged obstacles and the overall timescale of the proposed development.
62. The Commissioner had reviewed the redacted information and he is satisfied that it is of a commercial nature for the reasons YF has explained. The information relates to the potential purchase of a site along the Humber for development. The sale of land in such circumstances is a commercial activity.
63. Turning now to the second bullet point, YF confirmed that the company concerned considers all information held by YF concerning this matter to be held "in the strictest of commercial confidence". The landowner confirmed in writing that YF owes it a duty of confidence and that it would action any breach of confidence should this occur. YF stated that it considers the company's views to be sufficient to meet this second bullet point.
64. The Commissioner considers that "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. As YF has provided no evidence to demonstrate that confidentiality exists due to a contractual obligation or statute, he will consider whether a common law duty of confidence exists in this case in relation to the remaining withheld information.
65. As stated above YF considers it owes the company concerned a duty of confidence in respect of the remaining withheld information. The Commissioner considers such a duty of confidence can only apply to information supplied by the company to YF and to information jointly created or agreed between the two parties.
66. The Commissioner has reviewed the redactions made to the information YF disclosed to the complainant. The majority of information redacted is not information supplied to YF by the company concerned or information which was jointly agreed or created between YF and company. A significant amount of information that has been redacted is contained in

communications between YF and other public authorities or external parties. For example there are several communications between YF and North Lincolnshire Council from which information has been redacted. Information has been redacted from the minutes of various South Humber Gateway Delivery Group meetings which had numerous attendees. There are also emails between North Lincolnshire Council and the National Grid and correspondence dated 6 September 2010 to which YF was copied in from Natural England outlining the formal objections it had received to the proposals. No duty of confidence can be owed by YF to the company concerned for these types of communications. This is because this information was not supplied to YF by the company concerned under a duty of confidence or created jointly or agreed between YF and the company. It was provided to YF by other parties, supplied by YF itself or jointly agreed with various external bodies at board meetings.

67. Therefore, for the majority of information redacted, this exception falls at the second bullet point and regulation 12(5)(e) of the EIR does not apply. No common law duty of confidence exists between YF and the company concerned for the types of communications the Commissioner has described in the above paragraph.
68. There is a small selection of communications between YF and the company concerned. The Commissioner accepts that these communications were either supplied to YF or jointly created or agreed between YF and the company concerned under a duty of confidence. YF has supplied evidence in the form of a letter from the company concerned which explains clearly that it considers all information shared, supplied or jointly agreed relating to the commercial negotiations that have taken place relating to the potential development of its site for the construction of turbines to have been supplied, shared or jointly agreed in the strictest of confidence.
69. For this information the Commissioner accepts that the second bullet point of paragraph 59 is met. It is now necessary for the Commissioner to go on to consider whether disclosure would adversely affect the legitimate economic interests of the company concerned (bullet points three and four).
70. YF stated that the offshore wind market is huge and highly competitive with the potential for development and investment on the Humber being worth hundreds of millions pounds. At the time of the complainant's request the OEM was in negotiation over two possible sites along the Humber – one owned by the company mentioned in the withheld information and the complainant's request and one owned by the complainant. The OEM had made no decision at this time over either site. The small selection of communications between YF and the company concerned to which a duty of confidence exists discuss issues

and possible barriers or obstacles to the negotiations that were taking place with the OEM. YF confirmed that if such information had been released at such a critical stage in the negotiations it would have adversely affected the legitimate economic interests of the company concerned. YF argued that if this information had been released in response to the requests it could have been used by the complainant or possibly other competitors to suggest to the OEM or future investors that the site owned by the company concerned is inferior to other sites and that rival sites are a much better prospect. Disclosure would therefore damage the economic interests of the company concerned and devalue its site.

71. For the Commissioner to agree that the third and fourth bullet point of paragraph 59 above are met in this case YF needs to demonstrate that disclosure 'would' adversely affect the legitimate economic interests of the company concerned. Arguments that disclosure would be likely to, might or are a possibility are insufficient to uphold the application of this exception.
72. The Commissioner has reviewed the contents of the small selection of communications between YF and the company concerned to which a duty of confidence exists. While he accepts that the complainant and the company concerned were at the midst of crucial negotiations with the OEM at the time of the request, he remains unconvinced that the contents of these communications themselves 'would' have adversely affected the legitimate economic interests of the company concerned at the time of the request.
73. The Commissioner understands that the offshore wind market is highly competitive and has the potential to bring significant inward investment into the area. However, YF has failed to explain how the contents of the communications themselves to which a duty of confidence is owed would adversely affect the company concerned. As stated above, the Commissioner has reviewed the contents himself and while he may accept that disclosure could possibly prejudice the commercial interests of the company concerned he does not agree from the submissions he has received from YF that disclosure 'would' adversely affect the interests of the company concerned. The threshold for the engagement of this exception is high and the Commissioner does not consider in this case that this threshold has been met.
74. Regulation 12(2) of the EIR states that a public authority should apply a presumption in favour of disclosure. As the Commissioner is not wholly convinced that disclosure 'would' adversely affect the legitimate economic interests of the company concerned he can only conclude that elements three and four of paragraph 59 are not met in this case.

75. In conclusion, for the small selection of communications between YF and the company concerned to which a duty of confidence is owed, the Commissioner had concluded that regulation 12(5)(e) does not apply.
76. As the Commissioner has decided that regulation 12(5)(e) does not apply to any of the redactions made to the information YF disclosed there is no need for him to go on to consider the public interest test.

Right of appeal

77. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

78. 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.
79. 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

Annex A

First request – 13 May 2010

“Information contained in all correspondence with the Department for Transport and Government Office for Yorkshire and The Humber regarding funding for the South Humber Gateway and Northern Wind Innovation Programme.”

“Information contained in all correspondence with [company name redacted] regarding funding for the South Humber Gateway and Northern Wind Innovation Programme.”

“Information contained in all correspondence and documents (including minutes from meetings) relating to the Planning Application by [company name redacted] (PA/2009/0600) for Change of Use from Agricultural to Industrial for A3, C1, B1, B2 and B3 Land Uses for Port Related Storage and Associated Services Facilities – Land at East Halton.”

“Information contained in all correspondence and documents (including minutes of meetings) related to new developments being promoted by [company name redacted] on the south bank of the Humber.”

“Information contained in all correspondence and documents (including minutes from meetings) related to ‘impact studies commissioned in the Humber estuary’ referenced in a letter from Tom Riordan, Chief Executive, Yorkshire Forward to [name redacted] [company name redacted] dated 30 April 2010, together with full copies of the aforementioned impact studies.”

Refined request – 22 October 2010

“Copies of all correspondence and meeting notes, by letter and e-mail, with –

- i) the Department of Transport;
- ii) the Government Office for Yorkshire and Humber;
- iii) North Lincolnshire Council; and
- iv) [name of company redacted]

Relating to the funding of the South Humber Gateway and the development proposes by [name of company redacted] on the south bank of the Humber.”