

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

Date: 6 July 2017

Public Authority: Tees Valley Combined Authority
Address: Cavendish House
Teesdale Business Park
Stockton-on-Tees
TS17 6QY

Decision (including any steps ordered)

1. The complainant has requested information relating to Tees Valley Airport. Tees Valley Combined Authority ("TVCA") initially handled this request under the FOIA and refused to provide information relating to one of the requests citing section 43 (commercial interests exemption). It upheld this position at internal review. During the course of the Commissioner's investigation and at the request of the Commissioner, it stated reliance on EIR regulation 12(5)(e) (confidentiality of commercial or industrial information).
2. The Commissioner's decision is that TVCA is entitled to rely on regulation 12(5)(e) in respect of the information it has withheld from disclosure.
3. No steps are required.

Request and response

4. On 4 June 2016, the complainant requested information of the following description:

"I note from a press release dated 30th November 2015 that following planning approval for the North Side/South Side road being granted DTVA hoped to make a start on the road in April 2016 with completion in 12 months, using the £5 million grant from TVU. I assume that the grant will only be given if DTVA can show that it has title to all the land

needed for the road and the grant will be linked to the construction of the first unit on the south side as promised.

I would be grateful therefore it could let me know whether

[1] DTVU has said that it now owns all the land necessary for the road,

[2] the road has actually been started,

[3] the grant has actually been given yet and

[4] what mechanism is in place to ensure that the promised south side building will take place."

5. For ease of future reference, the Commissioner has numbered these as Requests 1 – 4 as shown above.
6. On 1 July 2016, TVCA responded. It said it needed further time to consider the balance of public interest test for reliance on section 43 (commercial interests exemption). It also stated that it did not hold any information within the scope of Request 1 and that the complainant may be able to access it via the Land Registry.
7. On an incorrectly dated letter sent to the complainant on 8 July 2016, it reiterated its response regarding Request 1. It gave direct answers to Requests 2 and 3. In regards to Request 4, it argued that it held some information within the scope of this request but the information was exempt under section 43.
8. The complainant requested an internal review on 8 July 2016 of TVCA's response to Request 4. TVCA sent him the outcome of its internal review on 8 August 2016. It upheld its original position. It said that there was no concluded mechanism in place and that negotiations are ongoing.

Scope of the case

9. The complainant contacted the Commissioner on 13 September 2016 to complain about the way his request for information had been handled. Specifically, he disputed TVCA's refusal to give him the information described in Request 4.
10. The Commissioner has considered whether the information described in Request 4 is environmental information caught by the EIR. If the Commissioner decides it is not, The Commissioner will then consider whether TVCA is entitled to rely on FOIA section 43 (commercial interest exemption). If the Commissioner decides it is environmental information, she will consider whether TVCA is entitled to rely on EIR regulation 12(5)(e).

Reasons for decision

11. TVCA explained that, strictly speaking, because there is no concluded mechanism, it does not hold the information described in request 4. However, it was satisfied that the proposed mechanism information that it did hold was broadly within the scope of the request. The Commissioner also is satisfied that the information in question falls broadly within the scope of the request. She accepts that there is no final agreed mechanism. However, the information is what had been created up to this point in advance of any finalised agreement at the time of the request.
12. TVCA also argued that the information was not environmental because, at the stage it was still in draft form and because it was about a proposal. As such, there was no immediate and direct impact on the environment. However, it was prepared to accept that the Commissioner might come to a different view and submitted arguments about the exception at EIR regulation 12(5)(e) (confidentiality of commercial or industrial information) as well as submitting arguments about FOIA section 43.
13. The Commissioner has therefore considered first whether the requested information is environmental and therefore which access regime, the EIR or FOIA, is the correct legislation to apply.
14. Environmental information is defined in regulation 2(1) of the EIR:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) 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);
15. In the Commissioner's view, the information is clearly 'on' a measure, namely the proposed development of land around the airport. This is a proposed activity which is likely to affect that land. Therefore, the Commissioner has concluded that the information is clearly environmental information by virtue of regulation 2(1)(c).
16. In reaching this view, she has had regard for her own published guidance.¹

Regulation 12(5)(e)

17. Regulation 12(5)(e) 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.
18. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

19. TVCA explained that “the information relates to the development and implementation of the future plans for the Airport, and thereby to the economic prosperity and prospects of the sub-region”. The Commissioner agrees with this description having read the withheld information and has concluded that the information is commercial in nature. It refers in some detail to costings and planning for this proposed development. This does not mean that the Commissioner accepts that the exception applies; simply that this criterion of the exception is satisfied.

Is the information subject to confidentiality provided by law?

20. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute. 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.
21. Having read the withheld information and having considered TVCA's explanation about how the information is handled internally, the Commissioner is satisfied that the information has the necessary quality of confidence imposed by the common law of confidence. It is not trivial and is not in the public domain.

Is the confidentiality provided required to protect a legitimate economic interest and would that confidentiality be adversely affected by disclosure?

22. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
23. The Commissioner's guidance notes that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational

damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.²

24. TVCA explained that its own economic interest would be damaged as it seeks to ensure the best economic climate in which to undertake development. Having read the withheld information and what has been put into the public domain, the Commissioner is satisfied that maintaining the confidentiality of the information in question would be required in this case to protect TVCA's economic interest. She is unable to provide detail without disclosing what the information says. However, she has taken into account the complainant's assertion that there is little or no confidentiality attached to this information given that a headline costing figure of £5million has been disclosed.
25. Having considered the withheld information and the assertions of both parties, the Commissioner is satisfied that the Council is excepted from its duty to disclose the information described in Request 4 which remains withheld by virtue of regulation 12(5)(e). Regrettably, she cannot put further detail on the face of this notice without disclosing the withheld information itself.

Public interest test

26. Regulation 12(5)(e) is subject to the public interest test by virtue of regulation 12(1). TVCA can only rely on this exception where the public interest in doing so outweighs the public interest in disclosure. By virtue of regulation 12(2) a public authority shall apply a presumption in favour of disclosure.

Public interest in factors in favour of disclosure

27. The complainant is extremely sceptical about decision making around this topic and what he sees as a worrying lack of transparency. He expresses considerable concern about the amount of money that is being spent on something which, he feels, could be achieved at a lower cost and therefore at greater value to the public purse. He reports that a grant of £5million has already been made public and therefore details of how this is being spent cannot be considered confidential.
28. TVCA explained that:

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

"[it was] mindful of the arguments that a disclosure of information would increase public trust in TVCA decision making and explain to some extent the current position of the airport and its possible future. Disclosure would also inform the public of the financial position of the airport and the potential cost and risk to the taxpayer in the proposed funding. This would allow greater public participation in that the public would have greater information with which to question TVCA over the available options".

Public interest in maintaining the exception

29. The complainant did not submit any arguments as to why the exception should be maintained, nor did the Commissioner require him to.
30. TVCA emphasised the importance of protecting its negotiating position to the benefit of the public purse and argued that the public interest strongly favoured this. It said it was important to achieve "the best possible commercial and economic outcomes for funding for the airport".
31. It explained that disclosure would put it at a disadvantage in negotiations with the third parties also involved in this proposed development which was contrary to the public interest.

The Commissioner's conclusion

32. In the Commissioner's view, timing is the crucial factor in this case. The negotiations had not yet been finalised at the time of the request. In such circumstances and where negotiations are still live, the Commissioner accepts that there is a compelling public interest protecting the confidentiality of TVCA's negotiating position.
33. The Commissioner notes the complainant's argument that a final figure of £5million for the project has been made public. The complainant has asserted that this is a significant overestimate of the costs that would be incurred in completing this project. He has taken expert advice on the question. The complainant understandably seeks to find out whether this money would be well spent before it is actually spent. The Commissioner gives some weight to the complainant's arguments in this regard.
34. As regards the published figure of £5million, the Commissioner is unable to comment in detail without revealing the withheld information. However, she expects that as much detail as possible of arrangement will be made public once the matter is finalised.
35. When weighing the need for transparency and accountability against the requirement for TVCA to maintain the confidentiality of commercial negotiations in the circumstances of this case, the Commissioner has decided that greater weight must be given to those factors which favour maintenance of the exception. In reaching this view, she has given

particular weight to the timing of the request. Therefore, the Commissioner's decision is that TVCA is entitled to rely on regulation 12(5)(e) to withhold the information in question. She finds that the public interest favours maintaining the exception and that the withheld information to which this exception has been applied should therefore not be disclosed.

Right of appeal

36. 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

37. 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.
38. 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

Gerrard Tracey
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