



Homes
England

Mrs Newsom

By email only: request-521478-ed77d2c2@whatdotheyknow.com

14th December 2018

Our Reference: RFI2507

INTERNAL REVIEW OUTCOME LETTER

Dear Mrs Newsom,

Further to your request for an internal review dated 16 November 2018, I am writing to tell you the outcome of my review of Homes England's handling of your Freedom of Information request dated 24 September 2018 (the **Original Request**).

Firstly, I would like to confirm that I was not involved in any way in your Original Request for information and am acting as an independent reviewer of it with authority to alter the response to the Original Request if appropriate. I have conducted a full review of how your Original Request was considered at the time and have considered how the individuals dealt with the Original Request.

Background

On 24 September 2018 you requested the following information from Homes England (the **Organisation**):

DAEDALUS / WATERFRONT: Lee-on-Solent Phase 1: Independent Dust Monitoring

Relating to above Project works (December 2016 to present), please supply all air monitoring information to the current date. Also please give the name of the firm undertaking the work. For avoidance of doubt including all reports, full test results, monitoring exact locations from commencement onwards giving full dates. Please include PM10 and PM25 tests, levels and frequency.

Please state if there is no such information beyond the site boundary supplying the information and why not. If there are additional air monitoring tests to those quoted immediately above please also supply that information with the exception of the Natta information.

The Organisation responded to your Original Request on 2 November 2018 (the **Reply**) and in doing so, supplied you with Annex A enclosing the requested information. However, some of the information was withheld under the following Environmental Information Regulations 2004 (EIR) exceptions:

- (a) Regulation 12(3) and 13 – Personal Data; and
- (b) Regulation 12(5)(e) – Confidentiality of commercial or industrial information.

You wrote to the Organisation on 16 November 2018 requesting an internal review. In requesting your internal review of the handling of your Original Request, you noted that:

- Your request is overdue;
- Your request has not been properly handled and having been processed solely under the Environmental Information Regulations 2004 (**EIR**) rather than with consideration to the Freedom of Information Act 2000 (**FOIA**);
- Information is wrongly, mainly unjustifiably withheld without providing explanation to applicability of Regulation 12(3) and 12(5)(e) EIR.

I have conducted a full review of how your Original Request was considered, taking into your points made when requesting the internal review. My findings are set out below.

Handling of Original Request

Your Original Request was received on 24 September 2018 and acknowledged on 2 October 2018 indicating that you would receive a response on or before 22 October 2018. A full response to your request was issued on 2 November 2018. I am sorry that this reply was late and have investigated the reasons and would like to apologise to you for the delay on behalf of Homes England.

Dealing with your Original Request solely under EIR

I have reviewed the information that is subject of your requests and have concluded that it falls within the scope of “environmental information” as defined under the EIR. EIR has defined “environmental information” as namely any information in written, visual, aural, electronic or any other material form on (matters including):

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;

Since your request relates to air monitoring, I am satisfied that this is covered by the definition of environmental information since it relates to the state of the air. For more detailed information on environmental information, please refer to Section 2 (Interpretation) of EIR at <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>.

Given the information is “environmental information”, I have concluded that your Original Request has been dealt with correctly under EIR rather than FOIA. Section 39(2)(a) FOIA applies and allows an authority to exempt information which the authority is obliged, under the EIRs, to make available to the public or would be so obliged but for any applicable exemptions within EIR.

Exceptions under EIR

Personal data

In our Reply, personal data was withheld from the information disclosed to you under Regulation 12(3) of EIR.

Regulation 12(3) of EIR provides:

To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 13 of EIR further prohibits disclosure of third party personal data where (amongst other grounds) this would breach the Data Protection Act.

The Data Protection Act says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable from it. I have reviewed the redacted third party information (names, signatures and contact details) and am satisfied that this is case in this instance.

Regulation 13(2)(i) EIR then applies saying that personal data is excepted from release if disclosing it would contravene one of the data protection principles.

I have considered if the disclosure of the withheld information would breach the first data protection principle, specifically if it would exceed the data subjects' expectations as to how their information would be processed. In undertaking this consideration, I have:

- taken into account whether the personal data relates to an individual's public or private life;
- whether it is sensitive personal data;
- whether the individual has consented to the release of the information; and
- the data subjects' reasonable expectations about what will happen to their personal data.

The information relates to the individuals in their private capacities. Whilst it is not sensitive personal data, I am persuaded that the individuals would have a high degree of expectation that that information which identifies them would not be disclosed. This is particularly so where individuals are undertaking monitoring functions in relation to a sensitive issue such as air quality. The points you have made as regards the impact of air quality issues in your request for an internal review, help me appreciate the sensitivity in this regard. The expectation of confidentiality is further reinforced as the information is not material to the understanding of the documents at the time they were issued so disclosure would not be anticipated and it is subject to the usual confidences found in commercial engagements with private companies of this type.

I am therefore satisfied that Regulation 12(3) EIR applies. Releasing the information could cause unnecessary or unjustified distress or damage to the individuals concerned if, for example, people opposed to the scheme identified those participants.

Despite the factors above, though regulation 12(3) is not itself subject to a public interest test, a public authority may still disclose personal information if there is compelling wider public interest in doing so that would outweigh the legitimate interests of the data subjects. This balancing test is performed when determining if disclosure would be fair under the first data protection principle as stated above. In this sense, I disagree with the approach taken in the Reply and have considered a public interest test in the capacity of the Data Protection Act principles.

Whilst there is a strong public interest in transparency and ensuring the environment is being carefully considered, there is a greater interest in protecting the interests of the data subjects. In particular I have noted:

- the data subjects, employed by in private companies undertaking air monitoring would expect their information to be kept confidential;

- should disclosure to have occurred, companies providing monitoring services may be unwilling to undertake work for public bodies in the future where the public body is unable to protect the identity of private employees engaged to carry out the work and who typically benefit from confidentiality provisions with their employers.

Confidentiality of commercial or industrial information

In relation to Regulation 12(5)(e) exception, the information requested was withheld.

The Reply explained that it was withholding this information under regulation 12(5)(e) of the EIR, which provides an exception to the duty to disclose environmental information where disclosure would adversely affect the confidentiality of commercial/industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

In my considerations relation to Regulation 12(5)(e) I have considered the following:

Is the information commercial or industrial in nature?

The Information Commissioner's guidance advises 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. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. I have reviewed the information and concluded a fee structure is inherently commercial in nature. It provides details of a private company's business model and how it will compete in the market on cost.

Is the information subject to confidentiality provided by law?

In sharing its fee structure with Homes England, Homes England enters into a common law duty of confidence with the private company. The information is not available in the public domain and the expectation when shared was that it would not be. Having reviewing the information, I am satisfied that it is not trivial and benefits from legally enforceable obligations of confidentiality.

Is the confidentiality provided to protect a legitimate economic interest?

To satisfy this element to prevent disclosure, the disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In considering legitimate economic interest, I recognise that the private company needs to be able to have freedom to decide its terms of business and protect them from the risk of being unfairly undercut by competitors should its fee rates be disclosed publically and have its negotiating position compromised. I am satisfied this element is met.

Would the confidentiality be adversely affected by disclosure?

The Information Commissioner's guidance on regulation 12(5)(e), referenced previously, indicates that once the first three criteria are established, the Information Commissioner considers it is inevitable that this fourth element will be satisfied.

Having been satisfied that Regulation 12(5)(e) applies, I have considered the public interest arguments. I have noted points in your request for an internal review and recognise the importance in providing transparent public services and the interest in air quality.

I also have considered your comments as regards the project being unusual but do not agree that this information is purely relevant to a single project. The fee information even to the extent it may be project specific would nevertheless provide competitors with an indication of cost for the quoted project and use that to understand rates and costs likely to apply for other projects.

I have also considered arguments against disclosure. Specifically, Homes England needs to work with private sector businesses in order to deliver its statutory objectives. With this in mind, it is important Homes England can be trusted with commercially sensitive information relating to costs, fee rates and business models. Disclosure of the information is provided in confidence and is genuinely commercially sensitive. To make a disclosure in these circumstances would have a chilling effect on private sector companies wishing to work with public bodies such as Homes England and would impact on public sector bodies more widely being able to carry out their public functions. It would also impact on private sector business and undermine their business model. I am satisfied that there is a greater interest in enabling public bodies such as Homes England to deliver and that the public interest therefore supports the application of Regulation 12(5)(e) EIR.

Conclusion

In conclusion, this internal review supports the findings of Homes England's Reply. I have sought to provide you with a more detailed basis to your Request. I hope that this letter addresses your concerns and gives you confidence that Homes England has fully considered your Original Request and sought to answer it as far as possible.

This letter marks the end of Homes England's internal review procedure. If you are dissatisfied with the outcome of this review, you may submit your case to the Information Commissioner for consideration at the following address: Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely,

Neeru Tuteja

Neeru Tuteja

Homes England Legal Services