

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

Decision notice

Date: 8 December 2015

Public Authority: London Borough of Hackney
Address: Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant has requested information from the council in relation to the use of Hackney Downs for a 'Dirty Dancing' event staged between 26 August and 5 September 2013. Specifically, the complainant requested to know the fee charged and how this was calculated.
2. During the Commissioner's investigation, the council decided to disclose the fee charged and the amount it received from the event. However, it refused to disclose how this fee was calculated, as it considered this information was exempt from disclosure under regulation 12(5)(e) of the EIR.
3. The Commissioner's decision is that regulation 12(5)(e) of the EIR does applied in this case. He has however recorded a breach of regulation 11(2) of the EIR, as the council failed to carry out its internal review within 40 working days.
4. The Commissioner does not require any further action to be taken.

Request and response

5. On 4 September 2013, the complainant wrote to the council and requested information in the following terms:

"I would like to request the following information concerning the use of Hackney Downs for the Future Cinema 'Dirty Dancing' event held 26/8/13 to 5/9/13:

1. Total amount received by the Council for the use of Hackney Downs for the event
2. Total of any costs borne by the Council in connection with the event
3. Explanation of how the fee charged was calculated, i.e. how was it derived from area used, size of audience, duration etc"
6. The council responded on 13 December 2013. It stated that it does not hold any recorded information falling within the scope of question two. In relation to questions one and three, the council considered the requested information was exempt from disclosure under section 43 of the FOIA.
7. The complainant requested an internal review on 12 January 2014.
8. The council carried out an internal review and notified the complainant of its finding on 12 May 2014. It advised the complainant that it remained of the opinion that section 43 of the FOIA applied to questions one and three and reiterated that it does not hold any recorded information falling within the scope of question two.
9. The complainant referred the matter to the Commissioner on 19 May 2014. The Commissioner carried out an investigation and issued a decision notice on 4 September 2014 (FS50541469) ordering the council to reconsider the request under the EIR.
10. The council issued a further refusal notice on 13 October 2014. It advised the complainant that it considered the requested information was exempt from disclosure under regulation 12(5)(e) of the EIR.
11. The complainant requested a further internal review on 6 November 2014.
12. The council carried out another internal review and notified the complainant of its findings on 21 April 2015. The council informed the complainant that it remained of the opinion that the withheld information was exempt from disclosure under regulation 12(5)(e) of the EIR.

Scope of the case

13. The complainant contacted the Commissioner 8 June 2015 to complain about the way his request for information had been handled. Specifically, the complainant is dissatisfied with the delays he has incurred in receiving the council's further responses and its application of regulation 12(5)(e) of the EIR.
14. The Commissioner's investigation has been limited to the consideration of questions one and three of the request and the application of regulation 12(5)(e) of the EIR to the recorded information falling within scope. No complaint was made about question two and the council's response that it does not hold the requested information. This element of the request has therefore not been included in the Commissioner's investigation.
15. During the Commissioner's investigation, the council decided to disclose the information requested in relation to question one of the request to the complainant. The remainder of this notice will therefore focus on question three of the request and the council's application of regulation 12(5)(e) of the EIR.
16. The withheld information for question three of the request constitutes a chain of emails between the council and Future Cinema between 29 July and 1 August 2013.

Reasons for decision

17. Regulation 12(5)(e) of the EIR states 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.
18. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.

19. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
20. The council confirmed that the requested information relates to a commercial agreement between itself and Future Cinema for the hire of the Hackney Downs for a particular event. The withheld information discusses the terms and conditions of this agreement and details the negotiations that took place in relation to the fee the council charged for the hire of one of its open spaces.
21. The Commissioner has reviewed the requested information and he is satisfied that the contents are commercial in nature. The hire of Hackney Downs for a specific fee to enable Future Cinema to stage an event is a commercial transaction between the two parties. The withheld information discusses the terms and conditions of this agreement and details the negotiations that took place between the council and Future Cinema on price.
22. As the Commissioner is satisfied that the first bullet point of paragraph 18 above is met he will now go on to consider whether the requested information is subject to confidentiality provided by law.
23. The Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
24. The Commissioner has not been provided with any evidence that an explicit contractual clause relating to confidentiality existed between the two parties. He is however satisfied that due to the nature of the requested information, the requested information, is covered by a common law duty of confidence. It is not trivial in nature, has the necessary quality of confidence and was provided during commercial negotiations in which it was expected by both parties concerned that certain information would be held in confidence.
25. Turning now to the third and fourth bullet point, the council advised that the withheld information contains free and frank negotiations between itself and Future Cinema in relation to the fee charged for the hire of Hackney Downs for the 'Dirty Dancing' event. It also contains honest discussions relating to Future Cinema's profit margin for this event and provides a breakdown of its costings. The council confirmed that such information would adversely affect the commercial interests of Future Cinema if it were disclosed. It would provide useful information to Future

Cinema's competitors, which could be used against Future Cinema to its commercial detriment in any future negotiations for venues and events. Future Cinema has stated that it is a private B2C (Business to Consumer) business specialising in providing unique entertainment events in interesting settings. Their competitors include other provider of similar experiences such as Punchdrunk, You Me Bum Bum Train, Pop Up Screens, The Luna Cinema to name a few. Its competitors would gain access to its free and frank negotiations in relation to this event and knowledge of its profit margin and costings. Future Cinema's competitors could use this information to undercut it or to reduce their own profit margins and costs in order to attract business away from Future Cinema.

26. The council stated that disclosure would also adversely affect Future Cinema's ability to secure similar deals with other site owners, whether private or publicly owned. Other site owners would be able to work out exactly what Future Cinema can afford to pay and this would put them in a very advantageous position when negotiating their fees, terms and conditions for hire.
27. The council explained that there is no set fee charged for such events calculated by their size and duration. Instead each case is individually negotiated with the third party. The council considers that if it was ordered to disclose its free and frank discussions with Future Cinema for this event, this would adversely affect the council's ability to secure as favourable if not better terms with those wishing to hire Hackney Downs and other open spaces in its borough. It explained that hiring out sites for such events is an important source of income for the council on which it relies to provide its services. Disclosure would not only adversely affect its ability to negotiate effectively with other potential customers but would also adversely affect its ability to carry out its statutory functions, as less income would mean less public funds to spend on the services it is able to offer.
28. The Commissioner is satisfied that the remaining withheld information does contain free and frank negotiations between the council and Future Cinema in respect of the fee that was charged. It specifically refers to the profit margin Future Cinema works to for such events, the profit to be achieved from this event and provides a breakdown of how it has been costed. He considers this information would adversely affect the economic interests of Future Cinema if it were disclosed. Future Cinema has provided examples of its competitors and explained that it is one of many small enterprises working to set up events such as this across London. Such honest appraisals of its financial circumstances could be used by its competitors to its commercial detriment. It would enable competitors to see how Future Cinema costs its events and what profit margin it works towards. Such information could be used by Future

Cinema's competitors to give them a more competitive edge. They could use this information to undercut Future Cinema and reduce their costs and profit margins, attracting business away from Future Cinema and others.

29. The Commissioner also accepts that there is no set fee for such events; each is negotiated and compiled individually with the event organiser. Disclosure would hinder the council's ability to secure as favourable if not better terms in future cases and this would have a knock on effect on the income it is able to generate from hiring out its parks and open spaces. The council has confirmed that such income is an important source of revenue for the council on which it relies to provide its public services.
30. The Commissioner has concluded in this case that disclosure would adversely the legitimate economic interests of Future Cinema and the council. He now needs to go on to consider the public interest test.
31. The council stated that it accepts there is a public interest in accountability and transparency, particularly in respect of how it utilises its assets and public funds. It also understands that disclosure would promote transparency in commercial dealings and assist the public in understanding more clearly how decision making is processed.
32. However, in this case, the council is of the view that there are stronger public interest arguments in favour of maintaining the exception. It stated that disclosure would adversely affect the commercial interests of the council and Future Cinema and such consequences are not in the public interest. It is not in the public interest to hinder private businesses from competing fairly in the market place and it is not in the public interest to disadvantage the council's ability to rent out its parks and open spaces for well negotiated and competitive prices.
33. The complainant also raised an interesting point, which he believes should sway the public interest test balance in favour of disclosure in this case. He referred to complaints that were made to the council about this particular event and that the council had accepted that it had acted unlawfully in enclosing an area considerably in excess of the maximum 10% permitted for open spaces. He stated that this event enclosed 30% of the park.
34. The complainant considers that revenue received from an unlawful act should be disclosed and it is in the public interest for the process by which this situation arose to be fully understood in order to prevent a recurrence.

35. The Commissioner considers there are compelling arguments in favour of disclosure in this case. The requested information relates to the manner in which parks and open spaces are hired out for such events and the income this generates for the council. He accepts there is a public interest in knowing how such decisions are made and ensuring that value for money is being achieved from the rental of public assets. The Commissioner is also of the view that there is a general public interest in transparency and accountability and in making information available to the public to enable it to understand more clearly how decisions of this nature are made and how important revenue for the council is generated.
36. He also notes the complainant's concerns about the closure of Hackney Downs for this event and the fact that considerably more of the area was closed for the event than is permitted by the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967. He accepts that the amount of revenue generated from this event and from the hire of a public space is a matter of public interest.
37. However, in this case, the Commissioner considers there are stronger public interest arguments in favour of maintaining this exception.
38. Dealing with the complainant's concerns about the closure of 30% of the park for this event and this being significantly over what is legally permitted by the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 first, the council confirmed that this matter has been fully addressed by the council separately and it wrote to the complainant on 21 May 2014 to inform him of its findings. It stated that it fully acknowledged that the size of the enclosed area for this event exceeded that which is legally permitted and steps were being taken to ensure that this does not happen again. The council advised at this time that it would be reviewing and updating its Parks and Open Spaces Events Policy to ensure that the limitations of such events are included.
39. In more recent submissions to the Commissioner, the council confirmed that it now enforces a 10% allocation for all events held on Common Land and all event organisers are made aware of the Common Land restrictions at the initial point of enquiry to ensure that their event fits within the specified criteria. It confirmed that procedures are now in place for officers to be on site during the build, event delivery and de-rig to ensure such specifications are not breached.
40. The Commissioner considers this error has been full acknowledged by the council and it has now taken steps to ensure that a similar issue does not occur again. He agrees that there is a public interest in

disclosing the revenue the council receives from the hire of its parks and open spaces. But the Commissioner considers this has now been met in this case, as the council has now disclosed this information to the complainant for the Future Cinema event. He does not consider this error alone tips the public interest balance in favour of the disclosure of the remaining withheld information.

41. As discussed previously in this notice, the remaining withheld information is commercially sensitive and disclosure would adversely affect the legitimate economic interests of the council and Future Cinema. Disclosure would hinder the council's ability to secure similar if not better fees, terms and conditions with other event organisers and would hinder Future Cinema's ability to compete fairly in the market place and such consequences are not in the interests of the wider public.

Procedural issues

42. In his decision notice of 4 September 2014, the Commissioner requested the council to reconsider the complainant's request under the EIR and issue a response within 35 calendar days of this notice.
43. It is clear that the council took longer than the permitted 35 calendar days to respond, as it did not respond until 13 October 2014.
44. This is not a procedural breach of the EIR but rather a failure on the council's part to comply with the decision notice within the permitted timeframe. The appropriate course of action here is to deal with a failure to respond as a contempt of court. However, the Commissioner would only consider taking such action at his discretion and where a public authority has failed to respond at all.
45. No such action is deemed necessary here, as the council did comply with the steps ordered in the decision notice albeit later than it should have done.
46. The Commissioner has however recorded a breach of regulation 11(4) of the EIR in this case. It is apparent that the complainant requested an internal review on 6 November 2014. However, the council did not carry out its internal review and notify the complainant of its findings until 21 April 2015; over four months later. As regulation 11(4) permits a maximum of 40 working days it is clear that the council breached this regulation in this case. Such delays are excessive and unreasonable.

Right of appeal

47. 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

48. 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.
49. 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

Mrs Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF