

Environmental Information Regulations 2004 ("EIR")

Decision notice

Date: 16 February 2016

Public Authority: Merseyside Fire and Rescue Authority

Address: Merseyside Fire and Rescue Authority
Headquarters
Bridle Road
Bootle
Merseyside
L30 4YD

Decision (including any steps ordered)

1. The complainant has requested information about the estimated costs involved in building a new fire station. Merseyside Fire and Rescue Authority ("MFRA") refused the request, citing section 44(1)(a) (prohibitions on disclosure) of the Freedom of Information Act 2000 ("the FOIA"). During the Information Commissioner's investigation MFRA agreed that the EIR, rather than the FOIA, was the correct access regime. MFRA revised its position, applying regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that the EIR was the applicable access regime. The Commissioner's decision is that MFRA was entitled to withhold the requested information under the exception at regulation 12(5)(e). The Commissioner requires no steps to be taken.

Request and response

3. On 14 June 2015 the complainant wrote to MFRA and requested information in the following terms:

"This request is for:

a) the 2 A4 page Appendix H (capital costs) to report CFO/101/14 of the Chief Fire Officer (which was presented to the Authority meeting of the 2nd October 2014) and

b) the 2A4 Appendix F (capital costs) to report CFO/003/14 of the Chief

Fire Officer (which was presented to the Authority meeting of the 29th January 2015).

Part (a) of this request was connected to an agenda item titled "Proposals For Upton And West Kirby Fire Stations" and part (b) of this request was connected to an agenda item titled "West Wirral Operational Response Considerations (Post Consultation)".

Both reports detail "the costs of any new build station, together with an estimate of the potential income from the sale of the buildings and land at Upton and West Kirby."

As both reports fall under the meaning of "environmental information" as defined in the Environmental Information Regulations 2004 then I expect this request to be considered under the Environmental Information Regulations 2004

(<http://www.legislation.gov.uk/ukxi/2004/3391/contents/made>),

which unlike a request made under the Freedom of Information legislation the Environmental Information Regulations have a presumption in favour of disclosure (see Regulation 5

<http://www.legislation.gov.uk/ukxi/2004/3391/regulation/5/made>)."

4. MFRA responded on 8 July 2015. It said that the FOIA, rather than the EIR, was the applicable access regime in respect of the requested information. However, when exempting the requested information from disclosure it cited two EIR exceptions, regulation 12(5)(d) (confidentiality of public authority proceedings when covered by law) and regulation 12(5)(e) (confidentiality of commercial or industrial information, when protected by law to protect a legitimate economic interest). It stated that it was not in the public interest for commercially sensitive information which could jeopardise the authority's negotiating position to be disclosed.
5. The complainant asked for an internal review, disputing MFRA's contention that the requested information was not environmental information, and challenging the reasons given for the application of the two exceptions cited.
6. Following an internal review, MFRA wrote to the complainant on 31 July 2015. It revised its response, stating that section 44(1)(a) of the FOIA applied. It explained that the information was exempt from disclosure by virtue of prohibitions contained in paragraph 3 of Part 1 to schedule 12A of the Local Government Act 1972.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the request should be dealt with under the EIR or FOIA and to instruct MFRA to issue a fresh response to the request which did not rely on any of the exemptions or exceptions it had previously cited.
8. During the Commissioner's investigation, MFRA agreed that the EIR rather than the FOIA was the correct access regime. It withdrew its reliance on section 44(1)(a) and substituted instead regulation 12(5)(e).
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.
10. The Commissioner considers that the requested information would fall within the definition of environmental information as stipulated in the EIR. The scope of this decision notice is therefore to consider whether MFRA was entitled to rely on regulation 12(5)(e).

Reasons for decision

Applicable regime

11. The EIR and FOIA give rights of public access to information held by public authorities. The regimes are, however, distinct from each other. The EIR derived from European law and exclusively covers environmental information. FOIA, by contrast, provides an access regime to most other types of official records held by public authorities. A public authority must therefore decide under which piece of legislation information should be considered.
12. "Environmental information" is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "*any information...on*" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be

environmental. Information *on* something falling within these definitions will be environmental information.

13. The complainant asserted that the request should have been dealt with under the EIR, as the information he requested (the capital costs of building a new fire station) fell within the definition of environmental information at regulation 2(1)(c) and (e).
14. Regulation 2(1)(c) of the EIR defines environmental information as "*measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect*" the state of the elements of the environment. Regulation 2(1)(e) defines it as "*cost-benefit and other economic analyses...within...the measures and activities referred to in (c).*"
15. The Commissioner has seen the withheld information. It comprises only a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build. The figures include estimated sale prices for land currently owned by MFRA, estimated purchase prices for new land, and income from grants and partners.
16. The withheld information is concerned with plans to build a new fire station. "Plans" fall within the definition of "measures" at regulation 2(c). The plans involve selling existing land to raise capital with which to buy new land on which to build. The consequent use of the land is likely to affect several of the elements of the environment referred to in 2(1)(a). The Commissioner is therefore satisfied that the withheld information relates to a measure which will or will be likely to affect the environment.
17. He therefore considers that the withheld information is environmental under regulation 2(c) of the EIR and the request should be considered under this access regime.

Regulation 12(5)(e)– confidentiality of commercial or industrial information

18. Regulation 12(5)(e) of the EIR allows that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

19. The construction of the exception effectively imposes a four-stage test, each condition of which must be satisfied for the exception to be engaged:

- (i) The information is commercial or industrial in nature.
- (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
- (iii) The confidentiality is protecting a legitimate economic interest.
- (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Information Tribunal (*Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)¹ found that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information. As such, if the preceding three stages of the test are fulfilled, it will follow that the exception will be engaged. Where this is the case, a public authority must next go on to consider the balance of the public interest in disclosure.

20. The Commissioner has considered each point of the above test.

(i) Is the information commercial or industrial in nature?

21. The withheld information comprises a brief table of figures (income and expenditure) concluding with an estimated overall cost for the proposed build of a new fire station. The figures include estimated sale and purchase prices for land and income from grants and partners. MFRA considers that all of this information is self-evidently commercial in nature.

22. The Commissioner's guidance² on the exception states that for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. He goes on to say that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The information in this case relates to the sale of an asset and the purchase of more land and therefore the Commissioner is

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_I_C_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_I_C_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

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

satisfied that the document satisfies the description of information that is commercial in nature.

(ii) Is confidentiality provided by law?

23. 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.
24. MFRA has submitted that financial information about the proposed sale and purchase of land is subject to the common law of confidence. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances importing an obligation of confidence.
25. For information to have the necessary quality of confidence, the information must not be trivial nor can it already be in the public domain. The Commissioner is satisfied that both of these factors are present in this situation.
26. With regard to the creation of an obligation of confidence, this can be explicit or implied and may depend on the nature of the information and the relationship between the parties. The Commissioner considers that a useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
27. MFRA has argued that information relating to a commercial property transaction would normally be expected to import an obligation of confidence. It stated that at the time this information was created it was produced with an expectation of confidence until any purchase and sale negotiations were completed. This is reflected in the exclusion of the costing information from the published minutes of the meetings at which the proposed transaction was discussed. In the circumstances, the Commissioner accepts that the common law of confidence does apply and therefore this stage of the test is met.

(iii) Is the confidentiality protecting a legitimate economic interest?

28. The Commissioner's guidance explains 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.

29. When determining whether there is an economic interest that needs protection, a public authority must consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish it is more probable than not that disclosure would cause some harm.
30. MFRA considers that its own economic interests would be harmed through the release of the information. MFRA explained that the proposed sale and purchase figures were arrived at using its knowledge of similar transactions and market values and that they remain current. They represented what MFRA could afford or would be willing to pay for a piece of land and what it expects the sale of its existing land to achieve. At the time of the request it was intended that if an appropriate site could be identified, purchase of new land would take place within 12 months.
31. It has provided the following information relating to the purchase of a new site:

"...while the requested information is not contractual the sensitive nature of the information is deserving of legal protection, in that to disclose the information would put organisations that are bidding for the land at commercial advantage as they would know the potential value that MFRA have placed on the land, and so know what MFRA are willing to bid. This would mean the bargaining position of MFRA (with accountability for public funds) would be adversely affected in the context of future negotiations establishing that the economic interests and confidentiality will be adversely affected by disclosure."

32. MFRA explained that its own commercial interests would be prejudiced by disclosure of information revealing the amounts it was expecting to buy and sell land for. In effect, it would be "showing its hand". Disclosure would place it at a disadvantage when trying to negotiate competitively when purchasing new land, both with existing owners and any rival bidders. This could result in it either paying more than necessary, or being outbid on a particular location. With regards to the sale of its existing land, knowledge by prospective purchasers of what MFRA hoped to achieve for it would similarly undermine its ability to engage in competitive negotiations and achieve best value for money.
33. The Commissioner considers 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. In this case the Commissioner accepts that a link can be drawn between disclosure of the withheld information and protecting MFRA's commercial bargaining position. At the time of the request MFRA intended purchasing land imminently and, clearly, if the owners of prospective plots knew the amount MFRA was willing to pay this would make it more difficult for it to secure the best terms when negotiating for a plot.

(iv) Would the economic interest, and thereby its confidentiality, be adversely affected by disclosure of information?

34. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers 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 by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
35. The Commissioner is satisfied that disclosure would adversely affect the confidentiality of the withheld information and that the confidentiality is necessary to protect MFRA's legitimate economic interests. Since all exceptions under the EIR are qualified, the Commissioner has gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exception.

Public Interest Test

Public interest arguments in favour of disclosure

36. The information relates to the purchase of land to build a new fire station and the sale of publicly owned land to finance this. MFRA acknowledged that there is a public interest in openness, transparency and accountability of public authorities such as MFRA and that there would be interest from the public regarding matters concerning the environment and spending of public monies.
37. Building on this, the Commissioner considers that there will always be a significant level of public interest in a decision to sell land and property owned by a public authority and to buy new land and property. The reasons for this are threefold.
38. Firstly, the public will want to be reassured that the sale and purchase are either necessary or in the best interests of the public authority and therefore the community it serves. Secondly, a public authority has a fiduciary duty to the community it serves and therefore the public will

want to know that the authority is maximising value for money. Thirdly, (and with particular regard to the disposal of land) it will be important to the public that the authority has adequate safeguards in place to ensure that the future use of the land corresponds with a wider planning policy.

39. The complainant argued that disclosure was in the public interest because the information had been omitted from the public record of the meeting at which it was discussed, without proper procedures being followed. He considered this to be tantamount to unlawful concealment and therefore that the interests of transparency would be served by its disclosure. He also referred to the presumption in favour of disclosure inherent in the EIR.

Public interest arguments in favour of maintaining the exception

40. MFRA has submitted that it is in the public interest for it to be able to function effectively in a commercial sphere. The disclosure of the commercially sensitive costing information would jeopardise its position with regards to any negotiations concerning the purchase or sale of the sites in question.
41. It said that as a public authority, it has a duty to negotiate the best possible financial deal to protect the public purse, which in turn enables it to provide the best possible service. Over the last four years, it has had to make savings of £20 million as a result of budgetary spending cuts. It is required to make a further £6.3 million savings during 2015/16. It is therefore vitally important that it achieves the highest possible price for the sale of its existing fire station and pays the lowest possible price for the purchase of land at the new site on which it hopes to build a new fire station. Any prejudice to its ability to negotiate competitively in this regard would be likely to have serious repercussions for service delivery.
42. MFRA has acknowledged the importance of transparency relating to the proposed transactions. It contests, however, that the wider aspects of the transactions have been adequately explained to the public via the minutes of meetings at which the matter was discussed³. The

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<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CId=142&MId=562&Ve r=4> and

<http://mfra.merseyfire.gov.uk/ieListDocuments.aspx?CId=142&MId=651&Ve r=4>

information provided within the body of the minutes and the associated documents allows members of the public to understand decisions which may affect them and to challenge them if they so wish. The addition of the withheld information would not significantly inform the public's understanding of the transactions and therefore the prejudice to MFRA's commercial confidentiality could not be justified.

43. It dismissed the complainant's claim that, in failing to publish the whole report, it had not followed proper procedures, stating that it was not obliged by the Local Government Act 1972⁴ to publish any document which discloses exempt information.

Balance of the public interest arguments

44. The Commissioner has considered the competing arguments. The importance placed on transparency is conveyed by regulation 12(2) of the EIR, which expressly states that a public authority should apply a presumption in favour of disclosure. To that end, there is a public interest in disclosure to the extent that it would permit scrutiny of the way in which MFRA disposes of existing assets and spends public money. Therefore the arguments surrounding transparency and accountability do carry some weight.
45. However, there will often be a tension between those interests that, on the one hand, promote public participation in decisions relating to planning matters and those that, on the other, seek to ensure that a public authority is able to carry out its commercial activities effectively. In the case of truly commercially sensitive information, any disclosure that could jeopardise the sale of land from which a public authority will gain or the delivery of a project designed to benefit the local community is unlikely to be in the public interest.
46. Furthermore, the Commissioner recognises that MFRA has already disclosed a certain amount of information about the land transactions and this goes some way to meeting the public interest in disclosure.
47. As regards the public interest in maintaining the exception the Commissioner considers that the arguments for withholding the information are very strong given that the sale and purchase transactions have yet to go ahead but are likely to within the next 12

⁴ See section 100(b)(2) and section 100(d)

months. MFRA has confirmed that the costs estimates remain current and have not been revised. That being the case, disclosure would prejudice its ability to negotiate competitively. This has the potential to adversely impact its ability to get best value for money in both sale and purchase. This would in turn, impact on its service delivery.

48. Taking all the above into account the Commissioner considers that the benefit afforded to the public in terms of accountability and transparency is not sufficient to justify the impact of the disclosure on MFRA's ability to negotiate competitively and the resultant effect this would be likely to have on public services. For this reason the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the regulation 12(5)(e) exception outweighs the public interest in disclosure.

Right of appeal

49. 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

50. 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.
51. 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

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