

**Freedom of Information Act 2000 (the Act)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 24 October 2011

Public Authority: Thanet District Council
Address: PO Box 9
Cecil Street
Margate
Kent
CT9 1XZ

Decision

1. The Commissioner requires Thanet District Council to disclose to the complainant a copy of the condition survey of the air raid and disused rail tunnels under Ramsgate in Kent.
2. The complainant has requested:
A copy of the condition survey commissioned by Thanet District Council in 1997 of the air raid and disused rail tunnels under Ramsgate in Kent.
3. The Commissioner's decision is that Thanet District Council (the council) has not provided sufficient arguments and evidence to engage Regulation 12(5)(a) of the EIR.
4. The Commissioner therefore requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant a copy of the condition survey of the air raid and disused rail tunnels under Ramsgate in Kent.
5. Thanet District Council 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 9 June 2010 the complainant wrote to Thanet District Council (the council) and requested information in the following terms:

'I would like to be provided with a copy of the survey of the tunnels carried out for Thanet District Council'.

'Furthermore, I would ask for a copy of the report that identified the asbestos in the tunnel in the first instance'.

7. The council responded on 18 June 2010 stating that the request would be dealt with within twenty working days.
8. In the absence of a response, the complainant wrote to the council again on 29 July 2010 and reiterated that he was still waiting for a copy of the survey carried out for it on the tunnels/air raid shelters together with a copy of the report that identified asbestos in the tunnels. He added that the council had not complied with the Freedom of Information Act 2000 (the Act) by failing to respond to his request within 20 working days.
9. The council responded on 30 July 2010 by disclosing a copy of the asbestos report. However, it withheld the survey of the tunnels under section 38 of the Act on the grounds that disclosure into the public domain would encourage unauthorised access to the tunnels with the potential of endangering safety. The council added that the safety issue outweighed the public interest in disclosure.
10. On the 11 August 2010 the complainant requested an internal review on the grounds that there was already a wealth of information in the public domain (particularly via the internet) regarding access to and the layout of the tunnels.
11. In the absence of an internal review response, the complainant wrote to the council again 7 October 2010 and 12 January 2011.

Scope of the case

12. The complainant contacted the Commissioner on 12 January 2011 to complain about the way his request for information had been handled. In particular, he expressed his concern at the council's delay in responding to his initial request and its failure to carry out an internal review.

13. On 16 February and 18 March 2011 the Commissioner approached the council to request the withheld information and seek its further views as to which exemptions under the Act or exceptions under the EIR it wished to apply and to which parts of the requested information.
14. Following a telephone call with the Commissioner on 30 March 2011, the council wrote directly to the complainant on 31 March with an internal review of his complaint. This review resulted in the EIR being applied to the information requested and the survey of the tunnels being withheld under Regulation 12(5)(a) on the grounds that disclosure would adversely affect public safety.
15. The Commissioner has limited the scope of his investigation to the council's decision to withhold the survey of the tunnels under Regulation 12(5)(a) of the EIR. The asbestos report is not a matter for him to consider as it was disclosed by the council on 30 July 2010.

Reasons for decision

Is the requested information environmental?

16. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the Act, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information.
17. Environmental information is defined in Regulation 2 of the EIR which states:

“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 elements of the environment referred to in (b) and (c);"*
18. The withheld information consists of a condition survey carried out by contractors on behalf of the council in 1997 of the air raid and disused rail tunnels under Ramsgate and includes plans and photographs.
19. The Commissioner has seen this survey and is satisfied that it is environmental information within the meaning of Regulations 2(1)(a) and 2(1)(c) of the EIR in that it is information on measures (including administrative measures) plans and activities, affecting or likely to affect the elements of the environment, namely soil, land and landscape.
20. The council also accepts that the survey report is environmental information within the meaning of the EIR.

Exception applied

Regulation 12(5)(a) - public safety

21. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 'international relations, defence, national security or public safety'.
22. In this case the council has applied Regulation 12(5)(a) to the whole of the withheld information, referred to in paragraph 17 above, on the basis that disclosure would adversely affect public safety.
23. The council has pointed out that the tunnels (which are the subject of the withheld information) are not open to the public and furthermore, the public do not have a right of access to them. It has also pointed out that they are inherently dangerous for a number of reasons; firstly, they

are unlit and the ventilation shafts that may have been adequate in the 1940's, shortly after some of the tunnels were constructed have not been maintained; and secondly, some of the tunnels are unlined and there is evidence of roof collapse in a number of places. In fact, the council has stated that when the contractors carried out the survey on its behalf it was necessary for them to take lighting, communications and breathing equipment with them to ensure a safe system of work.

24. Specifically, the council has argued that disclosure of the descriptive and graphical information in the survey report would assist members of the public to gain access to the tunnels and indeed encourage this outcome for certain individuals.
25. The council has also argued that as the report was carried out in 1997 it is unlikely to accurately describe the present condition of and dangers in the tunnels. Therefore, in its opinion disclosure of the withheld information might encourage members of the public to enter parts of the tunnels in the mistaken belief that it was safe to do so.
26. The council accepts that under Regulation 12(1) of the EIR it cannot rely on the exception in Regulation 12(5)(a) unless, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. The council has considered the public interest factors in favour of disclosing the withheld information including the public interest of disclosing environmental information as well as the local historical interest. However, in its view these factors are of insufficient to outweigh the public interest in withholding the survey report on grounds of public safety.
28. The complainant does not accept that disclosure of the withheld information would adversely affect public safety and has referred the council to the detailed information already in the public domain (mainly via the internet and including various videos on www.youtube.com) regarding the access points to and internal layout of the tunnels.
29. The council accept that there is already information in the public domain (including plans, photographs and videos on the internet) regarding the access points, location, layout and condition of the tunnels. However, it does not accept that this information is of the same descriptive and graphical detail as that contained in the survey report.

The Commissioner's view

30. The Commissioner is mindful of Regulation 12(1) of the EIR which provides that a public authority may refuse to disclose environmental information requested if an exception applies under paragraphs 12(4) or

(5) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

31. He has also taken into account Regulation 12(2) of the EIR which requires a public authority to apply a presumption in favour of disclosure.

Adverse effect under Regulation 12(5)(a)

32. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-international relations, defence, national security or public safety.
33. The threshold for demonstrating an adverse effect is a high one. See the Tribunal's decision in *Archer v The Information Commissioner and Salisbury District Council* (EA/2006/0037). It is not enough that disclosure should simply have an effect on public safety; the effect must be "adverse". Furthermore, a refusal to disclose is only permitted to the extent of that adverse effect. (In the *Archer* decision the information requested was for the whole of a particular report but the Tribunal found that the adverse effect only arose in respect of part of it and held that the cited refusal could not therefore be applied to the whole document.) To successfully apply Regulation 12(5) a public authority must also show that disclosure "would" have an adverse effect - not that it could or might have such an effect.
34. The Commissioner has considered the withheld information in detail and has noted that much of it is of a general nature in that it relates to the contents of the survey report, the terms of reference under which the contractors were commissioned to carry it out, the history of the tunnels, general conclusions regarding the tunnels structure and condition and the safety precautions necessary to allow safe access to small groups of people with specialist interests in the tunnels. The Commissioner does not accept that disclosure of this general information would adversely affect public safety.
35. With regard to the rest of the report the Commissioner has noted that this is more specific and relates to the plans, photographs, location, dimensions, access points, ventilation shafts, layout and physical description of the tunnels. However, the Commissioner is not persuaded by the council's arguments that disclosure of this specific information would adversely affect public safety by assisting and encouraging the public to gain unauthorised access to the tunnels. This is because there is already a lot of information in the public domain regarding the tunnels and more importantly, the council has not persuaded the Commissioner that disclosure of additional information, in the form of the survey report

will assist and encourage members of the public, not already so minded, to enter the tunnels. The council has already admitted that there is an interest taken by a small number of individuals in gaining access to the tunnels despite the risks to their personal safety.

36. The Commissioner has researched the internet and discovered a wealth of information and interest in the public domain regarding the tunnels. Links to a small selection of the websites he viewed are shown below. He has also noted that some of this information in the public domain supersedes the survey report which was carried out in 1997.

<http://ramsgatetunnels.org/plan.html> (Original 1939 plan of the tunnels by Borough Engineer, R D Brimmell)

http://www.subbrit.org.uk/sb-sites/sites/r/ramsgate_air_raid_shelter_and_scenic_railway/index.shtml (Plan of tunnels with access points and photographs)

http://www.subbrit.org.uk/sb-sites/sites/r/ramsgate_air_raid_shelter_and_scenic_railway/index5.shtml (Photographs of tunnels)

<http://www.oblivionstate.com/forum/viewtopic.php?t=360&f=12> (Photographs of the tunnels)

<http://thanetunderground.blogspot.com/2006/05/ramsgate-air-raid-tunnels-railway.html> (plans and photographs)

http://www.undergroundkent.co.uk/reports/ramsgate_tunnels.pdf (Photographs of the tunnels)

<http://thanetunderground.blogspot.com/2006/05/ramsgate-air-raid-tunnels-cannon-road.html> (Photographs of the tunnels)

<http://www.28dayslater.co.uk/forums/showthread.php?t=49939> (Photographs of the tunnels)

<http://www.28dayslater.co.uk/forums/showthread.php?t=46149> (Photographs of the tunnels)

<http://www.oblivionstate.com/forum/viewtopic.php?f=12&t=1505#p11693> (Photographs of the tunnels)

<http://www.oblivionstate.com/forum/viewtopic.php?f=12&t=1259> (Photographs of the tunnels)

<http://thanetonline.blogspot.com/2011/06/ramsgate-tunnels-vote-today.html> (Photographs of the tunnels)

<http://www.desertionphotography.co.uk/apps/photos/album?albumid=7911384> (Photographs of the tunnels)

<http://thanetunderground.blogspot.com/search/label/effingham%20street> (Photographs of the tunnels)

www.youtube.com/watch?v=JD00v-X_0Fw (video of the tunnels)

www.youtube.com/watch?v=GTok13yU7kA (video of the tunnels)

<http://thanetonline.blogspot.com/2009/06/video-of-inside-ramsgate-tunnels.html> (video of the tunnels)

37. With regard to information already in the public domain concerning the location, layout, general dimensions, access points, ventilation shafts of the tunnels, the Commissioner has referenced the plan prepared in 1939 by the Borough Engineer, Mr R D Brimmell, and the plan drawn by Alan Lawrence, MM, for Subterranean Britannica¹ which can be viewed through the links shown below:

<http://ramsgatetunnels.org/plan.html>

http://www.subbrit.org.uk/sb-sites/sites/r/ramsgate_air_raid_shelter_and_scenic_railway/index.shtml

38. With regard to information already in the public domain showing photographs and physical descriptions of the tunnels the Commissioner has referenced the information on the internet accessible via the links listed under paragraph 35 above.
39. The Commissioner's conclusion is that the council has not provided sufficiently strong arguments and evidence to demonstrate that disclosure of the withheld information would adversely affect public safety by allowing and encouraging members of the public to access the tunnels under Ramsgate.

¹ <http://www.subbrit.org.uk/>

40. In view of this conclusion it has not been necessary for the Commissioner to consider any public interest arguments.
41. It is apparent from information provided by the council and that already in the public domain that members of the public have already gained unauthorised access to the tunnels. This has resulted in the council taking steps to prevent similar occurrences in the future by blocking and securing access points. The Commissioner is not persuaded that access to further information in the form of the survey report carried out 14 years ago, will facilitate and encourage members of the public not already so minded to access the tunnels, in so far as it is still possible to do so.

Other matters

42. The Commissioner notes that it took the council more than 20 working days after receipt of the complainant's request in which to issue a refusal notice in breach of Regulation 14(2) of the EIR.
43. The Commissioner also notes that the council took more than 40 working days in which to carrying out an internal review after being requested to do so by the complainant in breach of Regulation 11(4) of the EIR.
44. Finally, the Commissioner wishes to bring to the attention of the council the code of practice issued under Regulation 16 of the EIR which states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the Act and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided."
45. In this case, the Commissioner notes that the council failed to recognise and process the request under the correct legislation. He expects that, in its future handling of requests, the authority will have regard for the recommendations of the EIR Code and will ensure that requests are handled appropriately.

Right of appeal

46. 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

47. 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.
48. 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
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