

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

Decision notice

Date: 2 August 2018

Public Authority: Rutland County Council
Address: Catmose Street
Oakham
Rutland
LE15 6HP

Decision (including any steps ordered)

1. The complainant has requested full details of a Memorandum of Understanding (MoU) between Rutland County Council and the Ministry of Defence.
2. The Commissioner's decision is that Rutland County Council has wrongly applied the exemption at regulation 12(5)(e) to redact some information within the MoU.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose the MoU in full
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.

Request and response

5. On 1 December 2017 the complainant wrote to Rutland County Council ('the council') and requested information in the following terms:

"Please can you supply me with the full details of the Memorandum of Understanding between RCC [the council] and the MOD [Ministry of Defence] that covers St Georges Barracks."

6. The council responded on 13 December 2017. It withheld the requested information, citing the exemption FOIA Section 43(2) – commercial interests, as the basis for doing so. The council gave the following explanation:

"disclosure of the information may prejudice the commercial interests of another person as the information could provide the recipient with an unfair advantage. This is because the Council believes that disclosure of this information would prejudice the commercial interests of the provider, as it would harm the provider's ability to compete in the market."

7. Following an internal review on 30 January 2018 the council revised its position to provide some information within the scope of the request. It stated:

"The use of the section 43(2) - Prejudice to commercial interests, of the Freedom of Information Act was applied correctly. It was however time sensitive and can now be released subject to redactions. The information has been redacted where it remains commercially sensitive. Appendix B has also been withheld in its entirety as it is still commercially sensitive as it relates to the Ministry of Defence agreed process for procuring and appointing its Land Sale Delivery Partners."

8. On 3 February 2018 the complainant expressed dissatisfaction with the number of redactions. The council carried out a second review on 9 February 2018 and maintained its position for the appendices of the Memorandum of Understanding ('the MoU'), but revised the response for the redactions in its main body to rely on Section 22 – information intended for future publication. It stated:

"The redactions within the body of the Memorandum of Understanding are commercially sensitive but will be released as a later date. The Council therefore relies on Section 22 of the Act, which states that a public authority is not obliged to provide information which is intended for publication at a future date."

9. During the investigation the Commissioner advised the council that she considered it was likely that the requested information was environmental in nature and therefore the request should be considered under the EIR.
10. The council wrote to the Commissioner on 11 July 2018 stated that it accepted the Commissioner's view. It maintained the same redactions but cited EIR regulation 12(5)(e) – commercial confidentiality as the basis for doing so.

Scope of the case

11. The complainant contacted the Commissioner on 16 February 2018 to complain about the way his request for information had been handled. Specifically that it had withheld information from the MoU.
12. The MoU is between the MoD and the council. The project is regarding the sale of land by the MoD to facilitate the development of housing.
13. The council has published the redacted version of the MoU on its website. The Commissioner also received a full copy of the MoU and the appendices. Referring to the full copy of the MoU, the redacted information is contained on pages 10, 12, 21 (in the main body of the MoU) and pages 53, 54 (which is the majority of Annex B). The redactions are labelled as follows in this decision notice, for ease of reading:
 - [R1] Page 10 has one line redacted relating to "*Issues arising over creation of new communities and consequently local governance*" in the table "*Initial Risk Log*";
 - [R2] Page 12 (section 1.3.4b) relating to the MoD's procurement of a Land Sale Delivery Partner (LSDP);
 - [R3] Page 21 relating to funding for the early stages of the project;
 - [R4] pages *53, 54 (Annex B) relating to appointment of a LSDP by the MoD, describing key points within this arrangement.

*Note the council incorrectly refer to pages 53, 54 as 52, 53 in their responses to the Commissioner
14. The Commissioner considers that the scope of the case is to establish whether the council has correctly engaged the exception at regulation

12(5)(e) to all of the redacted information. If it has, then she will consider where the balance of public interest lies.

Reasons for decision

Regulation 2(1) - Environmental Information

15. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
16. Regulation 2(1) of the EIR defines environmental information as information 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...emissions...and other releases into the environment, likely to affect the elements 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;..."
17. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The information in this case relates to a project regarding future plans for the St Georges Barracks site which will clearly result in the repurposing of the land for a different use.
18. The Commissioner therefore finds that the information is environmental information and should be considered under the EIR.

Regulation 12(5)(e) – commercial confidentiality

19. Regulation 12(5)(e) states that:

'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'

20. 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?

21. The Commissioner considers that *"for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party¹."* The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

22. To support this condition, the council simply stated to the Commissioner that *"the information redacted on page 12 [R2], 21 [R3] and 52-53 (Appendix B) [R4] is commercially confidential in nature."*

23. Having considered the withheld information the Commissioner concludes that [R2] [R3][R4] is information about activities and funding that support the sale of land and the procurement of services. As such she is satisfied that [R2][R3][R4] relate to a commercial activity and therefore the first condition has been met.

24. The Council has not explained how [R1] is commercial information. The risk title, which isn't redacted is: *"Issues arise over creation of new*

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

communities and consequently local governance.” Additionally it says “*It is essential that early consideration is given to the creation of a new Parish and the implications of that on the project and the communities.*” The Commissioner considers that [R1] is not commercial in nature, as it relates to the implications of the project on the community.

25. The Commissioner finds that the council has failed to demonstrate how [R1] is commercial information. In view of this she concludes that the exception at regulation 12(5)(e) is not engaged for [R1].

Is the information subject to confidentiality provided by law?

26. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence, and in terms of the information that was provided by the MoD, whether information was shared in circumstances creating an obligation of confidence.
27. In the Commissioner’s view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
28. 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.
29. The council stated that “*The Council was requested by the Ministry of Defence (MoD) to redact the information on pages 12[R2], and 52-53 (appendix B) [R4] from the published version of the MoU. This information relates to the appointment of the Land Sales Delivery Partnership (LSDP) by the MoD and describes key points within this arrangement. This was provided to us with an expectation that this will remain confidential.*”
30. The Commissioner accepts that confidentiality provided by law can include a confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The council has confirmed that the agreed process for the procurement and appointment of the LSDP, and the LSDP “*generic model*” is owned by the MoD. In light of the comment in the paragraph above, the Commissioner is satisfied that the MoD had an explicit expectation that [R2] and [R4] would not be disclosed by the council. The Commissioner also accepts that [R2] and [R4] have the necessary quality of confidence being not available publically and more than trivial. As such the Commissioner is satisfied that the second criterion is met for [R2] and [R4].

31. In relation to [R3], the council states "*The redacted information on page 21 contains financial/funding information regarding the initial stages of the project, therefore, the Council consider this to be confidential information at this stage of the process*". It also advises that it "*is subject to Councillor and Ministerial approval, therefore it would be inappropriate for this to be in the public domain.*"
32. The Commissioner considers that funding information for a project of this size is clearly not trivial. Furthermore, as the council asserts neither is it in the public domain, the Commissioner finds that the second criterion is met for [R3].

*Is the confidentiality provided to protect a legitimate economic interest?
Would the confidentiality be adversely affected by disclosure?*

33. In her guidance² the Commissioner defines that legitimate economic interests "*could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.*"
34. 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. The Commissioner notes that confidentiality is clearly intended to protect both the council and the MoD, and so both parties interests need to be considered as part of this analysis.
35. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
36. 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

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

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"*.

37. With regard to [R2] the council advises *"The MoD are of the view that this level of detail about their procurement process would, at a stage where there has been no final determination even to sell the site, harm their commercial interest and/or potentially fetter their discretion."* The Commissioner accepts that the MoD have a legitimate economic interest in protecting a commercial bargaining position in the context of existing or future negotiations. However, the Commissioner considers that the statement provided is quite general and does not give sufficient grounds upon which to determine that, on the balance of probabilities, some harm would be caused by the disclosure.
38. In regard to [R3] the council states *"that the information redacted on page 21 has been done so as this is subject to Councillor and Ministerial approval, therefore, it would be inappropriate for this to be in the public domain. At this stage the information would be released as the formal democratic decision making processes"*. The Commissioner can appreciate that the council may not wish to release information that hasn't yet been approved. However, she finds that in terms of regulation 12(5)(e) it has failed to provide persuasive explanations of why the non-disclosure is protecting a legitimate economic interest.
39. In regard to [R4] the council state *"The MoD believe that the information redacted on page 52-53 (Appendix) B is commercially confidential."* The council has not provided any further information to enable the determination of harm to a legitimate economic interest.
40. Commissioner therefore finds that the council has failed to demonstrate how disclosure would adversely affect a legitimate economic interest in [R2] [R3] and [R4]. In view of this she concludes that the exception at regulation 12(5)(e) is not engaged for [R2][R3] and [R4].
41. The Commissioner has concluded that the exception regulation 12(5)(e) is not engaged for any of the withheld information. She has not therefore needed to consider where the balance of public interest lies.

Other matters

42. The Commissioner notes the council's changing its position in relation to the exception or exemptions cited.

43. The council have advised the Commissioner that it has arranged FOIA / EIR training for its officers. The Commissioner asks the council to also consider a review of procedures. Regard should be given to the FOIA / EIR detailed guidance the Commissioner has made available on her website and the Codes of Practice issued under sections 45 and 46 of the Freedom of Information Act (2000).

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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF