

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 February 2022

Public Authority: North Lincolnshire Council
Address: Church Square House
30-40 High Street
Scunthorpe DN15 6NL

Decision (including any steps ordered)

1. The complainant requested information from North Lincolnshire Council ("the Council"). The information had been provided to the Council by a company director in support of his application for a Certificate of Lawful Existing Use or Development. The Council provided some information to the complainant, but withheld various bills, invoices and insurance documents under regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information), and/or under regulations 12(3) and 13(1) of the EIR (third party personal data).
2. The Commissioner's decision is that the exception at regulation 12(5)(e) is engaged, and that the balance of the public interests favours the exception being maintained.
3. Because the Council failed to respond to the request within 20 working days, it breached regulation 5(2) of the EIR. In addition, by failing to carry out a reconsideration within 40 working days, it also breached regulation 11(4).
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 22 May 2020, the complainant wrote to the Council to request information of the following description:

"We are concerned that crucial supporting information referred to in the application is missing from the Council's planning register and is not referred to at all in the Delegated Officer's Decision dated 9 August 2017... The purpose in writing now is to request this missing information is provided to us forthwith... The supporting statement relied on a statement from [redacted] that he has operated a business continuously from the Site for over 10 years. This statement is not held on the public register. The supporting statement also refers to bills and invoices and insurance documents from 2007–2017, but none of this information is included on the register. You are requested to supply a copy of this supporting information to us forthwith electronically."

6. On 8 October 2020, the Council responded and provided some information, including the statement from the named individual, with some personal details redacted. It also provided a copy of a Waste Management licence and associated letters.
7. However, it withheld copies of various bills, insurance documents and sales invoices. It provided a breakdown of this information. In the case of the bills and insurance documents, details were provided (example: "16/03/2007 - North Lincolnshire Council Rate Demand Notice") and in the case of the sales invoices, an indication as to the nature of the information was provided (example: "invoices from suppliers for the period 2007 – 2017... [including] Plant hire companies... metal services...").
8. The Council explained it was relying on the following exceptions of the EIR to withhold copies of the documents themselves:
 - regulation 12(3)/regulation 13 – third party personal data – and
 - regulation 12(5)(e) – adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
9. The complainant requested a reconsideration (internal review) on 17 November 2020. The Council provided the outcome on 4 March 2021, but upheld its position.

Scope of the case

10. The complainant contacted the Commissioner on 21 January 2021 to complain about the way their request for information had been handled.

11. This notice considers whether the withheld information is exempt from being disclosed under the EIR, under either or both of the exceptions cited above.
12. The Commissioner has also considered the time taken by the Council to respond to the request, and to the subsequent request for a reconsideration.

Background to the case

13. This case relates to a particular application to the Council, by a business operator, for a Certificate of Lawful Existing Use or Development (CLEUD). The Certificate was granted in 2017.
14. Under section 191 of the Town and Country Planning Act 1990 ("TCPA"), a CLEUD can be granted by a planning authority to establish that "an existing use of land, or some operational development, or some activity being carried out in breach of a planning condition, is lawful for planning purposes".¹
15. As the government's planning guidance explains, an application must be "accompanied by sufficient factual information/evidence for a local planning authority to decide the application, along with the relevant application fee".
16. The complainant has stated that the decision whether to grant the CLEUD in this case turned on the applicant (a director of the relevant business) being able to provide evidence that the site had been in planning class B2/B8 use for ten years prior to June 2017 (class B2 being the carrying on of an industrial process, and B8 being distribution or storage). The complainant disputed that this had been the case. Because the CLEUD was granted, they consider that the applicant's supporting evidence may have been inaccurate or misleading.
17. The complainant therefore considers that all information submitted by the director, in support of his application, should be available for public scrutiny. However, the Council's position is that the specific bills and invoices, etc, which it listed for the complainant, are exempt from its duty to disclose environmental information.

¹ <https://www.gov.uk/guidance/lawful-development-certificates>

Reasons for decision

Regulation 12(5)(e) – adverse effect on the confidentiality of commercial or industrial information

18. 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.
19. The Commissioner has published guidance² on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.
20. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:
 - The information is commercial or industrial in nature;
 - It is subject to confidentiality provided by law;
 - The confidentiality is protecting a legitimate economic interest; and
 - The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

21. The Commissioner has considered the withheld information, and notes that it chiefly relates to the supply of goods and services to a named company at the address in question (that is, the site which the CLEUD relates to). An example of goods being provided is an invoice for the delivery of a pump, and an example of services being provided are various utility bills, addressed to the company.
22. The withheld information also includes sales invoices – for example, detailing the sale of parts – and insurance documentation.

² <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

23. The Commissioner notes that the withheld information was provided to the Council as evidence that the company had been operating a business for the required period, and relates to the day-to-day operation and costs of that business. He notes that all of the information is addressed to, or issued from, the company.
24. He is satisfied that, in the general sense of the word, the information is commercial in nature.

Is the information subject to confidentiality provided by law?

25. The phrase "confidentiality provided by law" in this circumstance can include the common law duty of confidentiality, which is what the Council considers to exist in respect of the information in this case.
26. For a common law duty of confidentiality to exist, it is required that the information has the necessary quality of confidence, and was imparted in circumstances which gave rise to an obligation of confidence.
27. Regarding whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public.
28. The Council has explained that the information includes: "invoices... detail(ing) the expenditure of the company on particular items of assets... (and) insurance policy documents which detail insurance renewal costs (e.g., buildings and contents insurance and liability cover at the specific site in question). These documents clearly detail information relating to the purchase of goods and services and contract information with insurance providers relating to the business".
29. The Commissioner is satisfied that the withheld information relates to the company's business activities and is not trivial, and he is not aware of it having been made public. The information therefore has the necessary quality of confidence.
30. The Commissioner has also considered the circumstances in which the information was provided to the Council, and whether these gave rise to an obligation of confidence.
31. As previously explained, the withheld information was provided to the Council by a director of the company in support of a CLEUD application, as evidence of certain business operations having been carried on at the site for ten years.
32. A key question in this case is whether the company expected the Council to keep the information confidential.

33. The Commissioner has considered whether planning authorities normally make this type of supporting evidence available to the public, as part of the CLEUD procedure.
34. He notes that the TCPA requires planning authorities to keep a public planning register which must, under that legislation, contain certain specified information. This includes, by way of example, a copy of planning applications and any relevant drawings. The registers should be open for inspection (and are usually available to view online).
35. However, the Commissioner is satisfied that the withheld information in this case, which was provided as evidence of business operations in relation to a CLEUD application, is not of the type that is required by law to be made available on the Council's planning register. The Council has also confirmed that it is not its usual practice to publish or release information of the type being requested. Indeed, it asserted: "it is standard practice to not publish personal data or commercially sensitive data in the public domain on the Council planning portal website".
36. The Commissioner has also considered the decision of the First-tier Tribunal (Information Rights) ("the Tribunal") in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), which is referred to in his published guidance, referenced previously.
37. In that case, the Tribunal accepted evidence that it was "usual practice" for certain types of document to be provided to a planning authority in confidence, even where it was obligatory, under planning guidance, for the information to be provided to the authority as part of the public planning process.
38. Specifically, the Tribunal concluded that the developer in that case had "reasonable grounds for providing the information to the council in confidence", adding that "any reasonable man standing in the shoes of the council would have realised that that was what the developer was doing". The Tribunal found that the council in that case had accepted the withheld information "in confidence". In reaching this conclusion, the Tribunal also applied the "reasonable person test" established by Megarry J. in *Coco v AN Clark Engineers Ltd* [1968] FSR 415.
39. Although the Commissioner notes the complainant's view that all information relating to a planning application should be made available for public scrutiny, he has determined that the Council was not legally obliged to make the withheld information public in this case, that it has been acknowledged by the Tribunal that information provided in support of planning applications may be provided in confidence, and that, taking into account the nature of the information and the usual practices of the

Council, the circumstances in which the information was provided to the Council in this case gave rise to an obligation of confidence.

40. The Commissioner is therefore satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

41. As the Tribunal confirmed in the case of *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) ("Elmbridge")³, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
42. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.
43. In this case, the confidentiality was designed to protect the interests of the company which operated on the site. The Commissioner has considered whether these interests were "legitimate economic interests".
44. The Commissioner's guidance on the application of the exception, referenced previously, explains that, whilst the information itself must be "commercial or industrial" in nature, the interests being protected by the confidentiality should be "economic", which is a broader term, and can include financial interests.
45. The Commissioner notes that the withheld information in this case contains precise details of the company's financial transactions, and also its financial standing, in terms of the day-to-day costs of running the business and the assets it has acquired. This information would be of interest to competitors and customers.
46. He considers that the company clearly has an interest in protecting its ability to maintain a commercial bargaining position, and its overall market position. He is satisfied that the ability of the company to be

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_\(GRC\)_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_(GRC)_20110104.pdf)

operate its business, in its current location, from a position of strength in terms of bargaining power and market position, comprises a legitimate economic interest.

47. However, as explained in his guidance, the Commissioner's approach is that the wording of this part of the exception – it may be engaged "where the confidentiality **is** provided by law to protect a legitimate economic interest" – should be interpreted strictly. It is not sufficient to engage the exception if the confidentiality **was** required to protect the interest, at some previous time. The Commissioner's guidance explains that the wording indicates that the confidentiality must be objectively required at the time of the request.
48. It follows from the decision of the Tribunal in Elmbridge, referenced above, that in order to show that confidentiality **is** (at the time of the request) required to protect a legitimate economic interest, it is necessary to show that an adverse effect, or harm, would occur to that interest, if the information were disclosed.
49. As the Commissioner's guidance explains, it is therefore necessary to consider the sensitivity of the information at the date of the request, and the nature of harm that would be caused by disclosure.
50. Despite the CLEUD having been granted some time before the date of the request, the Council considered that disclosing the information at the time of the request would nevertheless "cause significant harm" to the company. It considered it would damage the company's bargaining position and lead to a potential loss of revenue, by opening up to scrutiny details of the company's assets and outgoings.
51. The Council stated that the information is "commercial sensitive information relating to the business such as pricing information and insurance limits. If a member of the public and/or competitor were to receive this information, this would cause harm to the business. The documents also have policy numbers and account numbers relating to insurance products including listing of machinery and pricing value, telephone bills, business rate bills and water bills. On these documents, there is an address as well as account numbers and reference numbers which if released would create a fraud risk".
52. Taking into account the detailed nature of the information and the fact that the company was continuing to operate at the date of the request, the Commissioner is satisfied in this case that disclosure, at the time of the request, would cause harm.
53. He is therefore satisfied that the Council correctly asserted that the confidentiality is required to protect a legitimate economic interest.

Would the confidentiality be adversely affected by disclosure?

54. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
55. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have been identified.
56. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
57. The Commissioner is satisfied that the exception is engaged.

The balance of the public interests

58. Regulation 12(5)(e) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.
59. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.

Factors in favour of disclosure

60. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

61. With regard to accountability, in this case, there is some public interest in being able to interrogate whether the Council afforded sufficient scrutiny to the evidence that was provided to it, before determining whether it should “regularise” the company’s business operations by granting a CLEUD. In the complainant’s view, the evidence provided to the Council may not have been accurate.

Factors in favour of maintaining the exception

62. By finding the exception at regulation 12(5)(e) to be engaged, the Commissioner has already accepted that releasing the withheld information would negatively affect the legitimate economic interests of the company director and his business in this case. It is not, generally, in the public interest to allow harm to legitimate economic interests, although the extent of the harm needs to be considered, and it needs to be weighed against any countervailing considerations.
63. The Commissioner also considers that there will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected. It is important to preserve trust in public authorities’ ability to keep third party information confidential.

The Commissioner’s decision: regulation 12(5)(e)

64. In this particular case, an application was made for a CLEUD and the applicant provided evidence to the Council in support, in circumstances which, it has been demonstrated, gave rise to an obligation of confidence.
65. The Commissioner considers that trust between the parties would be negatively affected if the Council published, to the world at large, the highly detailed evidence of the business’s operations over a ten-year period. In turn, he considers, this is likely to affect the level of trust which other third parties would place in the Council. The Commissioner considers that this is a strong factor in favour of maintaining the exception.
66. The Commissioner notes that a three-year period elapsed between the CLEUD being granted and the date of the request. However, he considers that to release the withheld information would, nevertheless, cause severe harm to the operation of the business by enabling the scrutiny of commercially sensitive information by competitors. It would have a negative economic impact on the company. He considers that this, too, is a strong factor in favour of maintaining the exception.

67. In addition, the Commissioner observes that the Council provided some of the requested information in this case to the complainant. Specifically, it provided a redacted version of the statutory declaration sworn by the company director, a former planning decision, and copies of a waste management licence with associated letters. It also provided a breakdown of all of the other information in its possession; that is, the withheld information.
68. In providing the breakdown of the withheld information, the Commissioner notes that the Council precisely listed almost 50 individual documents which it held: specifically, bills and insurance policies in the name of the relevant company, with details of the date of each document and the name of the third party organisation providing the service. With regard to the sales invoices which it held, the Council did not list each document individually, but, rather, explained that it held information which recorded transactions with ten different types of business with which the applicant company had traded; it also confirmed that these invoices covered the entire relevant ten-year period.
69. Whilst noting that there is some public interest in being able to scrutinise the withheld information in detail, the Commissioner considers that the information already released goes a considerable way to illuminating the evidence that was provided to the Council: it reveals the nature and amount of evidence that was provided and is, in the Commissioner's view, sufficient to demonstrate that the company director's application was supported by a large quantity of detailed information relating to business operations. Releasing the withheld information would qualitatively add relatively little to the information that has already been released.
70. Whilst he is aware that the complainant suspected some malfeasance or fraud in providing the evidence, having reviewed the withheld information, the Commissioner is not aware of anything to support any allegations of wrongdoing.
71. On balance, the Commissioner considers that, in this case, the balance of the public interests favours the exception being maintained.
72. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

73. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.
74. Because the Commissioner is satisfied that the exception at regulation 12(5)(e) covers all of the withheld information, he has not gone on to consider regulation 13: third party personal data.

Procedural matters: time for response

75. Regulation 5(2) of the EIR states that a public authority that holds environmental information shall make it available on request "as soon as possible and no later than 20 working days after the date of receipt of the request".
76. Regulation 14(2) states that if a public authority is refusing a request for information, the refusal "shall be made as soon as possible and no later than 20 working days after the date of receipt of the request".
77. The Commissioner notes that the Council failed either to provide the information or to issue a refusal notice until approximately four and a half months after the date of the request. In doing so, it breached regulation 5(2) of the EIR.
78. Regulation 11(4) of the EIR states that, where a requester has made representations to a public authority asking for a reconsideration of their request, "a public authority shall notify the applicant of its decision... as soon as possible and no later than 40 working days after the date of receipt of the representations."
79. In this case, the Council did not provide the outcome of its reconsideration until 75 working days after it received the representations. It was therefore in breach of regulation 11(4).
80. Since the response and reconsideration were, ultimately, provided, the Commissioner does not require the Council to take any steps.

Right of appeal

81. 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

82. 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.
83. 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

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