

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

Date: 18 October 2019

Public Authority: Westminster City Council
Address: City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested information on the "Underbelly" theatre company's application for the use of Marble Arch in 2017.
2. The Commissioner's decision is that Westminster City Council ("the Council") appropriately applied regulation 12(5)(e) to withhold one element of the request. The Commissioner finds the Council in breach of regulation 11(4) for the failure to provide the complainant with its reconsideration within 40 working days.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The complainant had previously made a request to the Council for similar information as requested in this case, regarding a different location. In the circumstances of that case the Commissioner found that the withheld information should be disclosed¹. The Commissioner also found that the information was environmental information which should have been considered under the Environmental Information Regulations ('EIR'). The Commissioner explained at length to the Council her reasons for this determination.

¹ Decision notice FER0706268

Request and response

5. On 31 October 2018, the complainant wrote to the Council and requested information in the following terms:
 - “1. Please supply a copy of the application submitted by Underbelly for the use of Marble Arch in 2017?
 2. Please disclose how many days Underbelly used the site for with dates.
 3. Please disclose the rent paid by Underbelly to WCC.
 4. Please disclose the costs of reparation following Underbelly's term of occupation.
 5. Please disclose the contribution made by Underbelly to WCC or other contractor towards the costs of reparation.
 6. Did Underbelly have to go through a tender process to win the right to occupy this site.”
6. The Council responded on 28 November 2018. It provided the information requested at points 1, 2, 4, 5 and 6; withholding the information requested at point 3 in reliance of FOIA section 43(2)-Commercial interests.
7. Following an internal review the Council wrote to the complainant on 7 March 2019 upholding its initial response.

Scope of the case

8. The complainant initially contacted the Commissioner on 12 January 2019 to complain about the way his request for information had been handled. At this time the complainant had not received the internal review which he had requested on 29 November 2018. The Commissioner explained that in accordance with regulation 11(4) of the EIR, public authorities must provide the outcome of an internal review within 40 working days, which had not yet elapsed. Following the 40 working day period the complainant contacted the Commissioner again and she wrote to the Council reminding it of its duty. Following this intervention the Council provided an internal review which did not satisfy the complainant. He explained:

“WCC may have rented Marble Arch for £1. The tax payer has to be able to discover this figure. A site should go out to tender and follow the S123 principles. It is then reasonable to assume that WCC will licence a

site to the highest bidder. WCC rented both Leicester Sq. and Marble Arch to the same operator, Underbelly.”

9. At the beginning of her investigation the Commissioner questioned the Council on its consideration of the request under the FOIA rather than the EIR, particularly following her previous decision in this regard. The Council explained that an administrative error had resulted in its use of the wrong legislation. It determined that the appropriate exception on which to rely was regulation 12(5)(e).
10. The Commissioner considers the scope of her investigation to be the application of regulation 12(5)(e) to point 3 of the request.

Reasons for decision

The applicable access regime – FOIA or the EIR?

11. The Commissioner notes that she considered, at length, the appropriate legislative framework for information regarding the Council granting licences for use of an outside space in London, in her decision notice FER0706268. The EIR was determined to be the appropriate legislation in that case.
12. The Commissioner is satisfied that the information in the scope of the request in this case is substantially the same as in the previous case referenced above and therefore comprises environmental information falling within regulation 2(1)(c).

Regulation 12(5)(e) – confidentiality of commercial information

13. Regulation 12(5)(e) EIR states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;”

14. In considering the application of this exception the Commissioner considers that four criteria must 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. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
- (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 affect by disclosure of information.

Is the information commercial or industrial in nature?

15. The first criteria to be considered is the nature of the information. For information to be commercial in nature, it must relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade and as such a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
16. The Council argues that the information is commercial in nature as it relates to a commercial activity, the license fee paid for the use of land for commercial activities.
17. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity.

Is the information subject to confidentiality provided by law?

18. The Commissioner considers that "provided by law" will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
19. For the common law duty of confidence to apply, the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.
20. The Council explained that at the time of the request the fee to be paid by the new operator was still to be negotiated and the fee paid by the previous operator ("Underbelly") was not in the public domain. Furthermore the Council advised that the previous operator had:

"...specified confidentiality for this information in order to protect their own legitimate economic interests, thereby creating an explicit obligation of confidence."
21. The Commissioner is satisfied that the information has the necessary quality of confidence in accordance with the Common Law of Confidence. The Commissioner accepts that the information is not trivial and had not been placed in the public domain at the time of the request. She therefore considers that the information is subject to a duty of confidence provided by law.

Is the confidentiality provided to protect a legitimate interest?

22. 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.
23. The Council confirmed that, at the time of the request and ongoing, there are active negotiations for the site with operators other than Underbelly and the proposal from at least one of these operators is similar to how Underbelly used the site.
24. The Council explained that it would not ordinarily progress commercial discussions on fees until the outcome of both planning and licensing applications have been determined.
25. The complainant advised the Commissioner that in his opinion the Council should put out to tender for applications to hire the Marble Arch space and by doing so:

"..what rent they accepted in the past is irrelevant. If a tenant wants the site they will bid what they can afford.
26. The complainant added:

"There is no reason for WCC not to admit how much they received from Underbelly for Marble Arch. It does not affect their negotiations. Marble Arch has never been a popular site. Everyone seems to fail there. Underbelly failed there too. The rumour is they paid no rent. Should WCC not admit that? Afterall if they got a high rent why would they resist admitting it? That would help their negotiations."
27. As referenced above, the complainant previously complained to the Commissioner about the Council's refusal to provide information with respect to a different site in London. In the circumstances of that case the Commissioner found that the exception was not engaged. The complainant considers the circumstances of this case to mirror the previous case and should influence her decision in this case.
28. The Commissioner disagrees with the complainant's assessment. The Commissioner considers that in the circumstances of this case there is greater risk of harm to the Council's current negotiating position than in the previous case because the Council has provided the Commissioner with different reasoning which focusses on the commercial, financial impact of disclosure.

29. The Council explained its view that disclosure of the amount paid by Underbelly for use of Marble Arch would be likely to impact on the amount paid by future interested third parties. As one current proposal is of a similar nature to the Underbelly event disclosure of the fee previously accepted would provide the third party with an advantage in ongoing negotiations.
30. The Council advised the Commissioner that the income generated from events such as the ones currently under negotiation is invested back into public services. Consequently, if negotiations were adversely affected the income generated for public services would also be adversely affected.

Would confidentiality be adversely affected by disclosure?

31. As the Commissioner considers the first three elements of the test to have been established, she is satisfied that disclosure into the public domain would adversely affect the confidential nature of the information by making it publicly available and would consequently harm the legitimate economic interests of the Council. She therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest test

Public interest arguments in favour of disclosing the information

32. The Council acknowledged that there will always be some public interest in disclosure to promote the transparency and accountability of public authorities, with greater public awareness and understanding of environmental matters. The Council noted that this is particularly the case when information relates to financial operations.

Public interest arguments in favour of maintaining the exception

33. The Council explained its view that disclosure would undermine its position in the on-going negotiation process which, in turn, would have a

prejudicial effect on the income it could secure for investment into public services. This result would not benefit the public interest.

The complainant's view

34. The complainant states that his objective in requesting information regarding the license fees charged by the Council is to "keep WCC 'honest'". The complainant considers that the Council should use a tendering process which, in his view, would have a beneficial effect in financial terms for tax payers. The complainant explained that in past years he has had experience with regard to tendering for the Marble Arch location and is therefore concerned that on this occasion there has not been a tendering process. He therefore considers that the public interest favours knowing the fee paid by Underbelly.

The Commissioner's view

35. The Commissioner acknowledges the complainant's concerns. She notes his comments and understands that he is exercised about "Underbelly 'winning' all these sites for their use". She accepts his interest in this matter. However, the Commissioner must consider the wider public interest. She has been advised by the Council that it is not obliged to tender out land for events although it may choose to do so. The Commissioner is not able to comment on the operation of the Council, albeit the tendering process may seem to be a logical step. The Council has the choice whether or not to use a tendering process. In this case it has not and the Commissioner must therefore consider her decision in this circumstance.
36. The Commissioner has therefore weighed the benefits of the disclosure of the fees paid against any adverse effect this may bring to the amount of the fee negotiated by the Council in this current circumstance. She considers the matter to be finely balanced. She is persuaded by the on-going status of negotiations that disclosure currently is not in the public interest as such disclosure would adversely impact the Council's revenue. Once negotiations are complete she may have a different view. Notwithstanding this she is satisfied that the public interest favours maintaining the exception at regulation 12(5)(e).

Regulation 11 – Representations and reconsideration

37. The EIR regulation 11(4) provides:

"A public authority shall notify the applicant of its decision under paragraph 3 as soon as possible and no later than 40 working days after the date of receipt of the representations."

38. The complainant asked for an internal review of the outcome of his request on 29 November 2018. The Council did not provide the results of its review until 7 March 2019, some 67 days later.
39. The Commissioner considers that this period of time to conduct the internal review is excessive and therefore considers it to be unsatisfactory.
40. The Commissioner therefore finds the Council in breach of regulation 11(4).

Right of appeal

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

42. 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.
43. 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

Susan Hughes
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