

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 March 2015

Public Authority: Wirral Metropolitan Borough Council
Address: Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Wirral Metropolitan Borough Council ("the Council") for information regarding a property which had been purchased by the Council as part of a development scheme. The Council disclosed some information but refused to disclose the remainder of the information under the exceptions in regulations 12(5)(e) (commercial confidentiality), 13 (personal information), 12(4)(e) (internal communications).
2. The Commissioner's decision is that regulation 13 is engaged in respect of some of the requested information but that regulation 12(5)(e) and regulation 12(4)(e) are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council shall disclose to the complainant the requested information with the exception of the information identified in the schedule which is provided to the Council only.
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

(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

5. On 7 October 2014 the complainant made a request for information to the Council which read as follows:

"I write to request a full and complete copy of the files howsoever held regarding 244 Laird Street Birkenhead."

6. The Council responded to the request on 29 October 2014 when it explained that the information it held was covered by the exception in regulation 12(5)(e) of the EIR (commercial confidentiality). It concluded that the public interest in maintaining the exception outweighed the public interest in disclosure. The response also indicated that any personal information in the file was exempt under the regulation 13 exception (personal information).
7. Mr Irwin subsequently asked that the Council carry out an internal review of its handling of the request and it presented its findings on 26 November 2014. The review upheld the decision to refuse the request under regulation 12(5)(e) and 13. It also now said that the information was additionally exempt under regulation 12(4)(e) (internal communications).

Scope of the case

8. On 28 November 2014 the complainant contacted the Commissioner to complain about the Council's handling of his request.
9. The Commissioner subsequently agreed with the complainant that the scope of his investigation would be to consider whether the Council was correct when it said that it was entitled to rely on the exceptions it had cited.

Reasons for decision

10. The withheld information relates to a commercial conveyancing transaction where the Council purchased the property referred to in the complainant's request. It includes the normal conveyancing information

one would expect to find with a sale of a property. Most of the information has been withheld under the regulation 12(5)(e) exception. However, regulation 13 exception has been applied to protect the sellers of the property and junior officials at the Council. Regulation 12(4)(e) has also been applied to some of the internal communications between Council officials. However, the Council has failed to identify explicitly where each exemption has been applied.

11. The Commissioner has first considered the regulation 12(5)(e) exception.

Regulation 12(5)(e) – Commercial confidentiality

12. Regulation 12(5)(e) 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.
13. The Council has said that regulation 12(5)(e) is being applied because the information is confidential and disclosure could adversely affect the legitimate economic interests of the Council and the previous owners of the property.
14. In considering the application of regulation 12(5)(e) the Commissioner considers that the following four criteria have to be met:
 - (i) The information has to be commercial or industrial in nature;
 - (ii) The information has to be subject to a duty of confidence provided by law;
 - (iii) The confidentiality has to be required to protect an economic interest; and
 - (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.
15. As regards part one, the Council said that the information was commercial in nature as it relates to the commercial activity of the Council. The Commissioner would agree that a property sale is clearly a commercial activity and therefore he is satisfied that this element of the test is met.
16. On the second point the Council said that a duty of confidence was owed to the sellers of the property. A common law duty of confidence will exist where information has the necessary quality of confidence and where information was shared in circumstances giving rise to an obligation of confidence. Information will have the necessary quality of

confidence if has not otherwise been made public and if it is more than trivial. In this case the Commissioner would accept that information regarding a house sale is not trivial. He is also prepared to accept for the sake of argument that at least some of the information has not previously been made public, although he will return to this point below.

17. As regards an obligation of confidence, the Council explained that the files contained extensive information about the property and the sellers had a legitimate expectation that information relating to the sale would not be disclosed. Again, the Commissioner is prepared to accept that for at least some of the information there was an obligation of confidence where the sellers of the property would not expect information to be made available to a member of the public.
18. However, to engage the exception a public authority must also be able to demonstrate that that confidentiality is required to protect a legitimate economic interest. In this case the Council has said that the sellers of the property had an economic interest which needed to be protected but they have failed to state what this might be. Indeed it is unclear what economic interest might need to be protected given that the sale of the house took place in 2010. Therefore, the test for applying the exception falls down on this point.
19. The Council had also tried to suggest that the exception should also be applied to protect an economic interest of the Council. However, in order to engage 12(5)(e) disclosure must adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. Therefore, if the Council has said that the confidence is owed to the sellers it can't then argue that the adverse effect is that which is caused to the Council unless it can show that the obligation of confidence also exists internally within the Council. The Council has not provided any details to support this line of argument. However, even if the Commissioner were to assume that such an argument could be made he is not satisfied that the confidentiality is required to protect an economic interest (of the Council).
20. It appears that the Council is trying to suggest that disclosure of the information would prejudice its negotiating position when buying other properties as part of the redevelopment scheme. However, much of the information contained within the file is relatively innocuous and is not financial information. Therefore it is difficult to see how this could prejudice future negotiations. Even where the information is financial, the Commissioner would have to conclude that the Council has failed to demonstrate how this information could prejudice future negotiations. This is because it is apparent that the Council has in the past released information about the prices paid for other properties as part of the

scheme and it does not seem that the Council has ever tried to keep this kind of information confidential. Indeed, it is very easy to find the price paid for properties through the land registry and various websites on the internet. Again, on this point the test for applying the exception fails.

21. In conclusion, the Council has not pinpointed where the exception should be applied to the withheld information and its rationale for applying the exception is misconceived. The arguments are unconvincing and as such there is no basis on which to find that regulation 12(5)(e) is engaged.

Regulation 12(4)(e) – Internal communications

22. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
23. The Council has provided the Commissioner with over 100 A4 pages of information but, as noted above, has failed to specify where any of the exemptions apply. As regards regulation 12(4)(e) the Council has said that this exception applies because some of the information consists of emails and memoranda, between the Council's former Asset Management Team and the Council's legal team concerning the Council's purchase of the property.
24. Regulation 12(4)(e) is a class based exception which means that it is not necessary to demonstrate any kind of prejudice to engage the exception – only that the information falls within the class of information the exception is designed to protect. The concept of 'internal communications' is broad and covers a wide range of information. However, in practice the application of the exception will be limited by the public interest test.
25. An internal communication is one which stays within a single public authority. Communications with other public authorities, contractors or other third parties will not be caught by the exception. Therefore, there is a great deal of the withheld information which is not an internal communication such as letters and emails with the sellers and their representatives.
26. However, the Commissioner has found that there are a number of emails between officials at the Council concerning the sale of this property and the Commissioner is satisfied that this information falls within the regulation 12(5)(e) exception. The Commissioner will now go on to consider the public interest test in respect of this information.

Public interest test

Public interest arguments in favour of maintaining the exemption

27. The Council advanced the following public interest arguments for maintaining the exception:
- *Individuals would be reluctant to negotiate agreements for sale of their properties and provide information to the Council about their properties, if they were aware that communications regarding their private transactions were to be made available to a member of the public.*
 - *If such information were disclosed it could adversely affect the bargaining position of the Council in concluding such transactions.*
 - *The Council, as a public authority, would argue that disclosure of internal communications would inhibit free and frank discussions in the future, and affect the internal deliberation process. I consider that although this particular transaction was completed in 2010, the housing development in this area of Birkenhead is still a live issue, with properties still being acquired.*

Public interest arguments in favour of disclosure

28. As regards the public interest in disclosure the Council said that it had taken into account the following:
- *There is a public interest in disclosure to promote transparency and accountability of public authorities*
 - *There is a public interest in the scrutiny of transactions carried out by a public authority*

Balance of the public interest arguments

29. As the Commissioner has explained, although a wide range of internal information will be caught by the regulation 12(4)(e), the exception is in effect limited because of the requirement that public interest arguments should be focussed on the protection of internal deliberation and decision making processes. Irrelevant arguments should be dismissed.
30. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'. This rationale was made clear in the proposal for the European Directive which the EIR are intended to implement and is supported by the duty set out in Article 4

paragraph 2 of the Directive to interpret exceptions in a restrictive way. If the public interest arguments were unrestricted, the broad scope of the exception would turn it into a 'catch-all' exception, which would seem contrary to this duty.

31. In light of this, the Commissioner finds that the Council's arguments for maintaining regulation 12(4)(e) carry very little weight. The Commissioner has dismissed the argument regarding individuals being reluctant to negotiate sales of their property as this is separate and not relevant to concerns regarding the Council's internal decision making.
32. The arguments around protecting the Council's negotiating position also carry little weight given that, as the Commissioner has explained in relation to regulation 12(5)(e), prices paid for properties are routinely available and have been disclosed by the Council in the past.
33. The Council's arguments around protecting its internal thinking space would appear to be relevant to section 12(4)(e). However, it is again unclear what "free and frank" discussions the Council is trying to protect. The information is in many cases innocuous and administrative rather than being about debating live issues or decision making. Again the Commissioner has not given any weight to this argument.
34. As regards the arguments for disclosure the Commissioner would also accept that these are fairly weak and only provide a case for disclosure in the most general sense, in that disclosure of any public information promotes transparency and accountability. However, given the inability of the Council to specify where this exception applies and the presumption in favour of disclosure the Commissioner finds that the public interest in maintaining the exception does not outweigh the public interest in disclosure.

Regulation 13 – Personal data

35. Regulation 13(1) provides that information shall not be disclosed if it is the personal data of someone other than the applicant and one of two conditions is satisfied. In this case the first condition is relevant which is that disclosure would contravene any of the data protection principles under the Data Protection Act 1998 (DPA 1998).
36. Once again the Council's response is unhelpful in that it has failed to specify exactly what information it considers to be personal data or where this exemption applies. However, it has said that the names of the owners of the property and the junior officials at the Council should be withheld under this exception. The Council has said that disclosure of

this information would contravene the first data protection principle which requires that personal data be processed fairly and lawfully.

37. The first thing to consider when applying this exception is whether the information amounts to personal data. Personal data is defined in the DPA 1998 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,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;"

38. The withheld information in this case identifies the sellers of the property and includes some limited details about their personal circumstances. Junior officials at the Council are also named and so these individuals can be identified as well. The information is clearly personal data and so the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle.
39. In considering whether disclosure of personal data would be unfair, and thus contravene the first data protection principle, the Commissioner takes into account a number of factors including:
- What reasonable expectations does the individual have about what will happen to their personal data?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
 - The content of the information and the possible consequences of disclosure.
 - Considering any legitimate interests in disclosure.
40. As regards the expectations of the individuals, the Council explained that the information relates to their private lives, i.e. their homes and they would have a reasonable and legitimate expectation that their personal data would not be disclosed. The Commissioner notes that the Council has not obtained the consent of the sellers of the property to disclose their personal data and he would agree with the Council that the individuals would have a reasonable expectation that personal data

supplied during the course of a property transaction would not be disclosed. The Commissioner would also accept that disclosure of their personal data has the possibility to cause distress.

41. The Commissioner would also agree that disclosure of the names of junior officials would be unfair. These individuals do not appear to be in public facing roles and would have a reasonable expectation that information would not be disclosed given the seniority of their roles. The Commissioner also notes that in at least one case a member of staff has explicitly refused consent to disclose her personal data.
42. The Commissioner has also taken into account any legitimate interests in disclosure because it is his approach that notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose personal data if there is a public interest in disclosure. The Commissioner is satisfied that there is not a compelling case for disclosure when this is balanced against the public interest in protecting the rights and freedoms of the data subjects. In his view disclosure of the personal data of the individuals would not add anything material to the rest of the information which he proposes to disclose. In his view, any public interest in transparency and accountability surrounding the Council's actions can be met through disclosure of the rest of the information with any personal data redacted.
43. The Commissioner finds that regulation 13 is engaged.
44. As the Commissioner has noted above, the Council provided the Commissioner with copies of the withheld information, which ran to in excess of 100 pages, but failed to specify where each exception was being applied. Therefore, the Commissioner cannot be clear exactly where the Council had intended to apply regulation 13. In the absence of any further assistance from the Council the Commissioner has taken the approach that the names of the sellers can be redacted as well as the names of the Council's junior officials. The Council should also withhold any other personal data directly relating to the personal circumstances of the sellers, for instance their housing needs, details of their relocation, etc.
45. The Commissioner has provided the Council with a schedule outlining what information should be redacted.

Right of appeal

46. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

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