

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 September 2015

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham

Decision (including any steps ordered)

1. The complainant has requested information contained in communications between the China Railways Group Limited and Birmingham City Council which concern HS2-related infrastructure projects.
2. The Commissioner's decision is that Birmingham City Council is entitled to withhold the information it holds which is relevant to the complainant's request in reliance on Regulation 12(5)(e) of the EIR.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 22 March 2014, the complainant wrote to Birmingham City Council and requested information in the following terms:

"I would be grateful if you would provide me with copies of the information contained in any communications between the City Council and the China Rail Group Limited subsequent to the letter referred to in my [previous] request¹, including any correspondence with regard to my request.

¹ The complainant's first request is considered by the Commissioner under reference FER0574954.

Please also send me copies of the information contained in any other communications between Birmingham City Council and any other entity that relates to the China Railway Group Limited and/or the HS2 related infrastructure projects in which they have expressed an interest."

5. The Council acknowledged the complainant's request on 14 April 2014. The Council stated that it had asked a third party service provider to search all HS2-related email messages in order to consider how best to answer his request. The Council advised the complainant that the anticipated volume of information would mean that it would not be able to respond to his request within the timescale required by the EIR.
6. On 17 April, the Council wrote to the complainant to advise him that it needed more time to consider his information request and that it would endeavour to provide its response to him by 21 May 2014.
7. Nevertheless, on 24 April, the Council sent the complainant its formal response. The Council confirmed that it had discussed his request in a telephone conversation between its Chief Executive and a representative of the CRGL. The recorded information held in respect of this conversation is an email in which CRGL had outlined its position. The Council sent the complainant a copy of this email but redacted some information relating to third parties. This redaction was made in reliance of Regulation 13 of the EIR, and/or section 40 of the FOIA. The Council stated that there were no other communications passing between it and the CRGL in relation to his request or the wider issues relating to the reported proposal.
8. The Council also issued a refusal notice to Dr Thornton under Regulation 14 of the EIR. This notice concerned the remaining information which the complainant had asked for. The Council refused to supply the remaining information in reliance on Regulation 12(4)(b), where the request is considered as being manifestly unreasonable. The Council provided the complainant with its rationale for its application of Regulation 12(4)(b).
9. On 29 April 2014, the complainant wrote to the Council again. In respect to the first part of his request, the complainant acknowledged that the Council had sent him an email falling within the scope of his request. He pointed out that the email was not sent to [a named recipient] by the CRGL and he questioned the Council's redaction of the identity of the company or authority for which the sender is employed. The complainant pointed out that the email referred to a meeting and phone call between [a named recipient] and the sender of the emails. The complainant asserted that minutes and other records of the meeting and phone call should have been sent to him as they fall within the scope of his request.

10. In respect of the second part of his request, the complainant argued that the Council's application of 'manifestly unreasonable' to his request was inappropriate. He asserted that he had no prior knowledge of the extent or nature of the CRGL's expressed interest in HS2-related infrastructure and he drew the Council's attention to Regulation 9 of the EIR, where the Council have a duty to provide advice and assistance. In view of the Council's interpretation of his request and its application of Regulation 12(4)(b), the complainant stated his willingness to amend the second part of his request to:

"Please also send me copies of the information contained in any other communications between Birmingham City Council and any other entity that relates to the activities of the China Rail Group Limited and their interest in HS2 related rail infrastructure projects."

11. The complainant asked the Council to conduct an internal review of its handling of his original second request. He also pointed out that he was still waiting for the Council's internal review decision in respect of his first request (see above).
12. On 15 May 2014 the Council responded to the complainant's request for an internal review of its handling of his second request. The Council determined that the first part of his second request was subject to the application of section 40 of the FOIA and Regulation 13 of the EIR and that some information fell outside the scope of his request. It also found that Regulation 12(5)(f) was also engaged.
13. The Council also determined that its application of Regulation 12(4)(b) was not appropriate to the second part of the complainant's request. It found that the Council had failed to contact the complainant in order to seek clarification under its duty to provide advice and assistance. The Council confirmed that the complainant's 'new' or revised request had been remitted back to the appropriate service area to carry out a search for relevant information.
14. The complainant wrote to the Council again on 15 June. In his email he reminded the Council that it had not responded to his revised request.
15. On 16 June the Council advised the complainant that it had identified 138 pages of information relevant to his revised request. This information had been sent to 'legal colleagues' for their advice on disclosure.
16. On 19 June the Council sent the complainant an initial response to his revised request. The Council confirmed that searches were currently being conducted by relevant service areas. The Council informed the complainant that, on initial consideration, most of the information will

either fall outside the scope of his request or would be exempt from disclosure under Regulations 12(4)(e), 13 and 12(5)(e).

17. The complainant wrote to the Council again on 17 July 2014. He reminded the Council that a further month had passed since he had received its initial response.
18. On 24 July 2014, the Council made its formal response to the complainant's revised request. The Council determined that the information it held was subject to the exception to disclosure provided by Regulation 12(4)(e) – internal communications.
19. Also on 24 July 2014, the complainant wrote to the Council to question its application of Regulation 12(4)(e).
20. The Council responded to the complainant on 28 July 2014, advising him that the exceptions applied to his request still stand and that the Council will not be releasing the data to him. The Council also advised the complainant of his right to complain to the Information Commissioner.

Scope of the case

21. The complainant contacted the Commissioner 15 March 2015 to complain about the way his request for information had been handled.
22. The Commissioner's investigation sought to determine whether Birmingham City Council has handled the complainant's request in accordance with the EIR, specifically whether the Council is entitled to rely on Regulations 12(4)(e), 13 and 12(5)(e) as the basis for refusing to provide the withheld information.

Reasons for decision

23. In responding to the Commissioner's enquiries, the Council advised him that it is no longer relying on Regulation 12(4)(e) in respect of copies of correspondence between the Council and third parties.
24. The Council advised the Commissioner that it considers the complainant's second request – the request considered in this notice, is in part, a repeat of the request considered in case FER0574954. This is because the complainant is seeking correspondence relating to the CRGL, which would include the letter considered by the former case. In view of this, the Council assert that the exceptions relied on in respect of the first case, also apply here.

Is the requested information 'environmental information'?

25. Regulation 2(1) of the EIR defines what constitutes 'environmental information'. Subsections (a) to (c) state –

'(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 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) and (b) as well as measures or activities designed to protect those elements.'

26. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

27. In the Commissioner's opinion the information sought by the complainant can be considered as being environmental information: the information relates to the landscape – the possible development a branch railway line running to Birmingham International Airport. The information therefore falls to be considered under the EIR.

Regulation 12(5)(e) – prejudice to the confidentiality of commercial information

28. The Commissioner has examined the withheld information relevant to this request and had found it to comprise emails passing internal within the Council and between the Council and the CRGL, which discuss the approach made by the CRGL. In the interests of brevity and in view of his decision in case FER0574954, the Commissioner has considered whether the Council can rely on Regulation 12(5)(e) of the EIR to withhold the information which the complainant seeks in this case.

29. The Commissioner finds that the withheld information engages Regulation 12(5)(e) for the same reasons outlined in case FER0574954: It is information which has the quality of being commercial or industrial in nature; the information is subject to confidentiality provided by law; the confidentiality protects a legitimate economic interest; and, the

confidentiality of the information would be adversely affected by its disclosure.

The public interest test

Arguments which favour disclosure of the withheld information

30. The Commissioner considers that same public interest factors which are outlined in detail in case FER0574954 apply to this case: He considers that weight must be given to the general principle of achieving accountability and transparency through the disclosure of information.
31. He recognises that the disclosure of the withheld information would promote transparency in respect the approach made to the Council by the CRGL.
32. Likewise, the Commissioner believes weight must be given to the provision of information to citizens so that they may express their views about matters which will impact on the environment.
33. The Commissioner is a firm advocate for the provision of publicly held information which promotes accountability and transparency in the decision-making process and this is particularly so where the matter in question concerns potential environmental impact.

Arguments in favour of withholding the requested information

34. The Commissioner is mindful that no decision has been made in respect of the CRGL proposal and it has not been the subject of any formal planning process or enquiry: The proposal is still very much in the development stage. Consequently the Commissioner considers that the public interest arguments which favour of disclosure must be significantly tempered.
35. The Commissioner accepts that there would be greater and more compelling reasons for the withheld information to be made public when the CRGL's proposals engage the formal planning process. At that juncture, it will be appropriate for the public to have access to the withheld information and for it to play its role in the decision-making process.
36. The stage at which the CRGL's proposals currently stand would expose the Council to inappropriate public scrutiny and this would likely hinder the CRGL in refining its proposal. It is clear to the Commissioner that appropriate opportunity must be given to the CRGL to allow it to make its proposal suitable for formal scrutiny.

37. Disclosure of the withheld information at this stage could have a chilling effect on potential investors in the City of Birmingham. This is particularly the case where the withheld information is commercially sensitive. It is certainly credible that, should the Council be required to disclose the withheld information, the CRGL and other investors would be less likely to freely provide similar information in the future.
38. The Commissioner considers that disclosure of the withheld information would be detrimental to the CRGL's negotiating position. It would open-up the company's proposals to its competitors at a time when the proposals are very much in the development stages. This would be unfair to the CRGL: There must surely be a strong public interest in preventing others from obtaining a developer's expertise for free.

Conclusions

39. The Commissioner has considered where the balance of the public interest falls in terms of the withheld information in this case. He has decided that the balance of the public interest falls in favour of the continued withholding of that information.
40. The Commission's decision is founded on the fact that no formal planning application had been submitted in respect of the CRGL's proposal. A formal application would have to be based on a fully considered proposal, rather than the speculative approach made by the CRGL, to which concerns the withheld information. Likewise, the Commissioner cannot ignore the commercial value of the advance which the CRGL has made to the Council.
41. The Commissioner has decided that the Council is entitled to rely on Regulation 12(5)(e) to withhold the requested information on the grounds that the public interest arguments favouring the exception outweigh the public interest in the information being disclosed.
42. In view of the decision outlined above, it is not necessary for the Commissioner to consider the Council's additional reliance on Regulation 12(5)(f), although disclosure of the withheld information would, on the face of this case, likely adversely affect the interests of the Council and the CRGL.

Right of appeal

43. 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

44. 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.
45. 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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