

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 June 2018

Public Authority: Northumberland County Council

Address: County Hall
Morpeth
NE61 2EF

Complainant: Monica Anderton obo Bywell Parish Council

Address: mfanderton@gmail.com

Decision (including any steps ordered)

1. The complainant has requested a copy of an audit report relating to repairs to Ovingham Bridge. Northumberland County Council confirmed that some of the information was not held and withheld other information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Northumberland County Council has 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. Ovingham Bridge in Northumberland was closed during 2014-2015 to allow for repairs. However, following a brief re-opening in December 2015, debris carried downstream by floodwaters damaged the bridge supports before the scaffolding had been removed and the bridge was closed again, re-opening on 5th September 2016¹.
6. The closure of the bridge resulted in local disruption and in early 2016 the council instructed an external body to produce a report into the repairs contract associated with the bridge.
7. It is within this context that the request was made.

Request and response

8. On 20 April 2017, the complainant wrote to Northumberland County Council (the "council") and requested information in the following terms:
(in relation to an audit report associated with Ovingham Bridge)
(in summary) A copy of the report / a copy of the executive summary
9. The council responded on 12 May 2017. It confirmed that the report in question did not contain an executive summary and that this information was, therefore, not held. In relation to the report, the council confirmed that it was withholding this under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
10. 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

11. On 30 November 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
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¹ <http://www.bridgesonthetyne.co.uk/ovingham.html>

12. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested audit report under regulation 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

13. The council withheld a report into Ovingham Bridge Repairs – the “Report” under regulation 12(5)(e) of the EIR.
14. 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”.
15. 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?

16. The council confirmed that the information relates to the works to Ovingham Bridge and to the commercial contract to carry out these works between the council and Graham Construction. The report includes details of the contractor’s approach to pricing the works during procurement, performance and standard of workmanship as well as their commercial approach to issues that arose during the works.
17. Having considered the council’s submissions and referred to the withheld information the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

18. 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.
19. 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.
20. The council explained that the information contained in the report is not trivial and is not in the public domain. It confirmed that the report relates to the procurement process, management arrangements and performance of the construction works to the bridge. The report assisted the Council in its contractual discussions relating to settlement of the contractual dispute and to reaching a favourable full and final settlement of payment to Graham Construction in relation to the refurbishment works. The parties had an expectation that information gathered in contemplation of this or shared and exchanged throughout the process would be held in confidence.
21. In view of the above and, having had regard for the withheld information, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

22. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
23. 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.
24. 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”.

25. The council has stated that the confidentiality in this case is required to protect the legitimate economic interests of Graham Construction. It has also argued that it is required to protect the council's interests in terms of avoiding the risks of litigation against the council associated with the settlement terms and the duty of confidence owed to Graham Construction.
26. In relation to the council's interests, the Commissioner does not consider that potential litigation action or any expenditure which might result falls within the category of this exemption. Even if the council were to incur losses from any potential litigation this would represent a financial interest which is not relevant to the scope of the exception.
27. In relation to the interests of Grahams Construction (“Graham”), the council consulted with Graham and reflected its views to the Commissioner.
28. Firstly, the council stated that Graham was not involved in the production of the report and the company does not agree that the content of the report is factually correct or fair. The council confirmed that Graham believe the report's release would cause significant damage to its reputation in the marketplace, tainting future employer's views of Graham as a contractor and thus significantly inhibiting Graham's ability to negotiate future contracts and secure revenue and profit.
29. The council has also argued, after Graham, that Graham's are also concerned that the report is based on confidential knowledge regarding the procurement process surrounding the works and the content of the tender and qualifications contained therein. The council has stated that Graham believes that disclosure of the report would adversely affect their legitimate economic interest and would allow both competitors and potential customers to gain access to sensitive and commercially valuable information which would significantly impact their ability to negotiate and compete in the market in future.
30. The council confirmed that it accepted the arguments provided by Graham and believed their concerns that disclosure of the report would adversely affect their legitimate economic interests are valid, and that its disclosure would result in commercially significant reputational damage and that on this basis the report is exempt from disclosure.
31. The Commissioner is mindful that the submissions provided by the council make no direct reference to any specific elements of the Report

nor do they link any discrete information to specific adverse effects. In relation to Graham disputing the accuracy of the Report, the Commissioner considers that this in itself is not sufficient grounds for withholding the information. The council is at liberty to preface any disclosure with contextual information which reflects any such dispute. In any event, the Commissioner has not been provided with any specific examples of disagreements over factual elements of the Report and has no direct evidence that disclosure would cause the effects described.

32. The Commissioner acknowledges that, in general, reputational risk can be a legitimate adverse effect to a party's legitimate economic interests, however, it is for authorities to set out exactly why and how this would happen in any given instance. The Commissioner considers that the council has failed to do so in this case.
33. In relation to the argument that elements of the Report provide insights into Graham's procurement or operational practices which would benefit competitors, again, the Commissioner has not been directed to any specific instances of such information. The Commissioner also considers that, having read the Report, it is not immediately apparent what information falls within these categories.
34. Whilst the Commissioner accepts that the disclosure of information which would allow a competitor to adopt and/or undermine a company's strategies would result in genuine adverse effects, she has not been provided with direct evidence that these conditions apply in this case.
35. Having considered the council's submissions the Commissioner is left with the impression that, in addition to a wholesale acceptance of Graham's concerns, the council has not applied its own scrutiny to this matter and has sought to withhold the information on a general basis.
36. In cases where a public authority has failed to provide adequate arguments in support of the application of an exception the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. The Commissioner considers that, in this case, the council has had adequate opportunities to set out its position and her initial letter made it clear that it would have just one chance to justify its decision to withhold information.
37. On the basis of the arguments provided the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would harm the legitimate economic interests of any person.

Would the confidentiality be adversely affected by disclosure?

38. The Commissioner has concluded that disclosure would not 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.

Right of appeal

39. 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

40. 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.
41. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF