Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **27 September 2012**

Public Authority: **Cornwall Council**
Address: **Treyew Road**
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information relating to the Tourism and Rural Access in Cornwall project. The council refused to provide the information, withholding it under the exception for adverse effect to the confidentiality of commercial information.

2. The Commissioner's decision is that council has failed to demonstrate that the exception is engaged. He also finds that the council's internal review took too long to complete.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Disclose the withheld 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.

Background

5. TRAC (Tourism and Access in Cornwall) is a £1.6m project, funded, primarily by DEFRA through the Rural Development Programme for England. The project is intended to establish strategically important links in Cornwall's recreational trails network in the vicinities of Launceston, Bude[1].

6. The project received funding approval in November 2009 is due for completion by 31 December 2013. There have been changes to the originally proposed route alignment and at Launceston the proposal to enable the extension of the Launceston Steam Railway (LSR) from Newmills to Egloskerry has been dropped[2]. The TRAC business plan originally named LSR as one of the partners which would deliver the project[3].

7. In October 2011 LSR pulled out of negotiations with the council regarding the TRAC[4]. It is within this context that the request for information relating to these aspects of the TRAC project was made.

Request and response

8. In February 2012, the complainant wrote to the council and requested information in the following terms:

"Please provide information relating to the TRAC Project multi use trail at Launceston as follows:

[1] See the council website here:
https://democracy.cornwall.gov.uk/mgConvert2PDF.aspx?ID=46870
[2] Ibid.
[3] The business plan is published here:
http://www.launcestonsr.co.uk/TRAC%20Business%20Plan.pdf
[4] See - http://www.bbc.co.uk/news/uk-england-cornwall-15524633 and
http://www.launcestonsr.co.uk/LSR-hariades-14oct.pdf

1. *Details of the failed negotiations between Cornwall Council and the Launceston Steam Railway regarding use of the railway's land and extension of the railway to Egloskerry, preferably in the form of minutes or notes taken at meetings between the two parties.*

2. *Details of the expenditure committed by the council, based on the negotiations in point 1, on surveys, design work and the like relating to the trail using and/or crossing land owned by the steam railway, and surveys etc. relating to the extension of the steam railway.*

3. *Details of land purchases made to date along the length of the proposed trail between Launceston and Egloskerry and their cost."*

9. The council responded on 27 February 2012. It stated that the requested information was being withheld under the exception for adverse effect to the confidentiality of commercial or industrial information.

10. Following an internal review the council wrote to the complainant on 27 April 2012. It stated that it was maintaining its original position.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

12. The Commissioner has considered whether the requested information, which consists of minutes of meetings, costings of work carried out on the identified section of trail and expenditure on land, has been correctly withheld.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

13. 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.

14. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met,

namely. He 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?
- 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?

15. 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 concerned 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 for profit.

16. The council has stated that the information relates to ongoing negotiations with landowners regarding the purchase of land required to deliver the TRAC project.

17. Having had sight of the requested information the Commissioner is satisfied that, as it relates to the purchase of land, the information is commercial in nature. He has, therefore, concluded that this element of the exception is engaged.

Is the information subject to confidentiality provided by law?

18. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

19. In its initial response to the request and its internal review the council did not explain why it considered that the information was subject to confidentiality provided by law. The Commissioner invited the council to make submissions in this regard. The council explained that it currently has a compulsory purchase order with the secretary of state in relation to the land that is required for the TRAC project. It also referred the

Commissioner to a report - "Compulsory Purchase Order for the TRAC Project", dated 9 May 2012 and published on its website[5].

20. The Commissioner does not see the relevance of this document to the question of whether the withheld information is subject to confidentiality provided by law. Whilst he is under no obligation to generate arguments on a public authority's behalf the Commissioner has considered whether the withheld information can conceivably be said to have the necessary quality of confidence.

21. The withheld information consists entirely of information generated by the council itself, namely minutes of meetings, costings of work done on the section of trail identified in the request and expenditure on land. The Commissioner can find no explicit reference within the withheld information to it being shared in circumstances creating an obligation of confidence.

22. The Commissioner has considered whether there was any existing implicit assumption within the council that the withheld information would attract an obligation of confidence. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2012/0012, 24 May 2010)* the Tribunal applied the 'reasonable person' test. This considers whether a reasonable person in the place of the recipient of the information would have considered that the information had been provided to them in confidence.

23. The Commissioner considers that he is not obliged to speculate as to the council's normal practices in such matters; however, he has considered the relevant facts. Having viewed the withheld information, the Commissioner does not see that a reasonable person could conclude that this information was imparted in confidence. In reaching this conclusion, the Commissioner has considered the information which the council had already placed in the public domain at the time of the request and compared this to the additional detail provided by the withheld information.

24. With regard to the council's reference to its proposed use of a compulsory purchase order to acquire land required for the TRAC project, the Commissioner notes that this option had already been clearly set out in earlier documents published by the council. For

[5] https://democracy.cornwall.gov.uk/mgConvert2PDF.aspx?ID=46870

example, "Compulsory Purchase of Land for the Creation of a Multi-Use Trail from Launceston to Egloskerry - TRAC Project", published on 13 July 2011, states:

"Development of the Launceston-Egloskerry trail requires the completion of agreements with ten different landowners. Following lengthy discussions over the course of the last year officers have been advised by a number of landowners that they are unwilling to agree to use of their land for creation of the proposed trail either at all or without attaching conditions that would prevent the project from meeting its aims. It is therefore likely that the Council will need recourse to compulsory purchase powers in order to acquire sufficient rights to construct and maintain the trail."[6]

He considers that the additional detail provided by the withheld information does not reveal anything of substance about the council's specific negotiating position in respect of these matters and that the information is not more than trivial in this case.

25. In its submissions, the council has argued that disclosure of the information would result in adverse effect to landowners with whom it is negotiating; however, the Commissioner notes that it has provided no evidence that the views of these third parties has been sought. The Commissioner considers that it is not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner (EA/2006/0014, 11 December 2006).*

26. The Commissioner has also not been provided with evidence that any of the content of the withheld information was provided to the council by a third party, either under the terms of confidentiality provided by law or otherwise. In relation to the minutes of meetings between the council and LSR, the Commissioner has been provided with correspondence from the complainant which confirms that LSR has no objection to the disclosure of this information.

27. In the absence of relevant submissions from the council in this regard and, having concluded on the basis of the available evidence that there

[6] https://democracy.cornwall.gov.uk/documents/s33192/TRAC%20Project_P1.pdf

is no explicit or implicit assumption that the withheld information is subject to a duty of confidence, the Commissioner has determined that this element of the exception is not engaged. As he has concluded that the withheld information does not satisfy this particular condition, the Commissioner finds that the exception is not engaged. He has, therefore, not gone on to consider the other relevant conditions or the public interest test.

Regulation 11 – internal review

28. Regulation 11 provides requesters with the right to ask authorities to conduct a review of their handling of a request for information. This is commonly referred to as an 'internal review'.

29. Under regulation 11(4) of the EIR public authorities have a duty to notify an applicant of their internal review decision within 40 working days after the date of receipt of any representations.

30. In this case the complainant submitted their request for internal review on 1 March 2012 and the council issued its response on 27 April 2012. As the internal review took more than 50 working days to complete the Commissioner finds that the council has breached regulation 11(4).

Right of appeal

31. 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

32. 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.

33. 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