

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2012

Public Authority: Down District Council
Address: 24 Strangford Road
Downpatrick
County Down
BT30 6SR

Decision (including any steps ordered)

1. The complainant has requested a copy of the Business Plan and associated correspondence relating to the Magnus Viking Association's (MVA) proposal to create a Viking re-enactment centre at Delamont Park, Killyleagh, County Down.
2. The Commissioner's decision is that the exception as set out in regulation 12(5)(e) of the EIR applies to the requested information and requires no steps to be taken.

Request and response

3. On 20 June 2011, the complainant wrote to the Council and requested information in the following terms:

"I wish to request, under the Freedom of Information Act 2000, a copy of the Business Plan submitted by the Magnus Viking Association in respect of their proposed Viking re-enactment centre. The submission of this Business Plan was reported in the Down Recorder of 15 June 2011. I would also like copies of associated correspondence on this Business Plan between MVA and the Council."
4. The Council responded on 8 July 2011. It stated that it was refusing to disclose the requested information as it was information provided to the Council in confidence, as per the exemption set out in section 41 of FOIA.

5. Following an internal review the Council wrote to the complainant on 29 July 2011. It stated that the reviewer was upholding the original decision that section 41 of FOIA applied.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner decided that the requested information was environmental information as per the provisions of regulation 2(1)(c) of the EIR as it constitutes information on a proposed measure likely to affect the land and landscape. The Commissioner therefore asked the Council to re-consider the request under the EIR. The Council did so and decided that regulation 12(5)(e) of the EIR applied to the requested information. It provided its submissions to that effect and the Commissioner considered these accordingly.

Reasons for decision

8. Regulation 12(5)(e) of the EIR states that:
 - (5) For the purposes of paragraph (1)(a), 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.
9. The Commissioner considers that this exception can be broken down into four elements, all of which are required in order 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 provided to protect a legitimate economic interest?
 - Would confidentiality be adversely affected by disclosure?
10. The above criteria have been applied to the requested information.

Is the information commercial or industrial in nature?

11. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
12. The Council has informed the Commissioner that the requested information consists of a Business Plan and associated correspondence including financial projections. The Business Plan and financial projections in question contain in-depth information and details relating to the business of the MVA and their intended Project. The Plan and projections contain details of the business's proposals, ideas and targets. They also contain the financial projections of the business in terms of costs, income, visitor numbers etc. The Council believes that the information is commercial in nature on the basis that the information focuses on the business activity of the MVA which is a commercial enterprise proposing to provide goods and services for profit.
13. The Commissioner is satisfied that the requested information is commercial in nature as it relates to a commercial activity.

Is the information subject to confidentiality provided by law?

14. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, contractual obligation or statute. There is no need under regulation 12(5)(e) for the information to have been obtained from another. The exception can therefore also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party. The Commissioner has considered the common law duty of confidence in this case and whether or not it applies to the requested information.
15. The Commissioner has applied some elements of the common law test of confidence in that he has considered whether the information has the necessary quality of confidence and was imparted in circumstances giving rise to an obligation of confidence.

Does the information possess the necessary quality of confidence?

16. The Council has explained to the Commissioner that the requested information contains in-depth detail relating to the business of the MVA and its intended project. It contains proposals, ideas and targets relating to the project and also financial projections in terms of costs, visitor numbers and income. The Council is of the view that the

information possesses the necessary quality of confidence as it relates to a very specific and unique business idea and contains specialist information and knowledge. This information is not available to the public, nor is it widely known. It is based on extensive research and consultations with other parties and was compiled over a period of 3 years at a substantial cost. The Commissioner, having viewed the requested information, is satisfied that the information has the necessary quality of confidence in that it is neither generally accessible nor trivial.

Was the information imparted in circumstances importing an obligation of confidence?

17. The MVA provided the requested information to Down District Council in order to assist the Council in its considerations as to whether to lease some of its land to the MVA to facilitate the development of a Viking re-enactment centre. When providing the information, the MVA made it clear that it was providing it in confidence and that it was only to be used or disclosed in accordance with the MVA's wishes. It was the MVA's view, as made clear in correspondence provided to the Commissioner, that it was providing the information on loan to the Council in order to assist it in making an informed decision regarding leasing arrangements and for no other purpose. It specified that the information was not to be used in any other way nor shared with any other parties. The Commissioner is satisfied that there is an explicit obligation of confidence in those circumstances.

Is confidentiality provided to protect a legitimate economic interest?

18. The Commissioner considers that to satisfy this element of the test disclosure 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 to a legitimate economic interest might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.

19. The Council believes that the disclosure of the information would adversely affect the economic and commercial interests of the MVA. The MVA is currently in negotiations with the Council regarding a Lease of Council land for the development of a Viking Village (the subject of the Business Plan). The information provided is, according to the Council, clearly very specialised and commercial information provided as the result of extensive research, consultation and analysis on the

part of the MVA. The information relates to a very specialist Project. The MVA has clearly invested extensive time (3 years) and resources in the development of their Business Plan. The Council considers that the disclosure of this information would be potentially harmful to the MVA as, should the information become publicly available, it may be used by competitors of the MVA to their advantage (to the subsequent detriment of the MVA). The Council believes that the legitimate economic interests of the MVA would be at risk if the information were to be disclosed.

20. The Commissioner has considered the arguments as put forward by the Council and accepts that the requested information consists of information which, both now and at the time of the request was of significant commercial value and which, if disclosed, may be used to competitive advantage by any party competing against the MVA. This would cause harm to the legitimate economic interests of the MVA.

Would confidentiality be adversely affected by disclosure?

21. The Council considers that disclosure of the requested information would harm the confidential nature of that information by making it publicly available and will also harm the legitimate economic interests that have been identified above.
22. In relation to the requested information the Commissioner considers that as the first three elements of the test cited at paragraph 9 of this notice have been established, he is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the MVA. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest arguments in favour of disclosing the information

23. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure.
24. The complainant maintains that there is a strong public interest in the disclosure of the requested information. This is due to significant local concern regarding the MVA's business proposals. The land which the Council is proposing to lease to the MVA is situated in Delamont Country Park in Killyleagh, on the shores of Strangford Lough in County Down, Northern Ireland. The park is a popular feature, set in the countryside, and has remained an unspoiled local attraction.

25. The complainant states that, as the Council purchased the Delamont Estate with public funds and turned it into a popular country park, the parkland should be used for the benefit of the entire public, not just for commercial venture for the benefit of the MVA. There is very real public concern that, should the project go ahead and the Viking centre ultimately prove untenable, the Council and public could be left with what the complainant describes as a “costly eyesore” in a beautiful part of County Down. He argues that there is a strong public interest in seeing the Business Plan and associated correspondence in order to inform the public regarding expected visitor levels, targets and costs. This would go some way towards informing public debate as to whether the centre was likely to succeed and would help the public to understand the reasoning behind the Council’s decision to lease the land to the MVA.
26. The Council has also pointed out that it can alleviate any concerns of the complainant and the wider public that the project is not financially viable. The Council wants to be clear that the Council is not and does not intend to be a Funder of the MVA or its project. Public funds are therefore not at issue in this particular case. The Council intends only to lease Council lands to the MVA. Further, the proposed Lease for the purposes of a centre is subject to the MVA obtaining 100% funding for the project. The Council believes that the financial viability of the Project and the Business Plan will be tested by external Funders and are therefore content that no further ratepayers’ funds should be spent in this regard.
27. The Council accepts that there may be a public interest in the disclosure of the requested information as there is always a public interest in public authorities being open and transparent regarding their activities. It also accepts that, due to the nature of the business proposed to be carried out on Council land and the possible repercussions to the surrounding area, there is a strong public interest in disclosure of the information.

Public interest arguments in favour of maintaining the exception

28. However, the Council has also set out the public interest factors in favour of maintaining the exception. The Council argues that there is a strong public interest in maintaining trust with a party with whom the Council intend to have an ongoing commercial relationship (ie, the Council intend to lease land to the MVA for the purpose of this Project). The MVA have advised that any sharing of this Business Plan would leave “a pronounced question mark over any future dealings that we [the MVA] might potentially have with them [the Council]”. There is a public interest in maintaining this relationship as should the Council

proceed to lease land to the MVA it is believed that the Project has the potential to bring many benefits to the local area.

29. The Council has listed the above benefits as follows: -

- The Project will contribute to the development of recreation and tourism in the district. It is hoped that the Project will act as a tourist attraction and will encourage visitors to Down District;
- The Project will bring educational benefits to Down District ;
- The Project has the potential to create employment opportunities in the district

Balance of the public interest arguments

30. The Commissioner has considered all of the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality. For this reason he has discounted the arguments at paragraph 29 above about potential wider benefits to the area as not inherent in this exception.
31. He understands that the proposed centre is a matter of significant local concern and that there is a strong public interest in disclosure. However, he has also taken into account that the actual building of the centre was subject to planning approval, which was granted, and the environmental impact of the proposal was assessed as part of that process.
32. The Commissioner is of the view that whilst there are strong public interest arguments on both sides the public interest in disclosure does not, in all the circumstances of the case, outweigh the public interest in maintaining the exception.

Right of appeal

33. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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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