

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 October 2017

Public Authority: North Yorkshire County Council
Address: County Hall
Northallerton
North Yorkshire
DL7 8AD

Decision (including any steps ordered)

1. The complainant has requested information relating to oil and gas developments in the North Yorkshire area. North Yorkshire County Council disclosed some of the information and requested other information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that North Yorkshire County Council has failed to demonstrate that the exceptions in regulation 12(5)(e) and regulation 12(5)(f) of the EIR are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information (excluding personal data) to the complainant.
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

5. On 14 December 2016, the complainant wrote to North Yorkshire County Council (the "council") and requested information in the following terms:

"...any information North Yorkshire County Council has about the possibility of oil and gas development taking place in the North Yorkshire County Council area. For the purposes of this request oil and gas development includes the drilling of oil or gas wells, hydraulic fracturing (fracking), oil or gas processing plants, the construction of infrastructure to transport oil or gas from oil and gas wells and waste disposal facilities used to dispose of waste from the oil and gas industry. I also request all information on contacts between North Yorkshire County Council and the oil and gas industry regarding this subject."

6. The council responded on 16 January 2017. It directed the complainant to The Oil and Gas Authority website; it also directed the complainant to search for relevant applications on its own website.
7. Following an internal review the council wrote to the complainant on 24 March 2017. It stated that it was revising its position and confirmed that it was withholding information under the exception for the interests of the information provider – regulation 12(5)(f).

Scope of the case

8. On 19 May 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the investigation the council disclosed some information to the complainant. It confirmed that, in withholding the remaining information it wished to rely on the exception for commercial confidentiality (regulation 12(5)(e)) in addition to regulation 12(5)(f).
10. The council also confirmed that the outstanding withheld information contained some personal data – names of third party individuals and indicated that these would be withheld under regulation 13(1) of the EIR. The complainant has agreed with the Commissioner that they are content for this personal data to be excluded from the scope of their request.
11. The Commissioner's investigation has considered whether the council has correctly applied regulation 12(5)(e) and regulation 12(5)(f) to withhold the outstanding information.

Reasons for decision

Regulation 12(5)(f) – interests of the information provider

12. Regulation 12(5)(f) sets out a number of criteria which must be met for this exception to be engaged. These criteria have been drawn from the Tribunal decision in *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)*¹ and include the following:

- the person was not under any legal obligation to supply that information to any public authority;
- the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it; and
- the person supplying the information has not consented to its disclosure.

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13. The council has explained that the withheld information consists of 2 emails which document meetings its officers held with INEOS². The council considers that the information is of a similar nature to pre-application planning discussions. The council has confirmed that the information was, therefore, voluntarily provided, there being no legal obligation on INEOS to share the information.

the person supplying the information did not supply it in circumstances in which the public authority is not entitled, apart from under the EIR, to disclose it

14. Under this limb of the test it is necessary to consider whether the information was supplied to the public authority in circumstances such that it, or any other public authority, is entitled to disclose it. In practice this means considering whether or not the public authority has a duty of

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http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

² The council explained that INEOS is a "...company in the oil and gas industry which holds a licence relating to gas extracting within North Yorkshire."

confidence and whether any explicit power permits the public authority to disclose the information in the circumstances.

15. The council has stated that, in relation to the information supplied, it considers it owes INEOS a duty of confidence.

The person supplying the information has not consented to its disclosure

16. Public authorities must consider whether, at the time a request is made, the person who supplied the information has not consented to its disclosure. This will often be determined at the time the information was supplied. It is a matter of good practice that a public authority should advise the supplier at the time the information is supplied to what uses the information will be put, including any likely disclosures. This should help to establish whether the supplier consents to disclosure and also provide the authority with the opportunity to encourage the supplier to provide such consent.
17. The Commissioner considers that, as circumstances can alter, it is equally a matter of good practice, where possible, to revert to the supplier following receipt of a request in order to confirm whether or not there is consent to disclose. This will be especially relevant where circumstances have changed since the information was first supplied to the authority.
18. In this case the council has stated that INEOS has not consented to disclosure of the information, however, it has also confirmed that it has not approached INEOS in this regard. It has stated that the meeting which gave rise to the withheld information took place "...less than a year ago" and it had no reason to suppose that INEOS would, in any event, consent to disclosure.
19. The Commissioner's guidance on the application of regulation 12(5)(f) states that:

"(where there is)...no specific objection to disclosure the Commissioner considers that a public authority could disclose the information even in the absence of specific consent from the information provider. "

Adverse Affect

20. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

21. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and explain why disclosure would, on the balance of probabilities, directly cause the harm.
22. As the Tribunal in the *Kuschnir* case (cited above) noted, there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
23. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
24. In relation to adverse effects to INEOS' interests, the council has argued that "*Unfair competition from other firms in the same industry would be caused if disclosure means they learn things about INEOS that it cannot know about them....*"
25. In making its submissions the council has not directed the Commissioner to any specific elements of the withheld information nor has it properly defined the nature of the competitive disadvantage which disclosure would produce. The Commissioner is also mindful that the council has not provided any evidence that it consulted with INEOS in relation to the effects of disclosure on its interests or otherwise sought its views in this regard.
26. The Commissioner is left with the impression that the council's arguments are generic, neither being directly linked to the specific withheld information nor providing sufficient detail to demonstrate that they are anything other than highly speculative.
27. That the council has not contacted INEOS to establish whether it consents to the disclosure of the information and that it has provided no evidence that its views on any potential harm that disclosure would cause directly reflect INEOS' position indicates to the Commissioner that the application of the exception has not been given due consideration.
28. In any event, as there is no evidence that INEOS has not consented to disclosure of the information and, as the council's arguments have failed to demonstrate that disclosure would result in adverse effects to INEOS'

interests, the Commissioner has concluded that the exception is not engaged. She has not, therefore, gone on to consider the public interest test.

Regulation 12(5)(e) – commercial confidentiality

29. The council has also withheld the information under regulation 12(5)(e).
30. Regulation 12(5)(e) of the EIR provides 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”.
31. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. These are:
 - 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 the confidentiality be adversely affected by disclosure?
32. The only specific argument submitted by the council in relation to its application of regulation 12(5)(e) is that “...*the public interest lies in promoting fair competition, and in not allowing unfairness between competitors.*”
33. To the extent that the council is relying on the arguments provided in relation to its application of regulation 12(5)(f), transposed here, the Commissioner accordingly finds that no specific harm to INEOS’ interests (including its legitimate economic interests) has been identified. Just as with the previous consideration, the Commissioner’s is of the view that when a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.^{3 4}

³ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

34. The Commissioner's letter of enquiry to the council clearly set out that she provides public authorities with one opportunity to set out a final position before formalising her conclusions in a decision notice. On the basis of its submissions in relation to regulation 12(5)(e) the Commissioner has concluded that the council has failed to demonstrate that any of the conditions for the exception to apply have been met and that the exception is, therefore, not engaged. She has not, therefore, gone on to consider the public interest.

⁴ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

Right of appeal

35. 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

36. 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.
37. 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
Group Manager
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