

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

Decision notice

Date: 21 November 2017

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1 3BT

Decision (including any steps ordered)

1. The complainant has requested information from the Education Funding Agency ("EFA") relating to the amount of deposit paid for a specific site.
2. As an executive agency of the Department for Education ("DfE"), the EFA does not constitute a public authority for the purposes of FOIA and so this notice is issued to its parent Department, the DfE.
3. The Commissioner's decision is that the DfE has incorrectly applied regulation 12(5)(e) (commercial interests) to the amount of deposit paid for the site.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with the monetary figure of the 10% deposit paid for the Bowring site.
5. The DfE 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

6. On 27 March 2017, the complainant wrote to EFA and requested information in the following terms:

"You have indicated that the EFA paid a 10% deposit for the Bowring site. Please indicate how much this amount was in order that taxpayers might understand the total costs of this project to date. Please indicate the date in 2014 this deposit was paid or agreed. Since at this point the site has not been determined to be feasible I see no justification for the EFA withholding this information. I understand that the EFA publishes costs when schools are complete, however it does not publish the costs when a project does not progress yet the taxpayer has every right to know how the EFA uses their money."

7. The EFA responded on 13 April 2017 and refused to provide the requested information. It cited section 43(2) of the FOIA as its basis for doing so. The EFA did not offer an internal review and advised the complainant to contact the Information Commissioner.
8. The Commissioner contacted EFA on 21 June 2017 to advise she had accepted the complaint for consideration. The Commissioner received an email the same day advising that the complaint would be dealt with by the DfE.
9. On 15 August 2017 the Commissioner wrote to the DfE who then advised that they wished to carry out an internal review. Following that review DfE wrote to the complainant on 25 August 2017 stating *"the Department has decided to uphold the original decision not to disclose the information concerned, for the same reasons set out in our response to you of 31 July 2017."*
10. The Commissioner wrote to DfE on 29 August 2017 requesting its arguments in support of its application of section 43(2). At this stage the public authority considered that the request should have been dealt with under the Environmental Information Regulations (EIR) and maintained its original position.
11. DfE replied to the Commissioner on 25 September and stated that it was applying the exceptions under regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information) relating to the 10% deposit figure and the initial options appraisal paper (plus floor plan) both under regulation 12(5)(e) and regulation 12(4)(e) (internal communications).
12. The Commissioner wrote to the DfE on 27 September as from the content of its response it was evident that there was some confusion over the date and nature of the request that was the subject of the complaint to the Commissioner. This is because the complainant made a later request on 30 June 2017. The DfE responded on 12 October 2017 and provided its revised response based on the correct request.

Scope of the case

13. The complainant contacted the Commissioner on 2 May 2017 to complain about the way her request for information had been handled.
14. Following the correspondence outlined above the Commissioner wrote to the complainant on 29 August 2017 to confirm whether she wished to continue with her complaint. The complainant confirmed that she did.
15. The Commissioner considers the scope of this case to be to determine if the original request was dealt with under the correct access regime and whether the public authority has correctly applied the exemption/exceptions it has cited to the withheld information.
16. For clarification, the only issue within scope of this request is the 10% deposit figure paid to the vendor in 2015. Therefore the Commissioner is only considering the application of regulation 12(5)(e) to this figure, and is not considering the exceptions cited in relation to the "*initial options appraisal paper (plus floor plan)*" relating to the temporary premises, or the valuation report in its entirety.

Background

17. The information requested relates to the International Academy of Greenwich secondary school, which opened in September 2016 in temporary accommodation as part of the Government's free school programme. Subject to planning, a permanent school will be built on land known as the former Bowring Sports Ground in Greenwich, a short distance from their current temporary site.
18. The completion of the purchase of the Bowring site remains subject to planning. The submission of a planning application has been delayed due to ongoing dialogue with the Local Planning Authority and Environmental Agency regarding the complex nature of the proposals to develop the site - the site is metropolitan open land and part of it a flood plain.
19. As such, at the time of the request the DfE was considering the length of time the school may need to remain in its current temporary accommodation. However, the DfE had not yet commissioned a feasibility study for its technical advisor to undertake a review of the current temporary accommodation in order to identify the most viable option to enable an extended stay at the temporary site. The feasibility study has since been commissioned. Any amendment to the current temporary site will require renegotiation with the landlord, which will occur once the feasibility study has been completed.

Reasons for decision

Is it Environmental Information?

20. During the course of the Commissioner's investigation, the DfE advised that, it considered, the requested information fell under the EIR.
21. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'
22. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
23. In this case the withheld information relates to construction, planning and other measures likely to have an impact on the environment.
24. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
25. In view of this, the Commissioner has concluded that the EFA wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

26. In the circumstances of this case the Commissioner has found that although the EFA originally considered this request under FOIA it is EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the EFA will have failed to comply with the provisions of EIR.
27. In these circumstances the Commissioner believes that it is appropriate to find that the EFA breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the EFA issued (and indeed its internal review) failed to cite any exception contained within the EIR because the EFA actually dealt with the request under FOIA.
28. As the DfE addressed this failing during the course of the investigation the Commissioner does not require it to take any steps in this regard. However, it should be noted that the complainant has not been made aware of the change of access regime.

Regulation 12(5)(e)

29. Regulation 12(5)(e) of the EIR states 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.
30. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the DfE must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
31. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the DfE must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.

Is the information commercial or industrial in nature?

32. The withheld information consists of the monetary value of the 10% deposit paid for the Bowring site.
33. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
34. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity with a commercial gain for the development partners.

Is the information subject to confidentiality provided by law?

35. With regard to this element of the exception the Commissioner will consider if 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. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of the information.
36. DfE stated that:
 - The information is not trivial, not in the public domain and confidentiality has not been waived. The valuation document includes a clause making clear that the expectation of confidentiality exists:

Restrictions on Disclosure and Publication

The client will neither make available to any third party or reproduce the whole or any part of the report, nor make reference to it, in any publication without our prior written approval of the form and context in which such disclosure may be made.

37. The Commissioner is satisfied that the withheld information has not been made publicly available and so has not lost the quality of confidence. However, she also notes that the paragraph above is contained in the valuation report and not in the contract with the vendor itself. DfE could have sought permission from the valuers but has not provided any evidence that it has attempted to do so. Furthermore, it would be expected that this particular organisation that provided the valuation would have an awareness of EIR/FOI and the potential for disclosure under that legislation.

38. Nevertheless the Commissioner is satisfied that the withheld information was imparted importing an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

39. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. 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.

40. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes that the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based, gives the following guidance on legitimate economic interests:

"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."

41. DfE has argued that disclosure of the information would adversely affect its own legitimate commercial interests and those of the vendor.
42. With regard to the adverse effects on its own commercial interests, the DfE has argued that at the time of the request they, and the vendor were in negotiations regarding the value and purchase of the land. It confirmed that further negotiation has since taken place to change the commercial terms of the deal, and a final purchase price has yet to be agreed. With this in mind, DfE considered that release of the requested information would be likely to have a negative impact of both its own and the vendor's commercial interests.
43. It further stated that the withheld information relates to trade in the open market – the deposit reflects an amount of money paid to secure an interest in a site. That figure was based on an initial valuation of that site, and the completion of the purchase remains subject to the outcome of planning by an agreed longstop date. Following delays with the planning process, further negotiation is required to change the content of the deal and therefore the final figure is still under negotiation, and is likely to be further affected by the outcome of planning.
44. The department may also not proceed to full purchase. If it does not, the site will be back on the open market. If the withheld information were to be released, that site would then be associated with a figure

purporting to represent 10% of market value, which may not be accurate.

45. DfE confirmed that the procurement process for this site is still live, and the final prices are subject to continuing negotiations. The DfE is seeking to achieve best value for money for the taxpayer.
46. DfE explained that in the case of the permanent site valuation, it is competing against the existing owner's preference for a residential development. A planning pre-application had been provided detailing the redevelopment of the sports ground into a 67-unit scheme and replacement sports club facility. It went on to provide further information relating to the valuation report, however, this does not fall within the scope of the request and has no bearing on this decision notice.
47. DfE argued that the vendor's economic interests could also be affected if it did not proceed to purchase and the site were to be put back onto the open market with an inaccurate valuation attached. It could affect the vendor's bargaining position.
48. DfE considers that disclosure would inevitably harm the confidential nature of the information by making it publically available for the reasons set out above, and that it would harm the economic interests identified above. Accordingly, the DfE sees no reason to depart from this reasoning.
49. DfE further explained that the costs of the project will be published in due course, but the deal for the proposed permanent site is still under commercial negotiation. The DfE considers that there are several legitimate economic interests, which could have been adversely affected if the information held by the department at the time of the request had been released in response to the request.
50. The DfE has also considered whether the information could be released now in order to resolve the complaint, but has concluded that, as the procurement process is still live, the four-stage test still holds and the public interest favours withholding the information.
51. The Commissioner considers that the threshold for engagement of EIR regulation 12(5)(e) is a high one, and in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate interests of one or more parties. In demonstrating harm an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.

Is the exception engaged?

52. The Commissioner acknowledges that the information is of a commercial nature. However, she also considers that there is an argument that funding of free school projects should be more open to scrutiny to ensure that taxpayers money is being used in the most effective way and to ensure that the site procurement processes are as competitive and effective as possible.
53. The valuation was given in August 2015. Contracts were exchanged and the deposit paid based on that valuation in December 2015. The request was made in March 2017 and in June 2017 the DfE was still at the pre-planning stage. The valuation report itself states it is subject to change and valid for three months and based on the DfE's current plans.
54. The DfE's submissions also refer to current negotiations of the final price of the land stating that it is very much subject to change, as are its plans for the site.
55. Despite DfE's argument that the vendor could be disadvantaged if the purchase does not complete, the Commissioner is not persuaded this has significant weight. The Commissioner's view is that land and property valuations fluctuate and by the time the land is acquired (which is on planning permission being obtained) the 2015 valuation will be considerably out of date.
56. The Commissioner also notes that DfE has still not gained planning approval. The EFA's own response of 13 April 2017 stated "*At this time, subject to the length of the planning process, the school's permanent buildings could be completed during 2019.*" As indicated above in para 18 there are still complex negotiations ahead with regard to planning approval and there are no definite dates or plans agreed.
57. It is therefore difficult to see how disclosure would prejudice either parties commercial interests – both are party to the requested information so disclosure is not going to disclose anything both parties to the negotiation don't already know.
58. Furthermore, the Commissioner does not consider the DfE's argument that disclosure could affect future land acquisitions carries much weight. Each site will be different as will the plans for that land. With regards to the vendor, they have entered into a contract with the DfE and received a sizeable deposit. The vendor should be aware of the EIR and the need for transparency and accountability when entering into deals with public authorities, particularly where public funds are concerned.
59. Any future negotiations with other purchasers will realistically not be likely to occur in the near future and would clearly be based on a current

value for the land. Disclosure would only be releasing the valuation given in 2015 not the final price or any indication of what this may be.

60. The Commissioner does not accept that disclosure would be likely to prejudice the commercial interests of the DfE and the vendor.
61. The DfE argued that other existing and future vendors may be perturbed from such commercial information being made available if there is a risk that this could go into the public domain and possibly have a negative impact on their bargaining position should land return to the open market, however the Commissioner does not consider that carries significant weight.
62. In any business that involves a public authority and commercial contracts for services, be it catering or building contracts, providers would be likely to have an expectation that there would be a possibility of this information being disclosed in future.
63. The valuation was given as at 20 August 2015 and was on the basis that the site had planning consent for a secondary school with a sixth form. The Commissioner notes that further negotiation has since taken place to change the commercial terms of the deal, and a final purchase price has yet to be agreed.
64. At the time of the request the valuation was already 18 months old and the report states it "*remains valid for three (3) months from its date unless market circumstances change or further or better information comes to light*".
65. The Commissioner has reviewed information relating to the terms and conditions of the contract with the vendor signed in 2015. There do not appear to be any monetary penalties if the contract is terminated by either party and if the longstop date lapses, then the vendor could re-market the property.
66. The arguments presented do not warrant the conclusion reached that adverse effects to the DfE's and vendor's economic interests would be more probable than not.
67. For the reason described above, the Commissioner has concluded that DfE has not demonstrated to the Commissioner to the required standard that it has correctly engaged the exception under EIR regulation 12(5)(e). The Commissioner has, therefore, not considered the application of the public interest in this case.

Right of appeal

68. 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

69. 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.

70. 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
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