

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: **24 September 2013**

Public Authority: **Trinity Housing Association**
Address: **Beechill Business Park
96 Beechill Road
Belfast
BT8 7QN**

Decision (including any steps ordered)

1. The complainant requested information relating to the purchase of land by Trinity Housing Association in August 2007. The Association provided some information but refused the remainder of the request. The Commissioner's decision is that the Association was not entitled to rely on regulation 6(1)(b) or 12(5)(e) to withhold the entirety of the agreement between the Association and Inishmore Properties Ltd. The Commissioner requires the Association to disclose the agreement between the Association and Inishmore Properties Ltd to the complainant, with the following exception:
 - a. The Association may redact the bank account details from the agreement since the complainant has agreed that this information falls outside the scope of his complaint.
2. The Association must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

3. On 31 May 2012 the complainant requested the following information from the Association:

"... a copy of all documentation related to the agreed sale of [address], Crossgar by [named individual] (or if appropriate, his representatives) to Trinity HA".

4. The Association provided some information to the complainant, but disputed whether further information it held was environmental information under the EIR. The Commissioner issued a decision notice¹ on 26 February 2013, finding that the information in question was environmental information. Therefore the Association was required to respond to the request, either by providing the requested information or by issuing a refusal notice.
5. Following the Commissioner's decision the Association provided its revised response to the complainant's request on 21 March 2013. The Association provided some of the requested information and refused the remainder in reliance on regulations 6(1)(b), 12(5)(b) and 12(5)(e) of the EIR.
6. On 27 March 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner advised the complainant to seek an internal review before he would accept the complaint for investigation.
7. The complainant duly requested an internal review and the Association responded on 25 April 2013. The Association upheld its decision to rely on regulations 6(1)(b), 12(5)(b) and 12(5)(e).

Scope of the case

8. The complainant contacted the Commissioner again on 14 May 2013 as he remained of the view that the Association had not provided him with the information he was entitled to receive. The complainant has confirmed that he considers one document to have been wrongly withheld:
 - i. An agreement between the Association and Inishmore Properties Ltd (undated), withheld under regulation 6(1)(b) and regulation 12(5)(e).
 9. Therefore the Commissioner's decision in this case is limited to this document.
 10. The Association has claimed that the agreement contains some environmental information, but that the remainder of the information is not environmental information and therefore not subject to the EIR.
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¹ Case reference FER0455708

11. However the Commissioner confirmed the scope of the environmental information in the previous decision notice referred to at paragraph 4 above. That decision notice was not appealed and the Commissioner remains of the view that the agreement in its entirety constitutes environmental information.
12. The Association noted that the agreement contained sensitive commercial information, ie bank account details. The complainant has confirmed that he is content for this information to be excluded from the scope of his request. Therefore the Commissioner has not considered it further in this decision notice.

Reasons for decision

Regulation 6(1)(b)

13. The Association claimed that regulation 6(1)(b) applied to the agreement between the Association and Inishmore Properties Ltd (item iii at paragraph 8 above). Regulation 6(1)(b) of the EIR states that:

"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

... (b) the information is already publicly available and easily accessible to the applicant in another form or format."

14. The Association claimed that most of the environmental information contained within the agreement was available from Land Registry, and the remainder had already been provided to the complainant in previous correspondence. In summary, the Association was of the view that it had provided the following information to the complainant:
 - i. The purchase price of the property;
 - ii. The completion date;
 - iii. The fact that the property was subject to various burdens, details of which were contained in documents which were publicly available; and
 - iv. The fact that the agreement contained a special condition which provided that the scheme be provided as a 'design and build' package.
15. The Association appears to be conflating two arguments here. Firstly that information is already publicly available and easily accessible to the complainant in another form or format. This argument is clearly central

to the application of regulation 6(1)(b). Secondly that it has already provided the complainant with some of the requested information. The Commissioner considers that this argument goes to the question of whether information has been provided in accordance with regulation 5(1) and is not relevant to the application of regulation 6(1)(b).

16. The Association has claimed that regulation 6(1)(b) applies to the whole of the agreement. The Commissioner's view is that, in order for this to be the case, all (and not just some) of the information contained within the withheld agreement would have to be publicly available and reasonably accessible to the complainant in another form and format. This would include the exact wording of each of the clauses of the agreement, and any annotations to the agreement.
17. The Association argued that it had advised the complainant that he could obtain the information at item iii from other organisations including Land Registry and Down District Council. However the Association did not specify exactly what information could be obtained. The Commissioner is of the view that a complainant cannot be expected to search for unspecified information that may or may not be held by another public authority. The Association has not demonstrated to the Commissioner that all the information contained within the agreement (including the exact wording of each of the clauses and any annotations to the agreement) is publicly available and reasonably accessible to the complainant in another form or format. Indeed, in its submissions to the Commissioner, it has indicated that only some of the information within the contract is in fact publicly available and that it considers the precise terms of the contract to be confidential. Therefore the Commissioner finds that the Association has not demonstrated that regulation 6(1)(b) applies to this information.

Regulation 5(1)

18. The complainant did not accept that he had been provided with item iv, ie the special condition contained within the agreement. Having had sight of the information in question, the Commissioner agrees with the complainant. The complainant requested copies of documents, whereas the Association has disclosed the existence of the special condition, and has only provided its own interpretation of what that condition means.
19. Having had sight of the agreement the Commissioner is of the view that the information comprising the exact terms of the special condition has not been provided to the complainant.

Regulation 12(5)(e)

20. Information is exempt under regulation 12(5)(e) if 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. The Association claimed that the agreement, to the extent that it contained information which had not already been disclosed, was exempt by virtue of regulation 12(5)(e).
21. In deciding whether this exception is engaged, the Commissioner has considered the following questions:
 - Is the withheld information commercial or industrial in nature?
 - Is the withheld information subject to confidentiality provided by law?
 - Is this confidentiality provided to protect a legitimate economic interest?
 - Would confidentiality be adversely affected by disclosure?

Is the withheld information commercial or industrial in nature?

22. The information in question is an agreement between the Association and Inishmore Properties Ltd in relation to the purchase of land. The Commissioner accepts that this is a commercial activity, therefore this test is met.

Is the withheld information subject to confidentiality provided by law?

23. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. The Commissioner is not aware of any statutory duty of confidence, and the agreement does not contain any provision or obligation relating to confidentiality. Therefore the Commissioner has considered the common law of confidence, which has two key tests:
 - Does the information have the necessary quality of confidence?
 - Was the information imparted in circumstances creating an obligation of confidence?
24. 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. The Association has acknowledged that some of the information contained in the agreement has been disclosed into the public domain, including the purchase price and the existence of a special condition.

However the Association does not consider that this affects the confidentiality of the remaining withheld information.

25. The Commissioner is satisfied that the remaining withheld information was not in the public domain at the time of the complainant's request. The Commissioner considers that some of the information is innocuous as it comprises standard paragraphs which will be found in any contract of a similar nature. However the Commissioner does not consider any of the information to be trivial, therefore it is capable of having the necessary quality of confidence. The Commissioner also accepts that an agreement to purchase land, as the result of negotiations, would be reasonably understood as having been shared in circumstances importing an obligation of confidence. On this basis the Commissioner accepts that the information within the agreement which has not already been disclosed into the public domain will be subject to the common law duty of confidence.

Is this confidentiality provided to protect a legitimate economic interest?

26. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*² that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm.
27. The Association claimed to the Commissioner that disclosure of the withheld information contained in the agreement would harm its own economic interests. The Association argued to the Commissioner that disclosure would harm its negotiating ability, and its ability to compete with other housing providers. The Commissioner has not reproduced the Association's detailed arguments in this decision notice as they were provided in confidence, but he has considered them fully.
28. The Commissioner notes the Association's arguments but is mindful that, as the Association has acknowledged, information is already publicly available regarding the land purchase and financial issues. The complainant has pointed out that the Northern Ireland Audit Office published a report in November 2012 which referred directly to the land purchase in question:

² Appeal no EA/2010/0106, 4 January 2011

"In one scheme planned by Trinity Housing Association, NIHE are currently seeking to recover £835,000 as the scheme (for a development in Crossgar) changed from a 12 unit scheme to a 3 unit scheme"³.

29. In light of the information published in the Audit Office report, the Commissioner is not satisfied that disclosure of the withheld information would have any additional adverse effect on the Association's ability to negotiate with suppliers, or to compete with other providers. The Commissioner considers that the Association's ability to negotiate may well be affected by the fact that the NIHE is seeking to recover a substantial amount of money from the Association. The Association has not provided any detailed arguments as to how disclosure of the precise terms of the agreement would have a greater adverse effect than the information currently available.
30. For the reasons set out above the Commissioner has concluded that the Association has not demonstrated that disclosure would harm its own economic interests and he has, therefore, decided that the exception is not engaged. He has not gone on to consider the public interest arguments.

³ http://www.niauditoffice.gov.uk/general_report_2012.pdf, section 3.1.49

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Lisa Adshead
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