Reference: FER0570512

Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **28 July 2015**

Public Authority: **Staffordshire Moorlands District Council**
Address: **Moorlands House**
Stockwell Street
Leek
Staffordshire
ST13 6HQ

Decision (including any steps ordered)

1. The complainant submitted two requests to Staffordshire Moorlands District Council (the Council) seeking information about a proposed development at Moneystone Quarry. After some delay, the Council provided the complainant with information falling within the scope of his first request. With regard to the second request the Council provided some of the information but withheld other information, subsequently confirming that this was on the basis of regulation 12(5)(f) of the EIR.

2. The Commissioner's decision is that:

   - The Council cannot rely on regulation 12(5)(f) to withhold information falling within the scope of the second request.

   - The Council breached regulation 5(2) by failing to respond to the complainant's first request within 20 working days and regulation 5(2) and 14(2) by failing to respond to the complainant's second request within 20 working days. It also breached regulation 14(3) by failing to specify the exception upon which it was relying on to withhold information.

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

   - Provide the complainant with the information falling within the scope of the request dated 30 October 2014 which it previously withheld on the basis of regulation 12(5)(f).

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. The complainant submitted the following request to the Council on 2 June 2014:

> *'I refer to a meeting on Fri 30 May 2014 between Councillor Ralphs and Messers [names redacted] and submit the following Freedom of Information questions seeking information in relation to discussions between SMDC Officers and Laver Leisure regarding proposals for Moneystone Quarry.*
>
> 1. *What documents exist to evidence any meetings between Officers of SMDC and Laver Leisure and/or it's agents?*
> 2. *On what dates and at what venues did any such meetings take place?*
> 3. *Who was present?*
> 4. *What notes were taken and by whom?*
> 5. *After any such meetings 'at various levels' were notes of the meeting circulated, agreed and signed as a true and accurate record?*
> 6. *Did any/some/all documents contain the requirement that they were subject to 'commercial confidentiality'*[1]

6. The Council acknowledged receipt of the request on the same day.

7. Having failed to receive a response to his request, the complainant contacted the Council on 7 July 2014 in order to chase up a response.

8. The Council responded on 4 August 2014 and explained that staff shortages had prevented it from processing the request. However, it noted that these shortages had now been addressed and it anticipated being in a position to respond to the request shortly.

[1] Laver Leisure proposes to build a leisure development at Moneystone Quarry. The quarry itself is no longer in use.

9. The Council responded to the request on 3 October 2014 and provided the complainant with the information which he sought. It apologised for the delays in providing this response and explained that new measures had been put in place to ensure that such delays do not happen in the future.

10. The complainant contacted the Council on 30 October 2014 and submitted a further request in the following terms:

> *'I refer to my FOIA request of 02 June 2014 and your belated reply of 03 October 2014 shown below. It is now clear that those acting on behalf of Laver Leisure did not in fact seek to cover the contents of their pre-application discussions with 'commercial confidentiality'. As such I am clearly entitled to now see the material. It is also the case that some of the material (but not all) was placed before the Independent Inspector who heard the evidence in the authorities Core Strategy hearings in 2013. On that basis there can be no conceivable reason for any of the material that formed any part of the Inspectors hearing not now be disclosed to me. Expressly I seek the material for the meeting dates:*
>
> *21 Oct 2010*
> *15 Mar 2011*
> *17 May 2011*
> *10 Oct 2011*
> *18 July 2012*
> *16 April 2013*
>
> *Please also confirm that I may also attend in person to inspect the relevant file(s).'*

11. The Council emailed the complainant on 7 November 2014 in order to acknowledge receipt of this request.

12. Having failed to receive a response to his request, the complainant submitted a complaint to the Council on 1 December 2014.

13. The Council acknowledged receipt of this on 3 December 2014.

14. The Council contacted the complainant on 12 December 2014. It explained that before it responded to his request of 30 October 2014 it needed to discuss with the developer whether it had any concerns with the requested material being disclosed. The Council explained that once these discussions had taken place it would be in a position to respond to his request.

15. The Council contacted the complainant on 27 January 2015 and explained that the developer was happy for some information to be disclosed but wished 'to retain the confidentiality of other documents'. It explained that it would write to him shortly and provide him with a copy of the disclosable material.

16. The Council contacted him again on 30 January 2015. It explained that Laver Leisure were content for the original scoping document that formed part of the pre-application discussions to be disclosed. They also agreed to the release of the documents dated 17 May 2011 and 21 October 2010, albeit with a number of redactions. These documents were provided to the complainant. However, the Council explained that the remaining information falling within the scope of the request was being withheld because Laver Leisure considered it to be confidential. The Council did not cite a specific exception within the EIR, or indeed a specific exemption within FOIA, as a basis upon which to withhold this information.

Scope of the case

17. The complainant contacted the Commissioner on 4 February 2015 to complain about the way his requests for information had been handled. Given the delays in the Council's handling of the requests the Commissioner did not require the complainant to exhaust the internal review process before accepting this complaint as valid.

18. The complainant explained that he was dissatisfied with the time it took the Council to respond to both his request of 2 June 2014 and his further request of 30 October 2014. Furthermore he was dissatisfied with the Council's decision to withhold some information in response to his latter request.

19. In an annex attached to this notice, a table clarifies the nature of the information held which falls within the scope of the complainant's request of 30 October 2014. The table also explains whether the information has previously been disclosed or withheld by the Council. During the course of the Commissioner's investigation the Council confirmed that it considered the withheld information to be exempt from disclosure on the basis of regulation 12(5)(f).

Reasons for decision

Regulation 12(5)(f) – interests of the person who provided the information to the public authority

20. The Council argued that all of the withheld information was exempt from disclosure on the basis of regulation 12(5)(f).

21. Regulation 12(5)(f) states that:

> *'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*
>
> *(f) the interests of the person who provided the information where that person—*
>
> *(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*
>
> *(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*
>
> *(iii) has not consented to its disclosure'*

22. In the Commissioner's view the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.

23. With regards to engaging the exception, as recognised by the Information Rights Tribunal, a four stage test has to be considered, namely:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

- Has the person supplying the information consented to its disclosure?[2]

Adverse effects on the interests of the person who voluntarily provided the information

24. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

25. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.

26. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (ie once the application of the exception has been established). However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

The Council's position

27. The Commissioner asked the Council to explain why it considered this exception to be engaged. In response the Council explained that the information in question, including notes arising out of and taken at meetings, was provided by the developer (Laver Leisure) on a voluntary basis to the Council as part of the pre-planning application stage. The Council explained that it would not have the right to require the organisation to provide this information to it as no formal planning application had been made by the developer at that time.

28. The Council emphasised that requests for pre-application advice are provided voluntarily by a developer in order to identify issues early

[2] *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)*

enough so that these can then be taken into account in any formal planning applications which follow. Therefore information provided to the Council as part of pre-application requests/discussions are not planning applications and are not subject to the normal formal reporting/consultation of plans and development proposals as planning applications are. Consequently, the Council believed that in relation to the withheld information it would be not be able to disclose this information other than in response to a request made under the EIR or FOIA.

29. The Council explained that it had discussed this request with the developer. Whilst the developer was happy for some information to be disclosed it wanted other information to be withheld on the basis that it was considered to have been provided to the Council in confidence. More specifically, the developer argued that the withheld information contained commercially sensitive information and thus its disclosure could prejudice its commercial interests. It also explained that the withheld information contained information that was not Laver Leisure's to release as it was the information of other companies.

30. The Council also explained that the nature of the proposed development meant that any application was likely to attract a number of strong objections; indeed it noted that this had proved to be the case. Consequently, the Council argued that disclosure of the withheld information in such circumstances would act against the developer's interests generally and potentially assist objectors in opposing the development and not allow a fair and reasoned decision to be made by the Local Planning Authority.

The Commissioner's position

31. Given the context within which the Council was provided with the withheld information by Laver Leisure, ie as part of pre-planning application discussions, the Commissioner is satisfied that the information was provided voluntarily. Furthermore it is clear that the developer has not consented to the disclosure of the withheld information. Moreover, the Commissioner agrees with the Council's assessment that it was not entitled to disclose the withheld information apart from under the EIR.

32. Consequently, the Commissioner is satisfied that the second, third and fourth criteria set out at paragraph 23 are met.

33. However, the Commissioner is not persuaded that the first criterion is met. That is to say, he does not believe that based upon the submissions provided to him that disclosure of the withheld information would harm the interests of the developer. In reaching this conclusion

the Commissioner wishes to emphasise that as stated above there is a high threshold for engaging this exception; the public authority must demonstrate that the likelihood of harm occurring is more probable than not. Moreover it needs to identify a causal link between disclosure of the information and any adverse effect. (Furthermore the Commissioner wishes to note that during the course of his investigation he explained to the Council the high threshold that needed to be met in order for this exception to be engaged. In doing so he specifically explained to the Council that it would need to provide submissions which demonstrated a clear link between disclosure of the withheld information and any adverse effect.)

34. In the circumstances of this case, the developer has stated that disclosure of the withheld information would harm its commercial interests. In support of this position the developer's solicitors noted that the information in question was 'highly commercially confidential'. However, the Commissioner was not provided with any further details or submissions to support this position. In the Commissioner's view, the exception cannot be engaged simply on the basis that the developer states that the withheld information is commercially sensitive. Rather, some more detailed evidence is needed to support this assertion. That is to say, exactly *why* would disclosure of the information harm the commercial interests of the developer? Eg it could be used by competitors of the developers to their detriment.

35. Without such supporting evidence the Commissioner can only conclude that the suggestion that disclosure would harm the developer's commercial interests is a speculative argument. Whilst it is possible for the Commissioner to assume why some parts of the withheld information could harm the developer's commercial interests it is not his role to do so. Rather, in order for this exception to be engaged the onus is on the Council to provide evidence which demonstrates a clear link between the disclosure of the withheld information and any adverse harm to the developer's commercial interests.

36. Furthermore, the Commissioner notes that the Council has indicated that the withheld information contains material that it is arguably not Laver Leisure's to release ie because it was prepared for Laver Leisure by other commercial organisations. However, simply because this happens to be the case does not, in the Commissioner's view, provide compelling evidence to support the case that disclosure would necessarily harm Laver Leisure's commercial interests. Again, it is incumbent on the Laver Leisure to explain *why* disclosure of such information would actually harm its interests in order to demonstrate that the first criterion is met. In the Commissioner's view it has failed to do so.

37. Finally, the Commissioner does not dispute the Council's suggestion that those opposed to the proposed development would be interested in the withheld information. However, he is not persuaded that the availability of such information would necessarily adversely affect the interests of the developer. Rather, the Commissioner believes that the Council's suggestion that the availability of such information would act against the developer's interests generally is too broad an argument to be anything more than speculative. The Commissioner acknowledges that the information may have been used by those submitting objections to the subsequent planning application. However, he does not accept that this could or would necessarily result in an unfair decision by the Local Planning Authority. Firstly, because such a body is presumably capable of making an objective and reasoned decision, regardless of the submissions it receives from those objecting to a particular development. Secondly, because of the nature of the pre-planning process, some of the information may well no longer be directly relevant to the subsequent planning application that was submitted.

38. Consequently, the Commissioner has concluded that the withheld information is not exempt from disclosure on the basis of regulation 12(5)(f).

Regulation 5 and regulation 14

39. Regulation 5(2) of the EIR requires requested information to be made available as soon as possible and no later than 20 working days after the date of the request.

40. If a public authority wishes to withhold information in response to a request, regulation 14(2) requires it to provide the requester with a refusal notice stating that fact within 20 working days after the date of the request. Regulation 14(3) requires the public authority to specifically state the exception(s) which it is seeking to rely on.

41. In the circumstances of this case the complainant submitted his first request on 2 June 2014. The Council did not provide a substantive response to this request until 3 October 2014. This delay in responding represents a breach of regulation 5(2).

42. The complainant submitted his second request on 30 October 2014. The Council responded to this request on 30 January 2015, providing some information and withholding further information. The Council's delay in responding to this request represents a breach of regulations 5(2) and 14(2). Furthermore, it also breached regulation 14(3) by failing to cite a specific exception in the refusal notice which it provided to the complainant.

Right of appeal

43. 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 123 4504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.

45. 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 .....

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Request asked for information about meeting dated:	**Nature of information held**	**Disclosed or withheld by Council in response to request?**
21 October 2010	Record of meeting	Disclosed with one paragraph redacted
15 March 2011	Record of meeting	Withheld in full
17 May 2011	Agenda & record of meeting	Disclosed with one paragraph redacted
10 October 2011	Record of meeting	Withheld in full
18 July 2012	Agenda plus 300 pages of papers	Withheld in full, with the exception of pages 200 to 204 which were disclosed to the complainant during the Commissioner's investigation
16 April 2013	Record of meeting	Withheld in full