

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

Date: 27 November 2017

Public Authority: Darlington Borough Council
Address: Town Hall
Feethams
Darlington
County Durham
DL1 5QT

Decision (including any steps ordered)

1. The complainant has requested a copy of an agreement between local authorities and Peel Group relating to Durham Tees Valley Airport Ltd. Darlington Borough Council withheld the information under the exemption for commercial interests (section 43(2) of the FOIA) and, following the Commissioner's involvement, revised its position, withholding the information under the EIR exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Darlington Borough Council:
 - Wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 and,
 - Failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
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.

Background

5. The council has explained that Durham Tees Valley Airport Ltd (DTVA) is part of Peel Airports (Peel), which is part of the Peel Group. The shareholding is held between Peel (who are the majority shareholder with 89%) and local authorities, who between them, hold 11%. The council confirmed that it became a shareholder in November 2003.
6. The requested information relates to an agreement associated with the commercial (and physical) development of DTVA.

Request and response

7. On 29 March 2017, the complainant wrote to Darlington Borough Council (the "council") and requested information in the following terms:

"I attended the planning committee meeting where I learned that LAs and Peel entered into an agreement in April 2016 that provided for keeping Teesside open to KLM and Eastern for a period of 5 years, i.e. until April 2021. Please provide a copy of that agreement"
8. The council responded on 23 May 2017. It stated that it was withholding the requested information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
9. Following an internal review the council wrote to the complainant on 24 July 2017. It stated that it was maintaining its position.

Scope of the case

10. On 23 May 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

Is it Environmental Information?

12. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
13. 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...'

14. 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.
15. In this case the withheld information relates to the development of or use of land and, in the Commissioner's view, therefore falls within the category of policies or measures which would have an impact on this provisions referred to in regulation 2(1).
16. 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").

17. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

18. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the 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 council will have failed to comply with the provisions of the EIR.
19. In these circumstances the Commissioner believes that it is appropriate to find that the council 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 council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
20. As the council addressed this failing during the course of her investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

21. 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".
22. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

Is the information commercial or industrial in nature?

23. The withheld information constitutes an agreement between the parties with responsibility for DTVA (the "agreement") and a subsequent Deed of Amendment (DOA). It relates to a commercial activity, namely the operation of an airport. The Commissioner is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

24. 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.
25. 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.
26. 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 information.
27. The council has stated that the agreement and DOA "...provide for a binding obligation of confidentiality covering the requested information.
28. The Commissioner notes that the withheld information is not trivial in nature and the council has confirmed that the information has not been shared more widely.
29. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it relates to a significant potential development.
30. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

31. 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.
32. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".
33. The council has argued that the confidentiality in this case is required to protect the *"...development of the airport which has a direct link to the economic interests of the Council and the Tees Valley"* and the legitimate economic interests of the parties to the agreement. The relevant parties are the Tees Valley Councils and Peel¹.
34. The council confirmed that it approached each of the parties for comment in relation to the request and sought their views on the potential effects of disclosure. The Commissioner has had sight of the relevant correspondence. She notes that, of the parties that did respond to the council, their submissions were generic in nature, asserting that, as the information related to ongoing matters and transactions, confidentiality should be maintained and the request refused.
35. The Commissioner will not generally accept speculation on the part of public authorities as to the potential effects of disclosing information on third parties. In this case the Commissioner acknowledges that the council did approach the parties involved but she does not consider that

¹ The Tees Valley Councils are Darlington, Hartlepool, Middlesbrough, Stockton-on-Tees, Redcar and Cleveland.

the submissions in relation to the nature of harm which would occur meet the threshold in terms of details or evidence of causality necessary to demonstrate that the exception is engaged. However, as a party to the agreement, the council has provided its own submissions which the Commissioner has considered below.

36. The council has stated that disclosure of the information would impact on the commercial interests of the parties to the DOA. It confirmed that discussions relating to the information have been ongoing in private with an expectation of "commercial confidentiality". The council has argued that, at the time of the request, the information related to a commercial transaction that was incomplete and that disclosure "*...at this stage had the potential to undermine the confidence concerning commercial confidentiality and....destabilise what had been agreed.*"
37. In providing its submissions in relation to the application of regulation 12(5)(e) the council directed the Commissioner to its arguments provided in relation to the application of section 43(2) of the FOIA. The Commissioner notes that, in applying section 43(2), the council confirmed that it was relying on the "*prejudice would be likely*" limb to engage the exemption. The Commissioner considers that this threshold for engagement does not, in itself, satisfy the conditions set for the engagement of regulation 12(5)(e), which requires that disclosure *would* result in adverse affects to a party or parties' legitimate economic interests.
38. In addition to the relatively remote likelihood of the harm occurring, the Commissioner considers that the submissions she has received from the council fail identify any specific adverse effects and link these effects to specific withheld information; nor do they explain the causal link between disclosure and any ensuing adverse effects.
39. The Commissioner acknowledges that, in general, information identifying speculative conclusions or potential approaches might be "sensitive" before decisions have been made and might prove beneficial to parties seeking to gain leverage in negotiations. However, the council has not explained how disclosing the information would specifically assist third parties to the detriment of its own interests or the interests of other signatories of the agreement or the DOA. The actual harm which disclosure would cause has not been explain, the council has simply stated that harm would be caused to a process without detailing the form this would take.
40. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council does not properly understand what the effects of disclosure would be and has also struggled to meet

the evidential and explanatory burden set by the exception. The absence of any reference to specific elements of the withheld information and the potential harm that disclosure would cause also suggests to the Commissioner that the council has sought to withhold the information on a general or blanket basis.

41. Having had sight of the withheld information, the Commissioner is mindful that an argument could be made for the information to be withheld. However, she considers that the council has simply failed to make it and, where information is being withheld, the Commissioner considers that it is for public authorities to fully explain the relevant causes and effects that are relevant to the engagement of an exception. She does not consider it her role to generate arguments on an authority's behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.
42. Having considered the council's submissions, the Commissioner has decided that it has failed to demonstrate that disclosure would adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
43. As she has found that the exception is not engaged the Commissioner has not gone on to consider the public interest in this case.

Right of appeal

44. 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

45. 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.
46. 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
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