

## **Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 17 September 2013

**Public Authority:** County Durham and Darlington Fire & Rescue Service

**Address:** Finchale Road  
Framwellgate Moor  
Durham  
DH1 5JR

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

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1. The complainant has requested information relating to the siting of a fire station at Sniperley Farm in Durham. County Durham and Darlington Fire & Rescue Service (the "authority") refused the request under the FOIA, citing the exemption for information provided in confidence. In applying the exemption the authority also refused to confirm or deny whether the requested information was held.
2. The Commissioner's decision is that County Durham and Darlington Fire & Rescue Service:
  - wrongly dealt with the request under the FOIA, failing to provide the requested information or issue a compliant refusal notice. In doing so it breaching regulation 5 and regulation 14 of the EIR;
  - was entitled to rely on regulation 12(5)(e) to refuse to provide the complainant with the withheld information. He considers that the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 14 September 2012, the complainant wrote to the authority and requested information in the following terms:

*"confirmation as to the dates and contents of any discussions, letters and emails between the Fire Service and Mr Alan Morallee or other representatives of Galaxy Investments Ltd in relation to the location and siting of the new fire station at Sniperley Farm.*

*We would ask that you lets us have what information you can together with copies of any documents, letters or emails as may be available."*

5. The authority responded on 9 October 2012. It stated that it was refusing to confirm or deny whether the requested information was held citing the exemption for information provided in confidence.
6. Following an internal review the authority wrote to the complainant on 7 December 2012. It stated that it was maintaining its original position.

### **Scope of the case**

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7. On 29 November 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would determine whether the authority handled their request in accordance with the FOIA. Specifically, the Commissioner confirmed that he would consider whether the authority was entitled to rely on section 41 as a basis for refusing to confirm or deny whether the requested information was held.
9. During the course of his investigation, having viewed the withheld information, the Commissioner suggested to the authority that the information might constitute environmental information as defined by the EIR. The Commissioner invited the authority to reconsider the request under the EIR and provide submissions accordingly.
10. The authority agreed with the Commissioner that the request should have been handled under the EIR and stated that, in continuing to refuse the request it intended relying on the exceptions for adverse affect to the confidentiality of commercial or industrial information and adverse affect to the interests of the information provider.
11. The Commissioner has considered whether the withheld information is environmental as defined by the EIR and, if so, whether the authority has correctly applied exceptions to refuse the request.

## Reasons for decision

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### Is the information environmental?

12. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

"...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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

13. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.

14. The Commissioner considers the requested information to be information on a measure, namely planning, likely to affect the elements and factors referred to in Regulation 2(1)(a) and 2(1)(b) and is therefore satisfied that this constitutes environmental information by virtue of Regulation 2(1)(c).

#### **Regulation 5 – duty to provide environmental information**

15. Regulation 5 of the EIR obliges public authorities that hold environmental information to make it available on request within 20 working days of receipt of the request.
16. As the authority failed to deal with the request under the EIR or provide the requested information the Commissioner has concluded that it breached regulation 5 of the EIR.

#### **Regulation 14 – refusal to disclose information**

17. Where a request for information is refused by a public authority it must, under regulation 14 of the EIR, issue a refusal notice within 20 working days specifying the reason for refusing to disclose the information.
18. As the Commissioner has decided that the requested information constitutes environmental information and that the authority wrongly dealt with the request under the FOIA, he has concluded that the authority failed to issue an appropriate refusal notice within the statutory time limit. He has, therefore, concluded that the authority breached regulation 14 of the EIR.

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

19. In handling this complaint, the Commissioner has addressed his queries to Durham County Council, which supplies legal services to the authority under a Service Level Agreement. For the purposes of the FOIA, however, the relevant public authority responsible for the request which is the subject of this complaint is the authority.
20. 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”.
21. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. 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?
22. In dealing with the complaint, the authority consulted with Galaxy Investments Ltd ("Galaxy") and sought its views as the interested party. The authority provided the Commissioner with information submitted by Galaxy's representatives to the authority which, clarifies why it considers the information should not be disclosed. Whilst the Commissioner has considered the submission provided by Galaxy in evaluating the application of exceptions, he is mindful of the recommendations of the code of practice issued under regulation 16 of the EIR (the "EIR code"), particularly, paragraph 45 which states:

*"In all cases, it is for the public authority that received the request, not the third party (or representative of the third party) to weigh the public interest and to determine whether or not information should be disclosed under the EIR. A refusal to consent to disclosure by a third party does not in itself mean information should be withheld, although it may indicate interests involved."*<sup>1</sup>

*Is the information commercial or industrial in nature?*

23. 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.
24. Having viewed the withheld information the Commissioner notes that it consists of emails and notes of telephone conversations which relate to the potential sale of land.
25. The Commissioner considers that the information is clearly commercial in nature and that it relates to the commercial activity of the authority

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<sup>1</sup> <http://archive.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

and Galaxy Investments Ltd ("Galaxy"). He has concluded that this element of the exception is satisfied.

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

26. 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.
27. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
28. On the basis of the authority's submissions, the Commissioner is satisfied that distribution of the withheld information has been limited and that it is not otherwise accessible.
29. Having viewed the withheld information, it clearly relates to a development which will have an effect on the local area. The Commissioner therefore considers that the information in question is not trivial. He is satisfied that the information does have the necessary quality of confidence and, as a result has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.
30. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark* suggested that the 'reasonable person' test may be a useful one. He explained:

*"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence"*.
31. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*, the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.
32. In applying the "reasonable person" test in this instance the Tribunal stated:

*"in view of our findings ... that at the relevant time the usual practice of the council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) ... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing."*<sup>2</sup>

33. On the basis of the explanations provided by the authority, the content of the withheld information and the above criteria, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence. From the arguments supplied by the authority, the Commissioner considers that the circumstances gave rise to an obligation of confidence. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

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

34. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
35. 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. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

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<sup>2</sup> Published online here:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol\\_CC\\_v\\_IC\\_&\\_PBSA\\_\(0012\)\\_Decision\\_24-05-2010\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

*"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".*

36. The authority has confirmed that the legitimate economic interest in this case is Galaxy's business interests in avoiding a disclosure which could result in commercial and financial detriment. As to the nature of the harm to Galaxy's commercial interests, the authority directed the Commissioner to Galaxy's submissions.
37. Having considered all the relevant submissions, the Commissioner has concluded that withheld information consists of information which is of commercial value and which, if disclosed, is likely to harm Galaxy's ability to benefit from its investment in the land purchased from NEE. This would harm the legitimate interests of Galaxy. As such the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of Galaxy.

*Would confidentiality be adversely affected by disclosure?*

38. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of Galaxy. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

*Public interest in disclosing the information*

39. In its submissions to the Commissioner the authority acknowledged the general presumption in favour of disclosure provided by regulation 12(2) of the EIR.
40. The authority also accepted that there is always a public interest in transparency and the good decision making and accountability within public authorities which this can promote.

*Public interest in maintaining the exception*

41. In its submissions Galaxy has argued that any discussions it had with the authority were solely of a commercial nature and of no public interest. It has stated that the authority has not made any decisions based on considerations arising from the withheld communications with Galaxy so there can be no public interest in disclosure.



42. Galaxy has argued that the intention behind the request is not to obtain information which is of public interest but to further private, commercial interests alone. It has stated that it does not serve the public interest to disclose information that is both confidential and commercially sensitive, the result of which may be to benefit one part to the detriment of another.
43. The authority has submitted that the provision of the requested information in this instance would not advance any knowledge concerning decision making by the authority either in general or in relation to the specific issue which is the request's focus.

*Balance of the public interest*

44. The Commissioner first acknowledges that the EIR provides an inbuilt presumption in favour of disclosure and has factored this generic weighting into his consideration of the public interest balance.
45. The Commissioner would first like to note that he considers that it is not the purpose of the EIR to facilitate private disputes or disagreements between commercial entities, even where these relate to commercial interaction with a public authority. He acknowledges that the identity of a requester and the intention behind a request should, ordinarily, not be a relevant factor in considering whether an authority has complied with a request. However, in this instance he considers that, whilst not being a decisive factor in his conclusions about the authority's compliance, these factors expose the dominant issues here.
46. The Commissioner considers that the dominant factor which the withheld information exemplifies is the commercial relationship between Galaxy and NEE and both parties' perceptions about the basis of their contractual arrangements in respect of the land at Sniperley Farm. It is clear to the Commissioner that, in this instance, the authority has only a tangential connection to this issue and its interaction with Galaxy does not appear to present any governance issues or anything else of relevance to public interest factors such as transparency or accountability.
47. It is clear to the Commissioner that the only parties who are likely to benefit or suffer detriment as a result of the disclosure of the information are the complainant and Galaxy. He considers that there is nothing significant in the withheld information which would serve the public interest in understanding the authority's decision-making process in relation to its purchase of land from the complainant and its intention to build a new fire station. Whilst these latter two issues are of public interest, the Commissioner considers that the withheld information does

not provide a significant contribution to the public understanding of these matters.

48. Having considered all the relevant factors the Commissioner has concluded that it would not be proportionate to expose Galaxy to the strong likelihood of harm identified in order to achieve complete accountability and transparency about the authority's communications in relation to the issue in question. In view of the evidence presented, it is the Commissioner's view that the risk of harm outweighs the benefits and the public interest therefore favours maintenance of the exception.
49. As the Commissioner has found that the authority has correctly applied regulation 12(5)(e) to the request and that the public interest favours maintaining the exception he has not gone on to consider its use of the exception under regulation 12(5)(f).

## Right of appeal

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50. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

51. 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.
52. 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**