

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 May 2022

Public Authority: Exeter City Council
Address: Civic Centre
Paris Street
Exeter
EX1 1JN

Decision (including any steps ordered)

1. The complainant has requested from Exeter Council a DHN plan illustrating the location of underground pipes.
2. Exeter Council has withheld the plan under Regulation 12(5)(e) of the EIR on the basis that its disclosure would adversely affect the confidentiality of commercial information.
3. The Commissioner's decision is that Exeter Council has failed to engage Regulation 12(5)(e) of the EIR.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Disclose the withheld information to the complainant.
5. The public authority must take these steps 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 26 February 2021 the complainant wrote to Exeter Council (the Council) and requested information in the following terms:

"I should be pleased to receive a reply to my letter dated 28 December 2020. May I also request a copy of the correspondence you sent (on behalf of Exeter City Council/Monckton Heat Company to Eon as per your Email dated 24 December 2020 where you advise:

'I have raised the potential for a covenant to exist with Eon'.

I look forward to hearing from you in due course".

7. The Council responded on 25 March 2021. It disclosed the requested information with third party personal information, including email addresses, redacted under Section 40(2) of the Freedom of Information Act 2000 (the FOIA).
8. On the 5 April 2021 the complainant requested an internal review as he was unhappy with the redactions made by the Council. He also requested sight of an attachment to one of the redacted emails disclosed by the Council earlier.
9. The Council responded on 4 May 2021. It confirmed the attachment to the email was a detailed District Heat Network (DHN) plan sent to it by Eon displaying the location of underground pipes. However, it refused to disclose it citing Section 43 of the FOIA on the basis that it was commercially sensitive, and Eon had not given permission for its disclosure. It did however attach another plan showing the alignment of pipes which it hoped would fulfil the complainant's 'requirements'.

Scope of the case

10. The complainant contacted the Commissioner on a number of occasions in 2021 and 2022 to complain about the way the Council had dealt with his request. In particular, he was unhappy with the Council's decision redact email addresses and also its decision to withhold the DHN plan from Eon.
11. On 7 March 2022 the Commissioner contacted the Council and invited it to reconsider the complainant's request under the EIR on the basis that the information was 'environmental' as defined by Regulation 2(1). He also requested copies of all the recorded information held, including that which had already been disclosed together with any further arguments the Council might wish to raise in support of its decision to redact the email addresses and withhold the DHN plan.

12. The Council responded on 31 March 2022. Having reconsidered the request under the EIR it issued a revised response to the complainant on the same day. In relation to the third-party personal data comprising of the names, email addresses, phone numbers and job titles of Eon employees, the Council stated it was redacting this information under Regulation 13 of the EIR. With regard to Eon's DHN plan, the Council stated it was withholding this under Regulation 12(5)(e) of the EIR on the basis that disclosure would adversely affect Eon's legitimate economic interests.
13. In addition to reconsidering the request under the EIR, the Council also provided the Commissioner with copies of all the information falling within the scope of the request, including that which had been redacted and withheld.
14. The Commissioner contacted the complainant on 5 April 2022 in relation to the Council's revised response under the EIR, to see whether he was prepared to accept the personal data redactions and limit the scope of his complaint to the Council's decision to withhold the DHN plan.
15. The complainant responded on 5 April 2022 saying he was prepared to accept the personal data redactions relating to Eon's employees but not those of the Council.
16. The Commissioner contacted the Council again on 8 April 2022. In relation to the third-party data redactions, the Commissioner invited the Council to reconsider its position in relation to its own staff. With regard to the application of Regulation 12(5)(e) in respect of the DHN plan, the Commissioner said he was not satisfied that the arguments put forward that it was 'commercially sensitive' and 'sensitive between Eon and the customer (the developer)' were sufficient to engage Regulation 12(5)(e). He therefore sent them a copy of his guidance on Regulation 12(5)(e) with specific reference to section regarding commercial prejudice to a third party such as Eon and requested their further comments.
17. The Council responded on 26 April 2022. In relation to the third-party personal data, it clarified the only information redacted was for Eon's employees. All personal data for Council employees had been disclosed. With regard to the DHN plan, the Council confirmed it had canvassed Eon's views which were that disclosure would adversely affect Eon's legitimate economic interests.
18. The Commissioner discussed the matter further with the complainant on 3 May 2022 who confirmed he accepted the personal data redactions

and was prepared to limit the scope of his complaint to the Council's decision to withhold the DHN plan.

19. The scope of the Commissioner's investigation will therefore be to determine whether the Council was justified in withholding the DHN plan under the Regulation 12(5)(e) of the EIR.

Reasons for decision

Is the requested information environmental as defined by the EIR?

20. Regulation 2(1) of the EIR defines environmental information as being information on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements.

(d) reports on the implementation of environmental legislation.

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

21. The Commissioner considers that, as the information requested in this case relates to a plan illustrating the location of underground pipes, it is a measure affecting or likely to affect the elements and factors of the

environment, such as land and landscape, as defined by Regulation 2(1)(a). He is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

Regulation 12(2) of the EIR – presumption in favour of disclosure

22. The Commissioner is mindful of Regulation 12(2) of the EIR which states a public authority should apply a presumption in favour of disclosure.

Regulation 12(5)(e) EIR - commercial confidentiality

23. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
24. The Commissioner has published guidance¹ on the application of this exception which effectively imposes a four-stage test. Each condition as set out below must be satisfied for the exception to be engaged:
- Is the information commercial or industrial 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?
25. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial?

26. The withheld information in this case is map DHN prepared by Eon in relation to a commercial development to build new houses on the Linden

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

Homes Development at Sandrock². The Commissioner is therefore satisfied that the plan is commercial in nature.

Is the information subject to confidentiality provided by law?

27. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
28. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
29. The withheld information in this case is a DHN plan marked 'confidential' prepared by a third party, namely, Eon.
30. The phrase "confidentiality provided by law" in this circumstance can include the common law duty of confidentiality, which is what the Council considers existing in respect of the information in this case.
31. 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.
32. 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.
33. The Council has stated that the information does have the necessary quality of confidence in that it is not trivial and is not in the public domain.
34. The Commissioner has seen the withheld plan and is satisfied that it is not trivial and has not otherwise been made public. The information therefore has the necessary quality of confidence.
35. The Commissioner has next considered the circumstances in which the information was provided to the Council, and whether these gave rise to an obligation of confidence.
36. The Council has stated the plan was shared with it by Eon 'in circumstances creating an obligation of confidence'.

² Planning Application No 17/1320/FUL Land at Sandrock, Gipsy Hill Lane
<https://committees.exeter.gov.uk/mgAi.aspx?ID=43664>

37. In this case, furthermore, Eon was approached to ask for their consent to release the information. They refused, which may be said to indicate that they had an expectation of confidence when they provided the information.
38. 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?

39. 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, that 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.
40. 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. There must be a causal link between the requested information and economic interest identified.
41. 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.
42. As stated above, the Commissioner sought the Council's arguments in respect of the application of the exception and provided it with links to his guidance on the matter. However, in this case, the Council has simply stated 'the confidentiality protects a legitimate economic interest' and 'if the information was disclosed there would be an adverse effect such that it would affect Eon's legitimate economic interests' and 'on the balance of probabilities, the disclosure would cause some harm'.
43. However, the Council has not explained exactly what the legitimate economic interest is and why this interest would be harmed by

disclosure. It has simply reiterated what is stated in the Commissioner's guidance as referenced above.

44. The Commissioner has therefore decided that this part of the test has not been met and therefore, Regulation 12(5)(e) of the EIR has not been successfully engaged by the Council.
45. As Regulation 12(5)(e) of the EIR has not been successfully engaged it has not been necessary for the Commissioner to consider the public interest test.

Right of appeal

46. 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@justice.gov.uk

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

47. 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.
48. 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

**Laura Tomkinson
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