

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

**Decision notice**

**Date:** 22 October 2013

**Public Authority:** Department for Business Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the documents submitted by Waterford Wedgwood Royal Doulton (WWRD) to the Department for Business Innovation and Skills (BIS) applying for a grant from the Regional Growth Fund to redevelop its site in Stoke. BIS originally applied section 43 of FOIA to some of the information. However having accepted the information was environmental information, it later relied on regulation 12(5)(e) – confidentiality of commercial information, to withhold the information.
2. The Commissioner's decision is that in respect of the majority of the information regulation 12(5)(e) is engaged and that the public interest favoured maintaining the exception. However the information withheld from a table of 'Detailed Timings Plans' was not exempt.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld from the Detailed Timings Plans.
4. 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 the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 1 November 2012, the complainant wrote to BIS and requested information in the following terms:  
  
"I would like a copy of all documents submitted to the Department as part of the successful bid by WWRD (Waterford Wedgwood Royal Doulton) of Barlaston in Staffordshire for Regional Growth Fund Money."
6. BIS responded on 29 November 2012. It provided a copy of WWRD's completed application form which was split into two parts, together with two supplementary documents, consisting mainly of drawings. However information had been redacted from these documents under the exemptions provided by sections 43- commercial interests, 41 – information provided in confidence, 40 – personal data and section 21 – information accessible to the applicant by other means.
7. The applicant requested an internal review on 6 December 2012 but only in respect of the information that had been withheld under section 43. Following an internal review BIS wrote to the complainant on 7 January 2013. It continued to rely on section 43 to withhold that information.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 22 February 2013 to complain about the way his request for information had been handled.
9. Once BIS had provided the Commissioner with an un-redacted copy of the grant application he found that the information it held was environmental information. This was on the basis that the information related to the redevelopment of the Wedgwood Estate near Stoke on Trent which would clearly have an effect on the environment. BIS accepted that the request should have been dealt with under the EIR and therefore applied the exception provided by regulation 12(5)(e) – confidentiality of commercial or industrial information, to the information that had previously been withheld under section 43 of FOIA.
10. At the outset of the Commissioner's investigation BIS volunteered to release additional information and during the course of the investigation agreed to release still further information.
11. The Commissioner considers that the scope of the case is whether the exception provided by regulation 12(5)(e) applies to the information

that BIS is continuing to withhold under that exception and, if so, whether the public interest favours maintaining that exception.

12. The information that is still being withheld under regulation 12(5)(e) comprises of:

From Part 1 of the application

- The end of one sentence in part B09 of the application, originally shown as redaction 2 in BIS's submission with the Commissioner.
- The second and fourth rows of table D01, part of what was shown as redaction 4 in BIS's submission to the Commissioner.
- The entire entry under E02, shown as redaction 7 in BIS's submission to the Commissioner.

From Part 2 of the application

- The seventh column of tables 1a–2b in section A, referred to by BIS as redaction 1 of this part of the submission.
- The second and third rows of table 1 of section C, part of what was referred to by BIS as redaction 2 of this part of the submission.

Support documentation

- Lines 26- 31 inclusive of the Detailed Timing Plans (page 1)

13. The reference to numbered redactions relate to the submissions made by BIS to the Commissioner. They were not used in the original refusal to the applicant.

## **Reasons for decision**

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14. Regulation 12(5)(e) of EIR allows a public authority to withhold information if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
15. Under regulation 12(9) this exception cannot be applied to information on emissions. Having examined the information the Commissioner is satisfied the information is not about emissions and therefore regulation 12(9) does not prohibit its use.

16. For regulation 12(5)(e) to apply the information has to satisfy a number of conditions.
  - The information has to be of a commercial or industrial nature
  - The information has to be confidential, for example it may be protected by a common law duty of confidence
  - That confidentiality has to protect a legitimate economic interest.
  - Disclosing the information would have an adverse effect on that confidentiality.
17. However in respect to the final part of the test set out above the Commissioner considers that if the previous three conditions are met than it is inevitable that this element will be satisfied too. This is simply because the disclosure of truly confidential information would inevitably harm its confidential nature by making the information public.
18. Even if all these conditions are met the information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosure.
19. The information relates to the redevelopment of the Wedgwood factory which manufactures ceramics. The Commissioner is satisfied that this information is of both a commercial and industrial nature.
20. It is now necessary to consider whether the information is confidential. It is understood that BIS regard the information as being protected by the common law of confidence. For information to be protected in this way it has to have been provided in circumstances that would give rise to an expectation of confidence. The information itself also has to have the necessary quality of confidence.
21. The information has been provided as part of an application for a grant of public money. As part of that application private companies are required to provide information about their businesses, including their future plans. The information must have sufficient detail to convince BIS that any grant is going to a viable concern which will help grow the economy of the region. It appears obvious that this process could require a private company to provide commercially sensitive information and it seems reasonable that those applying for a grant would understand that, where it is necessary to do so, BIS would treat that sensitive information as confidential.
22. The application form does explain to applicants that BIS is subject to FOI and would be obliged to provide information in response to requests. However it goes onto say that FOI provides an exemption in

respect of information provided in confidence and offers applicants the opportunity to identify the information it considers to be confidential and to then justify why it is confidential. In light of this the Commissioner is satisfied that WWRD would have expected BIS to respect the confidentiality of the information in question.

23. The information also has to have the necessary quality of confidence, ie it is neither generally known nor is it trivial. Having examined the information the Commissioner is satisfied that the information is not generally known and would probably be known to only a limited number of people. He is also satisfied that it is not trivial relating as it does to the future business plans of BIS and to financial information.
24. In respect of whether that confidentiality is protecting a legitimate economic interest it is first important to look at whose legitimate interests are being protecting. Clearly in this case it is the interests of WWRD which confided the information to BIS. The next step is to ensure that the interests in question are both economic and legitimate ones. Clearly the commercial manufacture of ceramics and in particular the redevelopment of the Wedgewood site is an entirely legitimate economic interest.
25. However the real test of this condition is whether the duty of confidence serves to protect that economic interest. In other words, if WWRD's economic interests would be adversely affected if that duty of confidence was not in place and the information was released.
26. It should be noted that the under the EIR the Commissioner has to consider whether disclosing the information '**would**' be harmful. This is a high test. The Commissioner has to be satisfied that it is more probable than not that the harm would arise.
27. Where the interests that would be harmed are those of someone other than the public authority, the public authority must consult with that third party. It is not sufficient for the public authority to speculate on why the information is sensitive. In dealing with the original request and in its initial communications with the Commissioner, BIS withheld the information under section 43 of FOI which protects disclosure which would, or would be likely to, prejudice commercial interests. Having consulted with WWRD BIS argued that disclosing the information now withheld under regulation 12(5)(e) would only be 'likely to prejudice' WWRD's commercial interests. However the Commissioner is aware that since BIS accepted that the information was environmental information and should have been dealt with the EIR, BIS consulted with WWRD again. BIS then responded to the Commissioner's enquiries using the terminology that disclosing the withheld information 'would' adversely affect the legitimate economic interests of WWRD. The Commissioner

therefore understands BIS's position to be that the higher test ie that the harm would occur' is satisfied.

28. Before discussing the individual redactions it is necessary to consider the FOI statement on the inside cover of the application form. This has already been referred to in paragraph 22 above. WWRD's explanation of why its application should be treated as confidential partly concerned consultations that it was involved in and that were still on-going. At the time WWRD submitted its application it expected that these consultations would be complete by October 2012. As the complainant's request was dated 1 November 2012 the Commissioner asked BIS to explain why BIS still regarded the information to be confidential. BIS explained that certain consultations with local authorities were still on going at the time of the request and that this was the result of a change in WWRD's approach to the redevelopment. Rather than seeking outline planning permission for certain features of the scheme it had decided to seek full planning permission and this had delayed its consultations and its application for that planning permission.
29. BIS also pointed that these grant applications can take eight months to process and economic circumstances can change within that time. Although the Commissioner does not know precisely when this application was made, he notes that the deadline for applications being submitted was 13 June 2012. On reflection the Commissioner has decided that the real value of the FOI statement in this case is that it gave rise to an expectation that the information WWRD provided would be treated as confidential. In terms of what information is commercially sensitive the Commissioner considers that the correct approach is to take account of the arguments that WWRD presented when BIS approached it at the time of the request, rather than issues raised by WWRD at least four and half months earlier.
30. Having studied the withheld information the Commissioner considers that in some cases it would be difficult to explain BIS's grounds for withholding the information without revealing its contents. Where this is the case the Commissioner has set out his reasons in a confidential annex which will only be provided to BIS.
31. In respect of the first redaction identified in paragraph 12 above, ie the end of one sentence from B09, it is very difficult to explain why this information has been withheld in the open version of this notice. However the Commissioner is satisfied that disclosing this information would adversely affect the economic interests of WWRD. It follows that as the first three conditions are satisfied then so is the final test regarding the adverse effect on the confidentiality of the information. Therefore the Commissioner is satisfied that in respect of this particular

piece of information the exception provided by regulation 12(5)(e) is engaged.

32. The next redaction is the second and fourth rows of table D01. Again it is difficult to provide a detailed explanation of BIS's concerns over the disclosure of this information. In broad terms however the redactions relate to different means by which WWRD intend to finance the redevelopment. Disclosing the information would undermine its ability to obtain those funds and so adversely affect the economic interests of WWRD. It follows that as the first three conditions are satisfied then so is the final test regarding the adverse effect on the confidentiality of the information. Therefore the Commissioner is satisfied that in respect of this particular piece of information the exception provided by regulation 12(5)(e) is engaged.
33. Now it is necessary to consider the redaction of the information provided in section E02 of the form. This section asks the person or company applying for the grant to explain what the consequences would be if their bid for the grant was unsuccessful. As such it provides information on the future of the company. The Commissioner is satisfied that at the time of the request, disclosing this information would have been very sensitive and he finds that the exception is engaged in respect of this section of the form.
34. The redactions from Tables 1a – 2b of Section A, in part 2 of the grant application relate to the salaries paid to those currently employed in different job roles by WWRD and the average salary for the new jobs that would be created in those roles if the redevelopment went ahead. BIS explained that the disclosure of this information could prejudice employee relations since individuals' salaries were confidential and employees were not aware of what their colleagues doing similar jobs earned. Disclosing this information would mean that those who were earning below the average rate became aware of this fact and this would cause problems with employee relations. The Commissioner is initially sceptical that a labour force would not either understand the system of salary progression operated by their employer or have some awareness of the different rates of pay through casual conversations with colleagues.
35. Having consulted further with WWRD, BIS advised the Commissioner that WWRD employment contracts contained a confidentiality clause and that therefore WWRD thought it unlikely that colleagues discussed their salaries in private. In light of this the Commissioner finds that regulation 12(5)(e) is engaged in respect of the average salary information.
36. The second and third rows have been redacted from table 1 of Section C of Part 2 of the application. This is the same information that has been

redacted from table D01 which is discussed at paragraph 32. Again the Commissioner finds that the information is exempt under regulation 12(5)(e).

37. The final pieces of withheld information have been redacted from a table of Detailed Timings Plans. The table lists the different activities involved in the project from the actual planning stage through to the construction of the different elements of the redevelopment. It then shows the period over which each activity will take place. The redacted information all relates to one particular activity. The Commissioner has not been able to identify any arguments that specifically relate to why this information is commercially sensitive. In light of this the Commissioner is not persuaded that this information engages regulation 12(5)(e). This information must be disclosed.

### **Public interest test**

38. The Commissioner has found that the information redacted from the following parts of the grant application form engage the exception:

From Part 1 of the application

- The end of one sentence in part B09 of the application, originally shown as redaction 2 in BIS's submission with the Commissioner.
- The second and fourth rows of table D01, part of redaction 4
- The entire submission under E02, redaction 7

From Part 2 of the application

- The seventh column of tables 1a–2b in section A, redaction 1 of this part of the submission
- The second and third rows of table 1 of section C, part of redaction 2 of this part of the submission.

39. However having engaged the exception it is still necessary to consider the public interest test. The public interest test is set out at regulation 12(1)(b). This provides that even where an exception is engaged the information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
40. The public interest in withholding this information has two elements. Firstly it is necessary to look at the actual harm to the economic interests of WWRD that would arise from disclosing this information. Secondly there is the public interest in preserving the trust that those



who apply for grants have in BIS not to disclose the commercially sensitive information they share with BIS.

41. In respect of the sentence redacted from B09 and the information redacted from E02 the Commissioner is satisfied that disclosing this information about possible future scenarios for WWRD would have a significant impact on the company's management of its operation. This in turn would have a significant impact on WWRD's economic interests.
42. The information redacted from table D01 is the same as that redacted from table 1 of Section C in part 2 of the application. The information relates to the different means by which WWRD intend to raise funds for the redevelopment. The amounts involved are significant and the Commissioner is satisfied that weight ought to be given to the public interest in preserving WWRD's ability to maximise its fund raising potential.
43. The redactions from Tables 1a – 2b of Section A, in part 2 of the grant application relate to the salaries of staff. Although the Commissioner accepts that the disclosure of this information would interrupt the smooth running of WWRD's operations, he considers that this would have less of an impact on the economic interests of WWRD than the disclosure of the other information covered by the exception. Accordingly he assigns less weight to the public interest in preventing this harm.
44. The public interest in maintaining the exception arising out of the harm to WWRD's economic interests has to be combined with the public interest in preserving the confidentiality of the grant application process. As the Commissioner's guidance on regulation 12(5)(e) sets out there will always be some public interest in maintaining confidences so that third parties are not discouraged from sharing information with public authorities. The argument carries greater weight when it can be shown that the relationship of trust, protected by the confidentiality, serves the public interest. In light of this the Commissioner has gone on to consider the purpose of the Regional Growth Fund and whether companies would be discouraged from applying for such grants if they did not trust BIS to respect the confidentiality of the information they provided.
45. The Regional Growth Fund is an important part of the government's economic policy aimed at increasing and strengthening investment in the UK economy, creating and protecting jobs and encouraging creativity. There is clearly a very strong public interest in these aims being fulfilled. The Commissioner considers that this is particularly so in the current economic climate.

46. However the Commissioner has also considered whether private sector companies would actually pass up the opportunity to receive significant public funding through fear of commercially sensitive information being disclosed. The Commissioner has taken account of the fact that the bidding process is a competitive one and obviously there is no guarantee that an application will be successful. If a company could not rely on the information it provided remaining confidential it would risk the commercial prejudice without necessarily securing any commercial benefit. Furthermore the Commissioner anticipates that some of the applicants may have operations abroad or have the opportunity to relocate abroad. If this is so the company may choose to invest in these locations rather than in the UK if the grants offered there are more attractive and do not involve the risk of commercially sensitive information being disclosed. So although private companies may not easily be discouraged from applying for public money, he does consider there are good grounds for finding that the loss of confidentiality would undermine the success of the Regional Development Fund. Even if companies did still apply for these grants they may be less candid in the information they provided to BIS. Although this may undermine the chances of that application being successful, importantly it would also frustrate the ability of BIS to identify the applications which offered the best value for money. This would not be in the public interest.
47. In this particular case BIS has advised the Commissioner that at the time of the request, although the award of the grant was at an advanced stage, the process was not complete. The application was still being examined in order for BIS to satisfy itself that its contents and the business case presented were sound. A conditional offer had not been made and negotiations were still taking place to ensure the best use of public money. The Commissioner considers the need for confidentiality to be very important to this stage in the grant process.
48. The Commissioner finds that when account is taken of the public interest in preserving the confidentiality of the current application process there is a weighty public interest in maintaining the exception in respect of each piece of information. This now has to be balanced against the public interest in disclosure.
49. There is always some public interest in allowing greater transparency of the activities of public authorities and holding them to account for the decisions they take. This is particularly true when those decisions involve the use of public funds. In this case the information relates to an application of a grant for over £5 million. The Commissioner finds that transparency would help people decide for themselves whether this particular grant does represent good value for money.

50. The complainant has argued that the need for transparency is particularly important as the grant will effectively be paid to New York based private equity investors. The Commissioner has not investigated who owns WWRD. However it is not clear to the Commissioner what relevance this has to whether the grant is a good use of public money. That is something which is determined by whether the grant is successful in achieving its aims of strengthening investment, creating and securing jobs and encouraging creativity.
51. Nevertheless the Commissioner accepts that there is a significant public interest in disclosing information that would help the public understand how £5 million of public money was spent. There is also a public interest in disclosing information that would reveal how such grants applications are made if this encourages others to submit applications and improve the quality of those submissions. In respect of this point the Commissioner would comment that BIS has already disclosed a great deal of information that would go a long way to satisfying this public interest.
52. After balancing the public interest for maintaining the exception against the public interest in disclosure, the Commissioner is satisfied that the disclosures already made by BIS go some way to meeting the public interest in disclosure and the need for transparency and accountability. Balanced against this is the very real harm that disclosure would cause to the economic interests of WWRD. However the deciding factor in favour of maintaining the exception is the importance of preserving the confidentiality of the application process for truly sensitive information. In light of this the Commissioner finds that where the exception has been properly engaged the public interest favours maintaining the exception.

## Right of appeal

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53. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

54. 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.
55. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**