

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

### **Decision notice**

**Date:** 13 October 2014

**Public Authority:** Birmingham City Council  
**Address:** Council House  
Victoria Square  
Birmingham  
B1 1BB

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

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1. The complainant has requested information relating to the sale of the Martineau Centre in Harborne. Birmingham City Council disclosed some information but withheld other information under the EIR exceptions for personal data (regulation 13) and the confidentiality of commercial information (regulation 12(5)(e)).
2. The Commissioner's decision is that Birmingham City Council:
  - Failed to respond to the request or issue a refusal notice within the statutory time limits and breached regulation 5(2) and regulation 14;
  - Failed to conduct an internal review in accordance with the EIR and breached regulation 11(5).
  - Correctly applied regulation 12(5)(e) and regulation 13(1) to the withheld information.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 11 April 2014, the complainant wrote to Birmingham City Council (the "council") and requested information in the following terms:

*"I would like copies of any and all current (i.e., not cancelled or voided) contracts and agreements (whether binding or not) between the City Council (including its agents) and any third party relating to the potential sale, development or disposal of the Martineau Centre in Harborne (Quinton Ward)."*

5. The council responded on 30 April 2014 and confirmed that the information was held but refused to provide it, stating that it was "commercially confidential" under the terms of the FOIA.
6. Following an internal review the council wrote to the complainant on 19 June 2014. The internal review overturned the council's original position and confirmed that the information should be disclosed in a redacted form. The internal review stated that the matter would be referred back to the relevant service area for it to arrange for the disclosure of the redacted information.

### **Scope of the case**

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7. On 26 June 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled. The complainant stated that they had not been provided with the redacted information referred to in the council's internal review.
8. On 17 July 2014, during the course of the Commissioner's investigation, the council issued a further response to the complainant. The council provided some of the requested information and withheld other information under regulation 13(1) and regulation 12(5)(e) of the EIR.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under the exceptions cited.

### **Reasons for decision**

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#### **Regulation 5(2) – duty to provide information within 20 working days**

10. Under regulation 5(2) of the EIR, public authorities must provide information within 20 working days of the date of the request or, where relevant, issue a refusal notice.
11. In this case the complainant submitted their request on 11 April 2014 but the council did not disclose the requested information until 17 July 2014.

12. As the council failed to issue an appropriate response within 20 working days the Commissioner finds that it breached regulation 5(2) of the EIR.

### **Regulation 14 – refusal of request**

13. Where an authority is refusing a request for information made under the EIR, it must, under regulation 14, issue a refusal notice in writing within 20 working days.
14. In this case the complainant submitted their request on 11 April 2014 but the council did not issue a refusal notice under the EIR until 17 July 2014.
15. The Commissioner has concluded that the council failed to issue a refusal notice within 20 working days and that it breached regulation 14(2) of the EIR.

### **Regulation 11 – internal review**

16. Under regulation 11, an applicant may complain to a public authority if it appears that the authority has not complied with their request for information.
17. Regulation 11(4) requires authorities to respond to such complaints (requests for “internal review”) as soon as possible and within 40 working days.
18. Under regulation 11(5), where the outcome of an internal review is that an authority decides it has failed to comply with the EIR, the notification given under regulation 11(4) should include a statement of-
  - (a) the failure to comply;
  - (b) the action the authority has decided to take to comply with the requirement; and
  - (c) the period within which that action is to be taken.
19. In this case the complainant submitted their request for internal review on 1 May 2014. On 19 June 2014 the council wrote to the complainant and advised that it considered it unlikely that any exemption under the FOIA applied to the entirety of the information requested and that the information should be provided in a redacted form. The review response stated that the matter had been referred back to the relevant service area for a revised response.
20. The council sent a further response to the complainant on 17 July 2014, over 50 working days after the date of receipt of the review request,

which disclosed some information and identified the EIR exceptions upon which it was relying to withhold information.

21. The Commissioner considers that, in failing to specify the period within which action would be taken (i.e., when the information would be disclosed) the council's internal review breached regulation 11(5) of the EIR.

### **Regulation 12(5)(e) – the confidentiality of commercial information**

22. 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".
23. 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?
24. The Commissioner has considered how each of the conditions apply to the withheld information.

#### *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 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.
26. The council has stated that it entered into an Agreement for the sale of the Martineau Centre in Birmingham (the "Agreement") with Persimmon Homes Ltd ("Persimmon") on 13 November 2012.
27. In this instance, the withheld information relates to the council's intention to dispose of its land, a process involving negotiation with parties to ensure the best price is obtained. Having considered the council's submissions and referred to the withheld information, the

Commissioner is satisfied that the withheld information relates to a commercial transaction, namely the sale of land. This element of the exception is, therefore, satisfied.

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

28. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
29. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
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*, Megarry J, 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."*<sup>1</sup>

31. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square 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 that case as part of the public planning process.

32. In applying the 'reasonable person' test 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 approved)... 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*

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

*Council would have realised that that was what the developer was doing.”<sup>2</sup>*

*Was the information imparted in circumstances importing an obligation of confidence?*

33. The council has stated that, when a party submits a response to a tender to a public authority, they do so with the expectation that any sensitive information within their tender response will be treated as being confidential. It stated that the withheld information is unique to Persimmon’s bid to purchase the Martineau Centre. The council has argued that the redacted information was, therefore, provided to it in circumstances imparting an obligation of confidence.

*Does the information have the necessary quality of confidence?*

34. In this case the redacted information relates to Persimmon’s bid to purchase the Martineau Centre implemented as terms into the Agreement. The council has confirmed that terms of the bid are not in the public domain, that the information is not otherwise available and that it is not trivial in content.

*Would unauthorised disclosure of the information be such that it would give rise to an actionable breach of confidence?*

35. The council has argued that, as it considers that the information was imparted to it under a duty of confidence, its disclosure would, therefore, constitute an actionable breach of confidence. The council has stated that, whilst Persimmon has not objected to the disclosure of many of the terms of the Agreement, it has not authorised the disclosure of the redacted information.

36. Having considered the council’s submissions and the withheld information itself, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

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[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)

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

37. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
38. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
39. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

40. The council has argued that disclosure would cause harm to both its own legitimate economic interests and to those of Persimmon.
41. In relation to Persimmon, the council has argued that its legitimate economic interests relate to ensuring that competitors do not gain access to commercially viable information and to protecting Persimmon's commercial bargaining position in respect of future negotiations (with respect to bids for the purchase of other land and with respect to any further procurement process relating to the Martineau Centre).
42. The council has argued that disclosing the information would undermine Persimmon's position in any future bidding (specific to this site or more generally) as it would unfairly provide competitors with access to and an opportunity to undercut its bidding strategy.
43. In relation to its own legitimate economic interests, the council has highlighted that the contract for sale is conditional and contains information which sets out the financial terms agreed between both parties.
44. The council has argued that disclosure of the information would, in the event that the sale was to fall through and the tendering process restarted, prejudice its negotiating position. The council considers that placing its "bottom line" in the public domain would skew the competitiveness of any future bids and/or negotiations. It has argued

that the effects of this would be to adversely affect the council's position on this and on all other land sales.

*The confidentiality would be adversely affected by disclosure*

45. The Commissioner considers that the disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publically available. In turn, this will also harm the legitimate economic interests which the Commissioner has identified above, which the confidentiality provided by law is there to protect.
46. The Commissioner has, therefore, concluded that this element of the exception is engaged and, as a result, finds that the exception is engaged.
47. Regulation 12(5)(e) is subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.

*Public interest in disclosing the information*

48. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
49. The council has acknowledged that there is a general public interest in transparency and accountability.
50. In this instance the Commissioner notes that the requested information relates to the sale of council land. There is a public interest in transparency in relation to the sale of public assets and disclosure would enable the public to see that the council is securing best value and acting in the best interests of the public purse.

*Public interest in maintaining the exception*

51. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.



52. The Commissioner considers that there is a strong public interest in maintaining the confidentiality of information which reveals a party's bargaining position during ongoing negotiations. In this case, disclosure of the information would reveal the negotiating position of both the council and Persimmon. The council has argued that Persimmon's ability to tender or negotiate for future projects would be impeded and may lead to competitors adopting Persimmon's bid in all other areas other than price (which competitors could undercut).
53. The council has argued that it is under a fiduciary duty to protect public money and disclosure at this time would damage its negotiating position and adversely affect its ability to secure best value.
54. The council has further argued that the Agreement in question does not require it to pay any sum to Persimmon and that there is no public interest factor in relation to public expenditure. It has argued that, to the contrary, the Agreement provides a potential source of revenue for the council – something which is to be welcomed in the current economic climate.
55. The Commissioner notes that the Agreement in question is conditional. In view of the provisional nature of the information, disclosure of the information at this time would not serve the public interest in knowing how much the council has obtained for the disposal of a public asset. Disclosure at this stage in the negotiations, in addition to having a negative impact on the council's bargaining position would only serve to reveal intermediary totals and conditions, information which would not provide a complete or accurate picture of the transaction.
56. Finally, the council has also argued that, were it to disclose the information, companies would be less likely to share confidential information with it in future invitations to tender. This, in turn, would limit the competitive environment and options available and inhibit the council's ability to secure the best possible value. The council has argued that this is a significant consideration in an era where public service is moving more towards a system of public delivery, intended to bring about cost savings.

*Balance of the public interest*

57. In weighing the balance of the public interest, the Commissioner has given due weight to the inbuilt presumption in favour of disclosure which the EIR provides. He also recognises that there is a particular public interest in promoting public understanding and (potential) public participation in planning matters. The Commissioner considers that

these factors are particularly important where information relates to the disposal of public assets.

58. In relation to the council's argument that disclosure would have a "chilling effect", resulting in companies being less willing to participate in tender options, the Commissioner is dubious of such arguments. He does not consider it particularly likely that companies would shun opportunities to win (often lucrative) public sector contracts. Furthermore, he is mindful that, since the EIR came into force, companies should be aware (or they should be so advised) that all information held by public authorities can be the subject of requests.
59. However, in relation to the facts of this specific case, the Commissioner is mindful that the timing of the disclosure of information is an important public interest consideration, particularly where commercial negotiations are involved. A balance has to be struck between how transparent a public authority can be about its commercial dealings before such transparency begins to actually undermine the public interest, given the harm that such disclosures can cause to a public authority's economic interests.
60. The Commissioner recognises the value of providing the public with information in order that it can have a greater understanding of council decisions which will affect the area and the environment around it. Although the requested information would help to formulate and inform individuals' opinions about the proposed sale it is not absolutely necessary in order to understand the central aspects of the sale, what impact to the environment may occur and what the benefits of the proposed sale might be.
61. Based on the facts of this case the Commissioner does not see that there is a specific public interest in accessing the information which would justify the damage which disclosure would do to the process it illuminates.
62. In this instance, the Commissioner recognises that, in addition to disclosure impeding the council's ability to secure a timely, best value disposal of its assets, it would also provide Persimmon's competitors with the means to adopt and undercut its bid, in the event of the tendering process being recommenced. Taking into account these factors and the significance of the timing of the request, the Commissioner considers that the balance of the public interest favours maintaining the exception.

### **Regulation 13 – Personal Data**

63. In disclosing a redacted copy of the Agreement, the council also withheld a small quantity of information under regulation 13 of the EIR.
64. Regulation 13(1) provides that information which is the personal data of a third party (i.e. not the applicant) is exempt if a disclosure of the information would breach any of the data protection principles.
65. In order to engage regulation 13 the information sought by the applicant must satisfy the definition of personal data provided by section 1(1) of the Data Protection Act 1990 ("the DPA").
66. Section 1(1) of the DPA defines personal data as:
- "data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*
67. The withheld information in this case consists of names and addresses of representatives of Persimmon and of council officers. The Commissioner is satisfied that the information constitutes the personal data of identifiable individuals.
68. As noted above, regulation 13 provides that personal data should not be disclosed where this would result in a breach of any of the data protection principles. In this case, the relevant principle is principle 1, which states that
- "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*
- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*
69. In considering whether disclosure would be unfair, and thus contravene the first data protection principle, the Commissioner takes into account the expectations of the individuals concerned and the possible effects of disclosure.
70. The Commissioner understands that the council officer in this case would have a reasonable expectation that their information would not be disclosed in this context. The council has confirmed that the official in question was not a senior member of staff and that they do not have a decision making role in this context.

71. In relation to the personal data of those executing and witnessing the Agreement on behalf of Persimmon, the council has stated that they would have had an expectation that their details would be safeguarded in accordance with the provisions of the DPA. As some of the personal data in question takes the form of signatures the council has argued that disclosure would give rise to the potential risk of fraudulent activity, which may adversely affect the individuals concerned.
72. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the individuals' reasonable expectations. The Commissioner considers that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information.
73. The Commissioner is satisfied that the data subjects would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.
74. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
75. In this instance, the Commissioner considers that, beyond the general interest in transparency, there is no specific legitimate public interest in disclosing the information.
76. When balanced against protecting the rights and freedoms of data subjects the Commissioner finds that it would not be fair to disclose the withheld information and that to do so would contravene the first data protection principle.
77. The Commissioner finds that regulation 13 is engaged. There is no public interest test to apply.

## Right of appeal

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78. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

79. 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.

80. 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**  
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