Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **15 May 2012**

Public Authority: **Department for Education**
Address: **Sanctuary Buildings**
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant requested information concerning the funding provided by the Department for Education (DfE) to Durand Education Trust in support of the Durand Academy proposal. He specifically requested the business plan or plans submitted to the DfE including the project budget with detailed costs estimates relating to the proposal.

2. The Information Commissioner's decision is that the DfE incorrectly withheld some of the requested information under regulation 12(5)(e) of the EIR (commercial confidentiality). The Information Commissioner (the Commissioner) does not consider that regulation 12(5)(e) of the EIR is engaged in relation to the information described in the confidential annex to this decision notice. The DfE is required to disclose this information to the complainant. The Commissioner considers that the DfE was entitled to withhold the remainder of the information under regulation 12(5)(e) of the EIR. He considers that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation:

    - provide the complainant with the information on page 4 of the Durand Academy proposal, except for the information under the heading 'Personal Details', as agreed in the DfE's letter to the Commissioner dated 6 March 2012;

- provide the complainant with the information on page 33 of the Durand Academy proposal, except for the handwritten information, as agreed in the DfE's letter to the Commissioner dated 6 March 2012;

- provide the complainant with the information contained on pages 19 and 24 of the Durand Academy proposal as agreed in the DfE's letter to the Commissioner dated 6 March 2012; and

- provide the complainant with the information described in the confidential annex to this decision notice.

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

5. On 4 July 2011 the complainant made the following request for information to the DfE:

> *'It has been reported that the Durand Education Trust / Durand Academy have been awarded over £17 million in funding from the Department for Education in support of the above project.*
>
> *Under the Freedom of Information Act I would like to request the following:*
>
> **A copy of the business plan or plans submitted to the Department for Education by the Durand Education Trust or Durand Academy in relation to the proposed state-funded boarding school at the site of St Cuthman's in Midhurst, Sussex*
>
> **A copy of the project budget with detailed cost estimates relating to the scheme.'*

6. The DfE responded on 29 July 2011 stating that the information the complainant had requested was contained within Durand Education Trust's application to the DfE to establish a Middle & Upper School Academy. It disclosed some of the information to the complainant. It refused the remainder of the information under section 40(2) with section 40(3)(a)(i) (third party personal data) and section 43(2) of the FOIA (commercial interests).

7. The complainant requested an internal review on 2 August 2011.

8. Following an internal review the DfE wrote to the complainant on 24 August 2011 upholding its original decision.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He considers that the DfE has inappropriately withheld the information and that the wider public interest favours disclosure.

10. The Commissioner contacted the DfE on 11 November 2011 asking the DfE to provide the withheld information and further arguments to support the exemptions it was relying on. The DfE responded on 8 January 2012 providing the information and further arguments in support of its reliance on the exemptions it had applied.

11. Having reviewed the information within the scope of the request the Commissioner wrote to the DfE outlining his view that the information was 'environmental information' and the request should have been dealt with under the EIR. He asked the DfE to reconsider the request under the EIR, outlined his preliminary views in relation to the withheld information and asked the DfE to provide arguments for any exceptions it was relying on to withhold the information.

12. The DfE responded to the Commissioner in a letter dated 6 March 2012. It stated that it was willing to provide the complainant with some of the information it had previously withheld. This information was as follows:

    - the information on page 4 of the Durand Academy proposal, except for the information under the heading 'Personal Details';
    - the information on page 33 of the Durand Academy proposal, except for the handwritten information;
    - the information contained on pages 19 and 24 of the Durand Academy proposal.

13. The DfE stated that it was relying on regulation 12(5)(e) and regulation 13 of the EIR to withhold the remaining information and provided arguments in support of its reliance on these exceptions.

14. The Commissioner contacted the complainant concerning the scope of his investigation. The complainant does not dispute the DfE's application of regulation 13 to the personal data withheld under that exception.

Therefore, the Commissioner has only considered the DfE's reliance on regulation 12(5)(e) of the EIR as part of his investigation.

15. In the course of his investigation the Commissioner has considered all of the arguments made by the complainant and the DfE including those not specifically referenced within this decision notice.

Reasons for decision

Does the request fall under the EIR?

16. The Commissioner considers that the information contained within the Durand Academy proposal falls within the definition of 'environmental information' under regulation 2(1)(c) with regulation 2(1)(a) and (b) of the EIR. Regulation 2(1) of the EIR states:

> *'"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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[…]'*

17. The information contained within the Durand Academy proposal is information in a written form on a measure/plan that would affect, or would be likely to affect, the state of the elements of the environment. The Durand Academy proposal involves significant external building and landscaping works which would affect or be likely to affect the land and landscape. For example, the proposal states that the "*13-18 boarding element at St Cuthman's site will need to be built from scratch*." For the avoidance of doubt the Commissioner considers that all of the information withheld under regulation 12(5)(e) of the EIR is environmental information within the definition provided in regulation 2(1) of the EIR.

Regulation 12(5)(e) of the EIR – Commercial Confidentiality

18. Regulation 12(5)(e) of the EIR states the following:

> *'12.— Exceptions to the duty to disclose environmental information*
>
> *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–*
>
> *(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'*

19. In determining whether the exception under regulation 12(5)(e) of the EIR applies the Commissioner will consider:

- whether the information is commercial or industrial in nature;
- whether the information is subject to confidentiality provided by law;
- whether the confidentiality is provided to protect a legitimate economic interest; and
- whether the confidentiality would be adversely affected by disclosure.

20. The DfE has argued that the disputed information is commercial in nature. It has also argued that although there were no explicit references to a duty of confidentiality in the application process it has a common law duty of confidence to the proposer. It has explained that the Durand Academy proposal was not a standard application to convert a school within local authority control into an Academy but instead an application to expand an existing Academy. Therefore, the normal explicit reference to confidentiality in the application process was not made.

21. The DfE has stated that the economic interests that would be adversely affected if the information were to be disclosed are:

> *'firstly; the Department's as part-funder of the projects; secondly, those of Durand Academy, as part-funder and thirdly the architectural firm, as release of the information could reveal information about their bidding processes.'*

22. The DfE has argued that the adverse effects of disclosure in relation to the information concerning budget projections and costs plans and information contained within the draft site report would be as follows:

> *'Exposing the possible budget before a procurement process is complete is likely to impact negatively on the negotiating position of any party seeking to buy goods or services in a competitive market, since any supplier would become aware that the school had planned to allow a certain level of funding for each budget head.*
>
> *At the time of the request the project was still in the early stages and tender and procurement processes had not yet been finalised. […]*
>
> *The Department believes the release of the information at the time of the request had the potential to damage the Academy's commercial interests by revealing information relevant to the tender and procurement process. Release of information about the budget for the refurbishment of the site or proposed building works could prejudice negotiations by revealing potentially how much money was deemed necessary and result in less effective use of public money. […]*
>
> *It would, for example, be difficult to achieve best value for money in tendering for maintenance services when the indicative budget until 2017 had been put into the public domain. The project is still in development as the tender and procurement processes have not yet been finalised. […]*
>
> *Releasing the amount of money allocated to a budget before a procurement exercise is complete makes it more likely that any element is likely to come nearer to a maximum figure than if those tendering do not know how much money has potentially been allocated to that budget head. […]*
>
> *Release of information about the budget for the refurbishment of the site or proposed building works could prejudice negotiations by revealing potentially how much money was deemed necessary and result in less effective use of public money.*
>
> *Release of information about the budget for the refurbishment could prejudice negotiations…the Department believes that the timing of this request is an important consideration.'*

23. The DfE has also argued that the disclosure of the proposed floor plans and site plans would adversely affect Durand Education Trust's economic interests for the following reason:

'The drawings contained a proposed floor plan and site plan. The costing summary includes amounts allocated per building element. This scheme is in the early stages of development and has not yet been tendered or procured. The drawings represent a vision for a scheme which could be subject to change. Release of this information outside the procurement process could also stifle any further creative solutions which could save public funding.'

24. The complainant has argued there is growing controversy about the DfE's financial management of Academy schools. He considers that given the amount of public money involved there is a clear public interest in being able to scrutinise the Durand Academy proposal. He has argued that it is not necessary to apply a blanket block on disclosure of the financial reasoning behind the DfE's funding commitment to the project in order to protect Durand Education Trust's bargaining position in relation to the tender and procurement process. He argues that disclosure of the information is in the wider interests of transparency and accountability.

Is the information commercial or industrial in nature?

25. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. It should be remembered that not all financial information is necessarily commercial information.

26. The Commissioner's view is that the information in the Durand Academy proposal is commercial in nature. Although some of the information contained within the proposal is financial it is the overall context in which it was submitted to the DfE that makes the information commercial.

27. The Durand Academy proposal is a bid for funding to expand an existing Academy in order to provide secondary education provision and deliver an 'All-Through Academy'. The information contained within the Durand Academy proposal includes draft budget projections, details of capital requirements and a cost plan report. This information would be important in the DfE assessing the financial viability of the proposal, in determining whether the proposal represented good value for money for taxpayers and in making a decision as to whether it should fund the proposal from its limited funds. Had the DfE chosen not to fund the Durand Academy proposal it would have had to procure further education provision from another provider. Therefore, in the Commissioner's view the DfE's decision to fund the Durand Academy

proposal was a commercial decision to 'buy' education provision from Durand Education Trust.

28. In addition to the above, the Commissioner considers that the information contained within the Durand Academy proposal also relates to Durand Education Trust's proposed procurement of goods and services in order to deliver the Durand Academy proposal. Therefore, the withheld information also relates to the commercial activity that, at the time the proposal was submitted, Durand Education Trust considered would be necessary to enable it to deliver the proposal.

Is the information subject to confidentiality provided by law?

29. In determining whether this element of the test under section 12(5)(e) of the EIR is satisfied the Commissioner considers that the term 'provided by law' includes confidentiality imposed on any person under the common law of confidence. The DfE has argued that it has a common law duty of confidence to Durand Education Trust. The key issues the Commissioner will consider in determining whether a common law duty of confidence exists for the purposes of regulation 12(5)(e) of the EIR are whether:

    - the information has the necessary quality of confidence; and
    - whether the information was shared in circumstances importing an obligation of confidence.

30. The Commissioner does not consider that it is necessary to determine whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no requirement to establish an actionable breach of confidence for regulation 12(5)(e) of the EIR to be engaged. As there is no need to establish an actionable breach of confidence, there is also no need to consider whether there would be a public interest defence to any breach of confidence.

31. The Commissioner considers that the disputed information has the necessary quality of confidence. The disputed information is not in the public domain and it is not trivial in nature.

32. The DfE has argued that it owes a common law duty of confidence to Durand Education Trust. It has also explained that Durand Education Trust expected the information contained within the Durand Academy proposal to be kept in confidence. The Commissioner notes that in the standard application process to convert a school into an Academy explicit references are made to the common law duty of confidence within the application process. He considers that taking into account the commercial nature of the information, the relationship between the

parties and the standard practice regarding funding applications, the DfE owed a common law duty of confidence to Durand Education Trust.

33. The Commissioner does not consider that the DfE has demonstrated that it owes a duty of confidence to the architectural firm that produced the plans that were included in the Durand Academy proposal submitted to the DfE by Durand Education Trust. The DfE does not have any direct relationship with the architectural firm and it has not provided any submissions to suggest that it has such a duty. However, the information included in the Durand Academy proposal that derives from the architectural firm is covered by the common law duty of confidence owed to Durand Education Trust.

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

34. The Commissioner considers that to satisfy this element of the test under regulation 12(5)(e) of the EIR disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The confidentiality of the information must be objectively required at the time of the request in order to protect a relevant economic interest. Where information is provided by one party to another under the common law duty of confidence it is the interests of the confider, in this case Durand Education Trust, which are relevant.

35. The DfE has argued that at the time of the request the tender and procurement processes in relation to the Durand Academy proposal were still in the early stages. It stated that the disclosure of budgets for each budget head would adversely affect the ability of Durand Education Trust to buy goods and services in a competitive market as any potential supplier would become aware that Durand Education Trust had planned to allow a certain level of funding for the goods and services it was in the process of procuring. Therefore, it considers that the information is highly commercially sensitive and its disclosure would cause significant harm to Durand Education Trust's bargaining position and ability to obtain best value for money.

36. The Commissioner agrees that at the time of the request the DfE's common law duty of confidence to Durand Education Trust was required to protect its legitimate economic interests in gaining the best value for money and maintaining its bargaining position in the tender and procurement process in relation to some of the information contained within the Durand Academy proposal. However, he draws a distinction between the information concerning projected costs and budgets to procure specific goods and services and the remainder of the information concerning the overall financial viability of the project and proposed floor and site plans. In short, he considers that the DfE's duty

of confidentiality is only provided to protect the identified economic interests to the extent that it would allow potential bidders in the tender and procurement processes, or businesses providing goods and/or services in relation to the Durand Academy proposal, to identify the projected costs or budget for the goods or services it would be providing to Durand Education Trust.

37. Therefore, he does not consider that all of the information withheld under this exception requires the protection of a common law duty of confidence in order to protect the economic interests of Durand Education Trust that the DfE has identified. This is because the DfE has not demonstrated to the necessary standard that some of the information withheld under this exception would adversely affect the identified economic interests if it were to be disclosed.

38. The DfE has identified further economic interests it considers to be relevant under regulation 12(5)(e) of the EIR, which are as follows:

- the DfE's interests as part-funder of the project;
- the architectural firm's interests as disclosing the information may reveal something about its bidding process; and
- the disclosure of the proposed floor plan and site plan could stifle further creative solutions for the Durand Academy proposal which have the potential to save public money.

39. The Commissioner does not consider that the DfE's or the architectural firm's economic interests are relevant in the circumstances of this case, as the DfE has only demonstrated that a common law duty of confidence is provided by law to protect Durand Education Trust's economic interests.

40. The Commissioner recognises that Durand Education Trust has an economic interest in securing the best value for money by considering innovative and creative solutions for the Durand Academy proposal. However, the Commissioner does not consider that the DfE has demonstrated to the necessary standard that the disclosure of the information would adversely affect Durand Education Trust's economic interests by stifling creativity.

41. The Commissioner does not consider that there is any evidence to suggest that the disclosure of the proposed floor plans and site plans would stifle creativity. He does not consider that a professional architects firm engaged by Durand Education Trust to consider further innovative and creative solutions for the Durand Academy proposal would not do so because they had seen the previous plans. Therefore, as there is no evidence to suggest that any harm to the identified

economic interest would be caused by disclosure of the information the Commissioner does not consider that this was an economic interest the confidentiality was provided to protect.

42. For the reasons outlined above, the Commissioner has concluded that this element of the test under regulation 12(5)(e) of the EIR has not been met in relation to some of the withheld information. Therefore, he does not consider that the exception is engaged in relation to this information which is described in the confidential annex to this decision notice.

43. The Commissioner considers that the remainder of the information, which would adversely affect Durand Education Trust's ability to obtain best value for money and maintain its bargaining position in the tender and procurement process, is protected by DfE's common law duty of confidence to Durand Education Trust.

Would that confidentiality be adversely affected by disclosure?

44. The Commissioner considers that once the first three limbs of the test under regulation 12(5)(e) of the EIR are satisfied it is inevitable that this limb will also be satisfied. This is because disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and will also inevitably harm the legitimate economic interests that have already been identified.

45. For the reasons outlined above, the Commissioner considers that the disclosure of the withheld information, with the exception of the information identified in the confidential annex to this decision notice, would adversely affect the confidentiality provided to protect Durand Education Trust's economic interests. Regulation 12(5)(e) of the EIR is therefore engaged in relation to this information and the Commissioner has gone on to consider the public interest test.

Public Interest Test

46. The DfE has argued that the public interest in maintaining the exception under regulation 12(5)(e) of the EIR outweighs the public interest in disclosing the information.

47. The DfE recognises that there are public interest factors in favour of disclosing the information. In particular, it considers that there is a public interest in transparency and accountability to demonstrate that public funds are being used effectively and that the department is getting value for money in the goods and services it purchases or the projects it funds.

48. The DfE considers that there are stronger public interest factors in favour of maintaining the exception. It considers that there is a public interest in the proposers being able to maintain strong bargaining positions during negotiations in the tender and procurement process. It also considers that there is a public interest in preventing harm to the economic interests of Durand Education Trust and preventing the adverse affect on the effective use of public money which would result from disclosing the information.

49. The complainant considers that given the amount of money involved in the Durand Academy proposal the wider public interest in ensuring good financial governance favours disclosure of the information, particularly at a time of severe economic austerity.

50. The Commissioner considers that there are public interest factors in favour of disclosure. He agrees with the DfE that there is a public interest in transparency and accountability to ensure that public funds are being used effectively and that the department is getting value for money in the goods and services it purchases and/or the projects it funds. He also agrees with the complainant that there is a public interest in disclosing information to enable the public to consider whether the DfE's funding of the proposal demonstrates that the department is following good financial governance practices. He considers that the amount of public money being invested in the Durand Academy proposal adds weight to this factor. The Commissioner has attributed appropriate weight to these factors.

51. The Commissioner considers that there are also public interest factors in maintaining the exception. He agrees with the DfE that there is a public interest in the proposers being able to maintain strong bargaining positions during negotiations in the tender and procurement process and obtaining best value for money. At the time of the request the Durand Academy proposal was at in its early stages and the tender and procurement process had not been finalised. Therefore, the harm that would be caused to Durand Education Trust's economic interests if the information were to be disclosed is likely to be severe. He has afforded significant weight to this factor.

52. The Commissioner also considers that there is some inherent public interest in maintaining commercial confidentiality. In the particular circumstances of the case he considers that there is a public interest in maintaining commercial confidentiality relating to funding bids submitted to the DfE. It is an important principle that organisations submitting bids to the DfE in the future can be assured that commercial confidence will be maintained where this is necessary to protect a legitimate economic interest. He considers that disclosing information which could significantly harm Durand Education Trust's economic interests could

also harm the ability of the DfE to reassure organisations in the future that it would protect commercially confidential information. He has afforded some weight to this factor.

53. On balance, the Commissioner considers that the public interest in maintaining the exception for the information within the scope of regulation 12(5)(e) of the EIR outweighs the public interest in disclosing the information. The DfE is not required to disclose this information.

Right of appeal

54. 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

55. 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.

56. 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 ……

Lisa Adshead
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