

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 6 December 2011

**Public Authority:** North East Lincolnshire Council

**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
N E Lincolnshire  
DN31 1HU

### Decision

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The Commissioner requires North East Lincolnshire Council to disclose the parts of the Settlement Agreement it has withheld under the EIR.

1. The complainant has requested:

*An unabridged copy of the Settlement Agreement.*

2. The Commissioner's decision is that North East Lincolnshire Council (the council) has not engaged Regulations 12(5)(e), 12(5)(f) and 13(1) of the EIR in respect of the parts of the Settlement Agreement that it has withheld from the complainant.

3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.

- Disclose the parts of the Settlement Agreement that it has withheld under the EIR.
- The 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.

## Background

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4. The subject matter of the current complaint is the Settlement Agreement signed on 18 August 2004 between the council and Millennium Park (Grimsby) Limited.
5. This agreement was initially requested by the complainant on 9 June 2010 and withheld in its entirety by the council under sections 41 and 43(2) of the Freedom of Information Act 2000 (the Act) on 13 July 2010. This decision to withhold the agreement was upheld by the council on 9 August 2010 following an internal review.
6. On 16 August 2010 the complainant contacted the Commissioner to complain about the way his request had been handled by the council, and in particular, its decision to withhold the agreement in its entirety under sections 41 and 43(2) of the Act.
7. Following the intervention of the Commissioner, the council also cited sections 36 and 40(2) of the Act as grounds for withholding the agreement in its entirety.

## Request and response

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8. On 31 March 2011 the Commissioner issued a Decision Notice under reference FER0345113 in which he upheld the complainant's complaint. In his decision he concluded that the requested information, namely the Settlement Agreement, was 'environmental' information within the meaning of the EIR and was therefore exempt under section 39 the Act. Accordingly, he ordered the council to reconsider the request under the EIR and either, disclose the requested information under Regulation 5 or issue a refusal notice under Regulation 14 of the EIR.
9. The council responded in writing on 5 May 2011. In its letter to the complainant it stated that it held the Settlement Agreement and had made those parts containing environmental information available to him for inspection at its offices.
10. On 8 May 2011 the complainant contacted the Commissioner to say that he was unhappy with the council's response as he was hoping to receive a hard copy of the complete Settlement Agreement through the post.
11. On 9 May 2011 the Commissioner wrote to the council and asked it whether it intended to make a complete copy of the Settlement Agreement available to the complainant for inspection and disclosure or a redacted version of those parts comprising environmental information.

If the latter, the Commissioner asked the council to clarify which parts it had redacted and why with reference to the relevant legislation.

12. The council responded on 11 May 2011. It clarified that the version of the Settlement Agreement being offered for inspection to the complainant was a redacted one comprising of the environmental information only.
13. On 13 May 2011 the Commissioner replied to the council and pointed out that his Decision Notice had concluded that all of the Settlement Agreement was environmental information within the meaning of the EIR. Accordingly, he said the council was obliged to either disclose the Settlement Agreement or issue a valid refusal notice and to do so within 7 days failing which enforcement action would be considered.
14. On the 20 May 2011 the council requested a 21 day extension of time in which to prepare a comprehensive and informed response to the complainant based on advice and assistance from counsel.
15. The Commissioner agreed to this but because the council failed to adhere to the new date he had to issue a 'Notice of Enforcement Action' letter on 22 June 2011 requiring compliance with his Decision Notice by 29 June 2011.
16. On 24 June 2011 the council issued a refusal notice to the complainant stating that it was prepared to make the Settlement Agreement available to him for inspection at its offices with clauses 2, 8 and 9 and schedules 1 and 3 redacted under Regulations 12(5)(e), 12(5)(f) and 13(1) of the EIR.
17. On 29 June 2011 the complainant requested an internal review. He stated that the council was obliged to apply a presumption in favour of disclosure under Regulation 12(2) of the EIR and that the public interest supported a full disclosure of the Settlement Agreement.
18. On 12 July 2011 the council wrote to the complainant with the outcome of its internal review which was to uphold its original decision. However, it did apologise for failing to respond to the Commissioner's Decision Notice within 35 days as it was required to do.

## **Scope of the case**

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19. The complainant contacted the Commissioner on 20 July 2011 to complain about the way his request for information had been handled. In particular, he complained about the council's application of Regulations 12(5)(e), 12(5)(f) and 13(1) of the EIR to parts of the

Settlement Agreement and confirmed his desire to see an unabridged version.

## Reasons for decision

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### Regulations 12 and 13 of the EIR

20. The council has stated in its refusal notice dated 24 June and its internal review response dated 12 July 2011 that it intends to rely on Regulations 12(5)(e), 12(5)(f) and 13(1) of the EIR to withhold clauses 2, 8 and 9 and schedules 1 and 3 of the Settlement Agreement in their entirety. However, apart from citing the above Regulations the council has not offered any explanation or put forward any arguments as to why it believes they apply. Furthermore, it has not stated to which parts of the withheld information it has applied which particular Regulation. Also, the six public interest factors it has considered are identical in respect of Regulations 12(5)(e) and 12(5)(f) and only very slightly different for Regulation 13(1).
21. The council has stated that the headings in the Settlement Agreement under which it has withheld information in its entirety are as follows:
- Clause 2 – 'COSTS'
  - Clause 8 – 'PROFIT SHARE'
  - Clause 9 – 'TRANSFER OF SHARES IN MPG'<sup>1</sup>
  - Schedule 1 – 'PROVISIONS RELATING TO PROFIT SHARE'
  - Schedule 3 - 'LIABILITIES OF MPG'<sup>2</sup>
22. The Commissioner has seen the information withheld from the Settlement Agreement and in the absence of any explanations or arguments from the council is not persuaded that Regulations 12(5)(e), 12(5)(f) and 13(1) of the EIR are engaged in respect of every redaction.
23. The Commissioner is mindful that the council has had a number of opportunities since the Settlement Agreement was first requested by the complainant on 9 June 2010, including the Decision Notice issued on 31

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<sup>1</sup> MPG – Millennium Park (Grimsby) Limited

<sup>2</sup> MPG – Millennium Park (Grimsby) Limited

March 2011, to either disclose the information or provide detailed arguments as to why it should be withheld in part or in whole by reference to the correct legislation, which in this case is the EIR.

24. The Commissioner is also mindful of the presumption in favour of disclosure of environmental information contained in Regulation 12(2) of the EIR.
25. As stated above, the exceptions in the EIR upon which the council has sought to rely to justify its decision to withhold parts of the Settlement Agreement are as follows:

### **Regulation 12(5)(e) of the EIR**

26. In its refusal notice dated 24 June (which it subsequently upheld following the internal review on 12 July 2011) the council simply reiterated the wording in Regulation 12(5)(e) and then went on to consider 6 matters to determine the public interest and concluded that the balance favoured the information being withheld.
27. The council did not state whether it had applied Regulation 12(5)(e) to all of the redacted information or just parts of it, and if so, which parts.
28. Furthermore, the council did not provide any evidence to suggest that it had considered any of the following factors which the Commissioner would be expect a public authority to do when applying Regulation 12(5)(e):
  - a. Whether the information was commercial or industrial in nature
  - b. Whether the information was subject to confidentiality provided by law
  - c. Whether the confidentiality was provided to protect a legitimate economic interest
  - d. Whether the confidentiality would be adversely affected by disclosure.
29. The above four-stage approach was approved by the Information Tribunal in the case of *Bristol City Council v IC and Portland and Brunswick Squares Association* (EA/2010/0012).
30. The Commissioner's conclusion is therefore that the council has not provided any or sufficient arguments to show that Regulation 12(5)(e) is engaged.

## **Regulation 12(5)(f) of the EIR**

31. In its refusal notice dated 24 June (which it subsequently upheld following the internal review on 12 July 2011) the council simply reiterated the wording in Regulation 12(5)(f) and then went on to consider exactly the same 6 matters that it listed under Regulation 12(5)(e) to determine the public interest and concluded that the balance favoured the information being withheld.
32. Regulation 12(5)(f) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
  - i. Was not under, and could not have been put under any legal obligation to supply it to that or any other public authority
  - ii. Did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - iii. Has not consented to its disclosure;
33. The council did not state whether it had applied Regulation 12(5)(f) to all of the redacted information or just parts of it and if so which parts.
34. Furthermore, the council did not provide any evidence as to why it believed Regulation 12(5)(f) was engaged, how disclosure would have an adverse effect and if so, on whom.
35. The Commissioner believes that the Settlement Agreement was negotiated and drawn up by its solicitors, Richards Butler. He therefore accepts that information provided voluntarily to Richards Butler, acting on behalf of the council, would be the same as the information being provided directly to the council.
36. The Commissioner recognises that to engage Regulation 12(5)(f) of the EIR a public authority must first demonstrate that disclosure would adversely affect the interests of the person who provided that information subject to subsections (i), (ii) and (iii).
37. As the Settlement agreement is a product of discussions and negotiations between of the various parties to it, the Commissioner cannot ascertain which parts, if any, constitute information provided voluntarily by another and if so, by whom and why disclosure would adversely affect the interests of that person.

38. The Commissioner's conclusion is therefore that the council has not provided any or sufficient arguments to show that Regulation 12(5)(f) is engaged.

### **Regulation 13(1) of the EIR**

39. In its refusal notice dated 24 June (which it subsequently upheld following the internal review on 12 July 2011) the council stated that Regulation 13(1) was engaged in respect of the personal information contained in the Settlement Agreement and disclosure of this would contravene the first Data Protection principle. It then went on to say that it had considered 6 matters in determining where the public interest balance lay and concluded that it weighed in favour of the information being withheld.
40. 4 of the 6 matters considered by the council were identical to those considered under Regulations 12(5)(e) and 12(5)(f) and one was substantially the same.
41. The Commissioner recognises that the Settlement Agreement includes the names of various individuals which would constitute their personal data. However, he has not been provided with any convincing arguments as to why disclosure of this personal data would be unfair under the Data Protection Act 1998. Although the council has alluded to the rights and reasonable expectations of the individuals concerned and the effect disclosure would have on them, it has not explained why these individuals would have a reasonable expectation of privacy.
42. The Commissioner has noted that some of the individuals named in the Settlement Agreement were employed in senior positions within the council when the Settlement Agreement was drawn up in 2004 and still enjoy senior positions in the council today. Although reference is made to their hourly rate as council officers the Commissioner is not persuaded that they would have a reasonable expectation of privacy. Indeed the Commissioner notes that details of their identity, is already in the public domain from a variety of sources including the council's own website.
43. The Commissioner therefore concludes that the council has not provided sufficient evidence that Regulation 13(1) is engaged in respect of personal information in the Settlement Agreement.

## Right of appeal

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44. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

45. 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.
46. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**