

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 28 April 2016

Public Authority: Newark and Sherwood District Council
Address: Kelham Hall
Kelham
Newark
Nottinghamshire
NG23 5QX

Decision (including any steps ordered)

1. The complainant has requested full legal documentation referred to in a Planning Committee meeting on 8 November 2011. The Commissioner's decision is that Newark and Sherwood District Council has failed to demonstrate that the exception at regulation 12(5)(e) where disclosure would have an adverse effect upon the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest is engaged.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
3. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

4. On 6 October 2015, the complainant wrote to Newark and Sherwood District Council ('the council') and requested information in the following terms:

"I would like to request a copy, under the Freedom of Information Act regulations, of the full legal documentation which was referred to in the following minutes:

Newark and Sherwood District Council

Minutes of the Planning Committee held in the Council Chamber, Kelham Hall, Newark

On Tuesday, 8 November 2011 at 4.00

Item 75

Site of Robin Hood Hotel 1-3 Lombard Street, Newark-on- Trent

(11/00476/FULM and 11/00477/LBC

Members had also been circulated with an exempt paper setting out the relevance of a legal agreement between the Council and the Applicant.

My request is for the full 'legal documentation' referred to in the Exempt Information report under "Purpose of Report

"The purpose of this report is to brief Members more fully on the requirements out in legal documentation between the Council and MF Strawson Ltd which relate to the Robin Hood.""

5. The council responded on 19 October 2015 and refused to provide the requested information citing the exception at regulation 12(5)(e) of the EIR.
6. On the same day the complainant requested an internal review.
7. The council provided an internal review on 8 December 2015 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 21 December 2015 to complain about the way her request for information had been handled.

9. The Commissioner has considered the application of the exception at regulation 12(5)(e) to the requested information.

Reasons for decision

Regulation 12(5)(e)

10. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”
11. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*¹. All four elements are required in order for the exception to be engaged:
- The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
12. The Commissioner has considered each of these factors in turn.

Is the information commercial or industrial in nature?

13. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
14. The council said that the requested information is a Development Agreement ('DA') relating to the redevelopment of a large site in Newark known as Potterdyke, of which the Robin Hood Hotel building is one element. It explained that the information is contractual information

¹ Appeal number EA/2010/0012

between it and third parties and concerns the commercial activity of the council in the form of development agreements.

15. Having considered the council's submission and referred to the withheld information, the Commissioner is satisfied that the withheld information is commercial in nature. Therefore, this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

16. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
17. The council has said that the DA contains a binding confidentiality clause protecting the content of the document, which was included to protect both the council's and the third parties' economic interests and that therefore this information is subject to a duty of confidence provided by law.
18. The Commissioner has identified the confidentiality clauses within the DA and is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

19. 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.

Whose interests?

20. The council has said that the confidentiality is required to protect the economic interests of the third parties as it includes details of prices paid and structured payments under the agreement. It also said that the confidentiality is important for the economic interests of the council in terms of securing the delivery of various elements of the development still outstanding and provisions for enforcement of this.
21. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the

Information Tribunal in Derry City Council v Information Commissioner². That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

22. It has not been made clear to the Commissioner whether the argument that confidentiality is required to protect the economic interests of the third parties because the information includes details of prices paid and structured payments under the agreement genuinely reflect the concerns of the third parties. However because the council has not provided any explanation as to how the third parties economic interests would be adversely affected by disclosure of the requested information, the Commissioner has only been able to take into consideration the council's own interests.

Legitimate economic interests and disclosure would cause harm

23. The Commissioner considers 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.
24. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. A public authority needs to establish, on the balance of probabilities, that disclosure would cause some harm. In addition to being able to explain the nature of an implied adverse effect, public authorities must be able to demonstrate the causal link between any such affect and the disclosure of the specific information.
25. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He 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

² Appeal no. EA/2006/0014, 11 December 2006

exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors”.

26. The council has submitted that its economic interests would be adversely affected by the disclosure of the DA at the current time, the adverse effect of which is substantial, not remote, and likely to occur (i.e. more probable than not).
27. It explained that the timing of this request for disclosure is key to this consideration. It said that whilst it is appreciated that this is a long standing matter, arising from documentation and agreements entered into by the council back in 2011, it is still very much a live issue. The Robin Hood Hotel element of the redevelopment scheme remains incomplete and the council is in the process of sensitive discussions with the parties to the agreement which include the enforcement of the DA. It said that the situation concerning this incomplete element of the contract was debated at a Full Council as recently as a meeting held on Tuesday 9 February 2016, when it was resolved to take independent legal advice and determine the most appropriate action to secure compliance with the contract between the council and the site owners and to ensure that the building is kept windproof, watertight and structurally sound.
28. The council submitted that disclosure of the DA at this stage in the discussions between the parties and in breach of the confidentiality requirements contained within the DA, together with the ongoing consideration of legal action to enforce the provisions of the contract would undoubtedly prejudice the council's position in this matter, would adversely affect the council's relationship with the other parties to the agreement and be detrimental to the council's legitimate economic interests.
29. The Commissioner does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. No precise examples have been provided of how the release of specific information would result in the effects claimed. He does not consider that the council has linked the claimed consequences to specific information or sufficiently explained the causal sequence. The Commissioner notes that the withheld information constitutes over 300 pages and covers redevelopment of a large site, of which the Robin Hood Hotel is only one element, but the council's arguments appear to relate to the situation with the Robin Hood Hotel only.
30. Whilst the Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing, he considers that it is for public authorities to fully explain the relevant causes and effects.

31. The Commissioner considers that there is little clarity around the specific nature of the alleged adverse effects which disclosure could cause and how this would be generated by the withheld information. This lack of clarity suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
32. As stated earlier, in order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. He considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. He considers that it is for public authorities to fully explain the relevant causes and effects.
33. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making his enquiries in this case, the Commissioner informed the council that his general approach is to allow one further opportunity for a public authority to submit thorough arguments in support of its position, with reference to the specific withheld information and the precise circumstances of the case, before recommending a decision. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link.
34. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

35. 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

36. 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.
37. 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
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