

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 September 2024

Public Authority: The Council of Newcastle University
Address: Newcastle upon Tyne
Tyne and Wear
NE1 7RU

Decision (including any steps ordered)

1. The complainant has requested information on refurbishment options, with emphasis on energy and carbon assessment, for Castle Leazes halls of residence site at Newcastle University (the University). The University disclosed some information but withheld a report to its Executive Board under regulation 12(5)(e). The complainant disputed whether all information relevant to the request had been located.
2. The Commissioner's decision is that the report withheld under regulation 12(5)(e) was correctly withheld and that the University has provided adequate explanations as to why no further information in scope of the request was held at the time of the request.
3. However, he finds that the University did not comply with its obligation under regulation 5 EIR at the time of the request as it did not locate and provide all relevant information within the statutory timeframe. However as information has now been provided the University is not required to take any steps.

Request and response

4. On 5 February 2024 the complainant wrote to the University and requested information in the following terms:

"The University recently announced their intentions to propose to demolish and rebuild the Castle Leazes Halls of Residence. On the Universities information page (<https://www.ncl.ac.uk/who-we-are/castle...>), they sight 'remodelling and updating the buildings would still not achieve fit for purpose'.

Could the University provide all information produced either within by the estates department or by their consultants on refurbishment or intensification options for the Castle Leazes site including energy assessments for retrofit. (eg. feasibility reports for retrofit/intensification options and whole life carbon assessments)."

5. The University responded on 4 March 2024 stating any information held was exempt under section 43 FOIA. Following an internal review a response was sent on 13 March 2024 upholding the use of section 43(2) to withhold information.

Scope of the case

6. The complainant contacted the Commissioner on 13 March 2024 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation the University was asked to reconsider its position and particularly the access regime under which it had considered and refused the request.
8. The University accepted the request should have been considered under the EIR and disclosed all of the information it stated it held except for a report to the Executive Board which it withheld under regulation 12(5)(e) - confidentiality of commercial or industrial information. In correspondence with the Commissioner the complainant queried whether further information was held by the University.
9. As such the Commissioner considers the scope of his investigation is to determine if the Report has been correctly withheld under regulation 12(5)(e) and if any further information in scope of the request is held.

Reasons for decision

Regulation 5(1) duty to make environmental information available on request

10. Under regulation 5(1) of the EIR, a public authority must make environmental information available on request if it holds the information and it is not subject to an exception.

11. Where there is a dispute between a public authority and a complainant as to whether all requested information falling within the scope of a request has been provided to the complainant, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide the matter based on the civil standard of the balance of probabilities.
12. The University disclosed several documents to the complainant during the course of the Commissioner's investigation – a powerpoint document on carbon modelling at Castle Leazes, a Castle Leazes options report and Executive Board minutes.
13. The complainant queried if further information may be held by the University. In support of their position the complainant referred back to the terms of the their request, in particular that it had asked for information to demonstrate 'refurbishment or intensification options of Castle Leazes' site had been considered'. The complainant argued the report that was disclosed was an economic report that did not assess the building, just the economic option to retain, rebuild or sell.
14. The complainant stated that the Head of Estate Planning and Development at the University had told them the University's architects for the redevelopment had conducted a conclusive report assessing all the options on how to retain the building. As such the complainant argued this information must be held by the University.
15. In addition, the request also asked for a 'whole life carbon assessment' of the refurbishment approach and the information released (the powerpoint document) was a financial model with little information on carbon and no whole life carbon assessment included. The complainant further added the powerpoint was missing methodology, making it difficult to understand the benchmarks for the modelling.
16. The Commissioner asked the University further questions around these points. On the potential existence of a report submitted by the architects the University explained the architects follow the RIBA stages of work¹ and at the time of the request they were working on stage 1. A report was not available until 7 March 2024, after the date of the request (and the internal review). The University's position is that this additional information was not held at the time of the request.
17. In terms of the part of the request that asked for a whole life carbon assessment the University explained that a whole life carbon assessment

¹ [RIBA Plan of Work \(architecture.com\)](https://www.architecture.com/plan-of-work)

has not been carried out at this stage as decisions have not been made regarding materiality of construction which is required to measure a building's embedded carbon, and therefore total carbon emissions across its entire life cycle. The University states therefore that a whole life carbon assessment was not held at the time of the request or at the point of the Commissioner's further enquiries with the University but, as the Commissioner understands it, this information may well exist in the future.

18. On balance the Commissioner considers the explanations given by the University are reasonable and explain why the further information referred to by the complainant is not held. The Commissioner doesn't have any evidence to challenge these assertions by the University and notes that the information the complainant is seeking is likely to exist or be held by the University either now or in the future although it wasn't at the time of this request.
19. Whilst the Commissioner is satisfied that, on balance, all recorded information has been located, as some information was only disclosed during the Commissioner's investigation, he finds that the University did not initially meet its obligation under regulation 5 of the EIR for this request.

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

20. Regulation 12(5)(e) states that a public authority can refuse to disclose information if disclosure would adversely affect the confidentiality of commercial information where such confidentiality is provided by law to protect a legitimate economic interest.
21. The exception imposes a four-stage test which is:
 - Is the information commercial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
22. The Commissioner received a copy of the report to the Executive Board report (the Report) that the University was seeking to withhold under regulation 12(e) and reviewed this as part of his investigation. The Report outlines options and recommendations with the intention of presenting the Executive Board with sufficient information to agree next steps. Throughout the Report there is information on estimated costs, budgets, the various finance options available ie University-funded and

different types of partnerships including financial models for each option, and analysis of the various student accommodation providers and their pros and cons.

23. The Report is focused on the financial viability of various options and the Commissioner is satisfied this information is commercial in nature. There is no information in the Report that is not related to costs, projected costs, current and previous spending or economic viability of options or that details options with any reference to carbon net zero targets, energy assessment or why demolition and rebuilding would be more likely to achieve environmental targets.
24. The Commissioner considers confidentiality provided by law to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
25. The University explained that it has publicly announced it is planning to work with Unite for the construction of new halls of residence at Castle Leazes but at the time of the request had not signed the final contract for this work.
26. The information was provided to the Executive Board in confidence, it was clearly marked as such and it was intended to be a frank and thorough assessment of the various options available including an honest assessment of all the different partners it could use.
27. Having studied the withheld information, the Commissioner is satisfied that it's not trivial and it's not already in the public domain. He's also satisfied that it was imparted in circumstances creating an obligation of confidence and therefore, the withheld information is subject to confidentiality provided by law.
28. The Commissioner will now go on to consider whether this confidentiality is required to protect a legitimate economic interest.
29. The University argued that disclosure would harm its legitimate economic interests due to the ongoing nature of its negotiations at the time of the request. It considered its commercial bargaining position would be impacted by disclosure of detailed information, including budgets, projected costs, what it perceived to be pros and cons of various potential partners and other financial information that may have impacted contract negotiations and the final contract signing.
30. Looking at the information that's being withheld, the Commissioner agrees with the public authority's position. It's disclosure, at the time of the request, would have allowed companies to tailor their bids or their pricing using the detailed knowledge of the University's budget,

specifications and preferred plans. In turn, this would adversely affect the University's ability to obtain value for money for the project.

31. Therefore the Commissioner is satisfied that the withheld information engages regulation 12(5)(e), on the basis that the confidence needs to be maintained in order to protect economic interests. The Commissioner will go on to consider whether the public interest lies in disclosure or in maintaining the exception.
32. The University acknowledged there is a public interest in transparency and accountability and that disclosing the information would provide details to the public of the University's preferred option for the Castle Leazes site ie to demolish, and the options considered when coming to this decision.
33. However, the University considers the timing of the request, when the contract with Unite had yet to be signed and finalised, is of importance. The University argues the public interest is better served by allowing the University to achieve the best possible price for the construction of the new halls of residence at Castle Leazes. The University believes that students bring a wide range of economic and social benefits to the city and region and modern accommodation offerings are important to attract students to the area.
34. The complainant emphasised that information on obligations to meet net zero carbon emissions should not be commercially sensitive and that they were seeking clarity and evidence as to how the University reached the assumption that demolition and rebuilding would meet net zero carbon goals.
35. The Commissioner acknowledges the complainant's argument but notes that the information that has been withheld is financial and commercial in nature and does not contain information on refurbishment options, carbon or energy assessment. The Commissioner considers the information is in scope of the request as it asked for all information on the Castle Leazes development but the emphasis was on energy assessment for retrofitting. As this information is not included in the Report the public interest arguments around transparency of information that could show how the University intends to meet net zero targets are not of significant weight here.
36. As such the Commissioner considers the arguments for withholding the information carry more weight in this instance as there is an acknowledged likely commercial impact on the University through disclosure at the time of the request. The Commissioner concludes that the University was entitled to withhold the report under regulation 12(5)(e) EIR.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jill Hulley
Senior Case Officer
Information Commissioner's Office
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