

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 30 September 2015

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant has requested a confidential Strategic Opportunity Proposal referred to in the agenda for a meeting of the Council together with a further report on that proposal referred to in the agenda for a subsequent meeting. The Council originally refused the request under section 43 of FOIA. At the internal review stage it reconsidered the request under the EIR and refused it under regulation 12(5)(e).
2. The Commissioner's decision is that the Council was correct to withhold a limited amount of the requested information under regulation 12(5)(e) however the exception does not apply to the majority of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information identified by the Commissioner as not falling within the scope of the exception provided by regulation 12(5)(e).
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.

5. The Commissioner has also found that the names of two individuals can be redacted from the disputed information under the exception provided by regulation 13 – personal information.

Request and response

6. On 14 February 2015, the complainant wrote to the Council in connection with the agenda for the Council meeting held of 28 January 2015 and in particular agenda item 17 which was headed "Strategic Opportunity Proposal" he went onto to say:

"I request you release this information, ..."
7. The Council responded on 24 February 2015. It stated that the information was exempt under section 43 of FOIA which provides an exemption for information the disclosure of which would prejudice commercial interests.
8. On 4 March 2015 the complainant wrote to the Council regarding the Council's forthcoming meeting of 11 March 2015. He noted that item 4 of the agenda for that meeting was a further report from the Chief Executive on the Strategic Opportunity Proposal.
9. The Council contacted the complainant the following day, on 5 March 2015, and explained that it was its intention to refuse his new request on the same basis as it had refused his original request. The Council therefore offered to carry out an internal review of his original request at the same time as considering the new request.
10. Following its internal review of the original request and its consideration of the new request, the Council advised the complainant on, 8 April 2015, that it now recognised that the information in question was environmental information and that his requests should be considered under the EIR. It went on to refuse both requests under the exception provided by regulation 12(5)(e), the confidentiality of commercial information.

Scope of the case

11. The complainant contacted the Commissioner on 20 April to complain about the way his request for information had been handled.
12. The Commissioner considers that the matter to be decided is whether the requested information can be withheld under regulation 12(5)(e) of the EIR.

Confidential annexe

13. When responding to the complainant's requests the Council provided very little explanation of why it believed the information was exempt from disclosure under regulation 12(5)(e). This is because the Council believes that to provide any indication of the subject to which the Strategic Opportunity Proposal relates would prejudice the economic interests it was trying to protect. In order to preserve the Council's position the Commissioner is unable to explain in the open version of this notice his consideration of the exception. He has therefore produced a confidential annexe which sets out the reasoning of his decision in more detail and identifies the information to be disclosed. This confidential annexe will be provided to the Council only.
14. The Commissioner is not aware that the term Strategic Opportunity Proposal has any specific meaning within local government but its name and the fact that the further report was from the Chief Executive would suggest it relates to something of significance. This is also supported by the fact that the agenda for the January meeting revealed that the proposal was contained in a document that ran to 22 pages. The Council's consideration of the request under the EWIR reveals that the information relates to the environment and its application of regulation 12(5)(e) reveals the Council believes its disclosure would harm the commercial interests of at least one party. This is confirmed by the fact that the proposal and further report were not published with their respective agendas by virtue of specific provisions within the Local Government Act 1972 on the basis that the information related to the business affairs of any particular person, which could include those of the Council itself. The only other details regarding the nature of the requested information is contained in the Council's letter informing the complainant of the outcome of its internal review in which it states that its disclosure could "... prejudice the nature of the potential transaction outlined within the report ...".
15. The Commissioner has been provided with a copy of the information for the purposes of his investigation and can confirm that the information does relate to the environment and therefore he accepts that the Council was correct to consider the requests under the EIR.

Reasons for decision

16. Regulation 12(5)(e) of EIR states that a public authority can refuse to provide environmental information if the disclosure would adversely affect –

“the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

17. The exception can be broken down into a four stage test as follows:
 - The information must be commercial or industrial in nature,
 - The information must be confidential,
 - That confidentiality must be protecting a legitimate economic interest,
 - Confidentiality must be adversely affected if the information was disclosed.
18. All four elements of the test must be met if the exception is to be engaged, however the Commissioner considers that once the first three elements are satisfied it is inevitable that the fourth test will also be satisfied.
19. When considering whether the Council has handled the requests correctly it is important to apply the tests in light of the circumstances that existed at the time the requests were made or at the latest the statutory time for complying with those request. The second request was on 4 of March 2015 and therefore the 20 working day period allowed for responding to that request would have come to an end on 1 April 2015.
20. The Commissioner has been provided with full copies of the both the Strategic Opportunity Proposal and the further report. He has also been provided with a copy of a memo containing the advice it obtained when carrying out its combined review of the first request and consideration of the second request. Having considered this information he is satisfied that the information is of a commercial nature.
21. Moving to the second test created by regulation 12(5)(e), the exception can apply to information provided in confidence to a public authority by a third party, to information jointly agreed by the public authority and a third party, and also to information generated internally by the public authority itself, so long as such information is capable of being protected by the law of confidence.
22. Having considered the information and the Council’s representations the Commissioner accepts that the information is protected by a common law duty of confidentiality. The Commissioner has had regard for how the Council treated the information and in particular how it was excluded

from the documents published with the agendas. This is indicative of the Council's wish to protect the information.

23. When raising his concerns the complainant informed the Commissioner that the information he believed to be the subject of the two agenda items had been widely leaked. The Commissioner has considered this point when reaching his decision but remains satisfied that the requested information remains confidential.
24. Having concluded that the information is both of a commercial nature and is protected by a duty of confidence the next test established by regulation 12(5)(e) is whether the duty of confidence is necessary to protect legitimate economic interests. In essence this comes down to whether disclosing the information would prejudice someone's economic interests. The Commissioner's decision is that the majority of the information could be disclosed without causing any detriment to the economic interests of any party. This information, which is identified in the confidential annexe, does not engage the exception and should be disclosed.
25. There is however a limited amount of information which if disclosed could prejudice the Council's own economic interests. The Commissioner is unable to go into any greater detail as to his reasons for reaching this conclusion within the open version of this notice. It can safely be assumed that, as the information relates to a "potential transaction", more than one party's interests could be affected. However the Commissioner has only had regard for the economic interest of the Council itself. This will be discussed in more detail in the confidential annexe.
26. In respect of this limited amount of information the first three tests established under regulation 12(5)(e) have been satisfied. It naturally follows that the fourth test is also met. This limited amount of information therefore engages the exception.

Public interest test

27. As with all the exceptions provided under the EIR, regulation 12(5)(e) is subject to the public interest test. This test states that even though the information is protected by an exception it can only be withheld if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing it.
28. When informing the complainant of the outcome of its internal review the Council did not explain its grounds for deciding the public interest favoured continuing to withhold the information. It did however

acknowledge that there were strong public interest arguments on both sides of the argument.

29. The Commissioner considers that there will always be a public interest in disclosing information which would provide greater transparency of a public authority's decision making processes and which would allow greater accountability of how a public authority discharges its functions and spends public money. These arguments are particularly relevant to this case. The information relates to actions taken at the very top of the organisation, involving elected members making decisions on a major issue based on advice and proposals presented by the most senior officers within the Council. It is known that the information relates to a transaction and the sums involved are also significant.
30. There is also a public interest in disclosing information which would allow public participation in the decision making process. Having seen the information the Commissioner considers that the information would facilitate such participation and allow an informed debate of the issues discussed in the proposal. He does acknowledge however that there would be opportunity for the public to comment on aspects of the proposal at a later date and this goes some way to meeting this public interest. Nevertheless the Commissioner agrees with the Council that there are strong public interest arguments in favour of disclosure.
31. If the requested information revealed wrong doing on behalf of the Council there would be a further public interest in disclosure. However having read the proposal and the subsequent progress report the Commissioner is satisfied that there is absolutely nothing in either that suggests any wrong doing.
32. In favour of maintaining the exception the Commissioner has had regard for the objective which the Council was seeking to achieve through the proposal and the value in preserving the Council's ability to pursue that objective. He has also considered the sums involved and the public interest in the Council obtaining the best deal it could in respect of the transaction to which the information relates. The Commissioner finds that in the circumstances that existed at the time of the request the transaction to which the information relates was very much a live issue and that its success would be seriously undermined if the information covered by the exception was disclosed. This provides a weighty argument in favour of maintaining the exception.
33. In light of the above the Commissioner finds that in respect of the limited amount of information which engages the exception the public interest favours maintaining the exception. The Council are entitled to withhold this information.

Regulation 13 – personal information.

34. Regulation 13 states that personal data about someone other than the applicant shall not be disclosed if to do so would breach of the data protection principles set out in the Data Protection Act 1998 (DPA),
35. The Council has not claimed this exception. However the Commissioner is also responsible for regulating the DPA and he would not be prepared to order the disclosure of the personal data of third parties if he considered to do so would breach the DPA. In this case the Commissioner is satisfied that the disclosure of two named individuals would be unfair and so breaches the first principle of the DPA.
36. The information in question is very limited and simply identifies two private individuals whose involvement in determining the shape or success of the Strategic Opportunity Proposal is minimal.

Right of appeal

37. 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

38. 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.
39. 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

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