

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 March 2019

Public Authority: Mid and East Antrim Borough Council

Address: Victoria.Taylor@midandeastantrim.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from the Council in relation to a commercial lease agreement. The Council disclosed the majority of the requested information to the complainant, however it withheld a small amount ('the withheld information') citing regulation 12(5)(e) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(e) of the EIR to the requested information.
3. Therefore, the Commissioner requires no steps to be taken.

Request and response

4. The complainant on 31 August 2017 made the following request for information to the Council:-

"Under planning application reference LA02/2017/0603/F the applicant (Telefonica UK Limited) purports that it has agreed terms for leasing/licensing or otherwise occupying a plot of land beside Dickeystown Road, Glenarm on which it proposes to erect a telecommunications mast. Mid & East Antrim Borough Council is the owner of this land."

Pursuant to the Freedom of Information Act 2000 I request the following:

- The agreed/proposed terms of lease/licence between the Council and the applicant in respect of the applicant's proposed use of the land;
 - Copies of associated communications."
5. The Council responded to the complainant on 2 October 2017. It refused to disclose the requested information, citing section 42(1) of FOIA as a basis for that refusal.
 6. The complainant did not seek an internal review of the Council's decision, as he believed there would be no point in doing this. However, the Council did carry out its own review, as the complainant had expressed dissatisfaction with the Council's response, in particular he disputed the fact that the requested information was subject to legal professional privilege. The reviewer upheld the original decision.
 7. The Commissioner wrote to the Council on 5 June 2018 to seek its submissions and to ask it to review the requested information, as the Commissioner considered from the description of the information that it may be environmental information and therefore fall under the EIR.
 8. The Council responded to the Commissioner on 20 July 2018, providing a copy of the requested information. It stated that it had reviewed the information and agreed that the complainant's request should fall under the EIR. The Council, having considered the request under the EIR, stated that it had applied regulation 12(5)(e) of the EIR to the request and considered that, in all the circumstances of the case, the requested information could now be disclosed to the complainant, with the exception of the proposed rent ("the withheld information") to which it considered that regulation 12(5)(e) still applied. The remaining requested information was disclosed to the complainant on 23 August 2018.

Scope of the case

9. The complainant contacted the Commissioner on 6 October 2017 to complain about the way his request for information had been handled.

10. The complainant had an issue in particular with the initial application of section 42 of the FOIA to the requested information. However, since the Council then decided to deal with the request under the EIR, following the Commissioner's correspondence, the Commissioner has not considered the Council's initial application of an exemption under the FOIA, as it is a different information access regime.
11. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of regulation 12(5)(e) of the EIR to the withheld information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

12. 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".
13. 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?

14. The request was for a draft commercial lease and associated documents, and the withheld information consists of the proposed rent within the lease, therefore the Commissioner accepts, having viewed the information, that the withheld information is commercial in nature.

Is the information subject to confidentiality provided by law?

15. 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. In considering this matter the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
16. The Council considers that it has a common law duty of confidence to the proposed lessee to protect the withheld information as part of lease negotiations. It considers that the proposed rent is part of the commercial lease and as such formed part of negotiations which created an obligation of confidence on the part of the Council and that the information relating to the proposed rent has the quality of confidence. The Commissioner accepts this, and considers that, even though the lease agreement did not proceed in the end, the proposed lessee would not expect proposed rent terms to be disclosed into the public domain, but to remain in confidence. She also accepts that the information is not trivial in nature.

Is the confidentiality provided to protect a legitimate economic interest?

17. The Council considers that the confidentiality is protecting its legitimate economic interests as the withheld information contained in the draft lease is of commercial value and, if disclosed, would impact on the Council's ability to negotiate the best possible market rent in the future. As such placing this information in the public domain would have an adverse impact on the Council's legitimate economic interest in future negotiations for the best possible rent terms.

Would the confidentiality be adversely affected by disclosure?

18. The Council considers that the information concerning the rent being disclosed into the public domain would have an adverse impact on its confidentiality and would adversely affect the Council's negotiating position in future similar leases.
19. The Commissioner considers that all four of the above conditions have been met and that therefore the exception as set out in regulation 12(5)(e) of the EIR is engaged in relation to the withheld information. She has now gone on to consider the public interest test.

Public Interest Test

20. The test, set out in regulation 12(1)(b), is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. It is important to consider both the specific harm that disclosure would cause to the relevant economic interest at stake in the particular case, and whether there is any wider public interest in preserving the principle of confidentiality.
22. When carrying out the test there is a presumption towards the disclosure of the information, as set out in regulation 12(2).

Public interest factors in favour of disclosure

23. The Council has explained that it is aware of the need for openness, transparency and accountability in the way in which it conducts its business. It therefore considers that some factors lend weight in favour of the information being disclosed.
24. The Council is also aware that disclosure of the information would inform public awareness of the robust nature of lease negotiations, and increase public awareness of environmental matters dealt with by the Council.
25. The Council therefore considers, and the Commissioner agrees, that some factors lend weight in favour of the withheld information being disclosed.

Public interest factors in favour of maintaining the exception

26. The Council has already disclosed the vast majority of the requested information to the complainant. However, it considers that disclosure of the proposed rent would not be in the public interest, as it was part of the proposed terms of a commercial lease, negotiated in confidence. Although the lease did not proceed in the end, disclosure of the rent terms proposed by the Council would have an adverse impact on its ability to negotiate a fair market rent with future proposed lessees, which in turn may lead to the Council having to accept unfavourable rent terms, or alternatively not proceed with any commercial leases, which would not be in the public interest.

Balance of the public interest factors

27. Whilst the Commissioner is aware of the need for openness, accountability and transparency in the way in which Councils and other public authorities conduct their business, she considers that the information which has already been disclosed would serve to increase public awareness of its commercial lease negotiations, without necessity to disclose the proposed rent terms, which would not be likely to add much to this awareness, but would have an adverse impact on future negotiations.
28. Having considered all factors in favour of disclosure and of maintaining the exception as set out in regulations 12(5)(e) of the EIR, the Commissioner in all the circumstances of the case considers that the public interest lies in favour of maintaining the exception.

Right of appeal

29. 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

30. 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.
31. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF