

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

Decision notice

Date: 20 October 2016

Public Authority: Hastings Borough Council
Address: Hastings Town Hall
Queens Square
Hastings
East Sussex
TN34 1TL

Decision (including any steps ordered)

1. The complainant has requested information relating to caravan park sites. Hastings Borough Council disclosed some information and withheld other information under the exemption for prejudice to commercial interests, section 43(2) of the FOIA. During the Commissioner's investigation Hastings Borough Council reconsidered the request under the EIR and withheld information under the exception for confidentiality of commercial information, regulation 12(5)(e).
2. The Commissioner's decision is that Hastings Borough Council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14(1) and failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information 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 8 December 2015, the complainant wrote to Hastings Borough Council (the "council") and requested information in the following terms (the Commissioner's numbering):

"(i) Could you please supply me with the latest Caravan Site Licence and Conditions for the following Caravan Sites:

- *Rocklands Caravan Park Rocklands Lane*
- *Spindle Wood Caravan Park Rock Lane*
- *Shearbarn Caravan Park Barley Lane*
- *Combe Haven Caravan Park Harley Shute Road*

Can you please provide a list of all the licensed caravan parks in the borough as well."

6. On 18 December 2015, the complainant added the following items to their request:

"(ii) I note that condition 4 of the site conditions refers to a plan of the site.....

Could you please supply me with copies of the site plans deposited with the council for the following caravan sites:

- *Rocklands Caravan Park Rocklands Lane*
- *Spindle Wood Caravan Park Rock Lane*
- *Shearbarn Caravan Park Barley Lane*
- *Combe Haven Caravan Park Harley Shute Road*

(iii) Sorry to be a pain but could I please add Stalkhurst Caravan Park, Ivy House Lane, Hastings to my request? I would like to have the site licence, conditions and site plan for that site as well."

7. The council responded on 17 December 2015. It disclosed all the information specified in request part (i).
8. The council issued a response to requests (ii) and (iii) on 25 January 2016. In this response the council disclosed the site licence and conditions for Stalkhurst Caravan Park but refused to provide the site plans, citing the exemption for prejudice to commercial interests, section 43(2) of the FOIA.

9. Following an internal review the council wrote to the complainant on 2 March 2016. It stated that it was maintaining its position.

Scope of the case

10. On 7 March 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld some of the information requested in part (ii) and (iii) of the request.
12. During the course of the investigation the Commissioner advised the council that, in her initial view, the requested information constituted environmental information as defined in regulation 2(1) of the EIR and that the request fell to be handled under the EIR. The Commissioner directed the council to reconsider the request under the EIR. The council agreed to do this, disclosed some additional information and confirmed that it was now withholding some remaining information under regulation 12(5)(e) of the EIR. The Commissioner has considered whether the council has correctly applied the exception.

Reasons for decision

Is it Environmental Information?

13. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
14. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'

15. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
16. In this case, the requested information relates to caravan sites, the use of land and planning. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
17. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

18. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
19. In these circumstances the Commissioner believes that it is appropriate for her to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
20. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

21. The council has withheld the site plans for Spindlewood Caravan Park and Rocklands Caravan Park under regulation 12(5)(e) of the EIR.
22. 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”.
23. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - 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?

Is the information commercial or industrial in nature?

24. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned 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 for profit.
25. Having reviewed the withheld information the Commissioner is satisfied that it relates to a commercial activity, namely, caravan parks.

Is the information subject to confidentiality provided by law?

26. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
27. In the Commissioner’s view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
28. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship

between the parties, and any previous or standard practice regarding the status of information.

29. The council has not provided any submissions in relation to this element of the exception nor has it made any explicit reference to the confidential quality of the information in question. It has stated that *"Caravan site plans are not normally in the public domain as they are not part of the licence but a requirement of our licence conditions where the licence and conditions are on public display at the sites..."*
30. The council has confirmed that the plans are provided in keeping with one of the licensing conditions, specifically *"A plan of the layout of the said land showing the position of the caravans, ablution blocks, fire points, roads, refuse points, waste water disposal points and standpipes must be deposited with the Council when making an application for a site licence."*
31. The Commissioner acknowledges that it might not be standard practice for caravan site plans to be placed in the public domain, however, the licensing condition referred to by the council simply makes it a requirement that site plans should be provided as part of the licensing process, it does not state or otherwise imply that the information would be treated in confidence.
32. The council has further argued that site plans *"...are more than just simple layouts of caravans. They contain commercial information relating to the operation of the sites. They contain information that could be described as business confidential as it will show how the site is laid out, the other amenities supplied on site, all of which could be business sensitive to other business users of what is effectively a private area."*
33. Whilst the Commissioner has concerns that the council has not explicitly made the case for the information being subject to confidentiality provided by law, she Commissioner accepts that, given the standard practice in place, there is at least an implied obligation of confidence in the information shared between the Caravan Site Parks and the council. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it relates to the operation of commercial operation of Caravan Sites. In addition to this, the council has confirmed that the information is not in the public domain and the Commissioner is satisfied that this is the case.
34. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

35. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm 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.
36. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:
- "Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*
37. The council's position is that disclosure of the site plans would result in adverse effects to the legitimate economic interests of the Caravan Site Parks. It has provided the following arguments in support of this position:
- (i) "Whilst the regulations request a site plan showing the position of caravans, they also requests details of services such as ablution blocks, fire points, roads, refuse points, waste water disposal points and standpipes. In some cases further information is provided over and above this minimum requirement."
 - (ii) "The operation of caravan sites is a commercial activity carried out in a competitive environment. The sites compete by offering something different from their rivals. The release of a sites detailed service arrangements would clearly be advantageous to a competitor."
38. The council confirmed that it consulted with the Caravan Site Parks during the handling of the request and sought their views. The Caravan Site Parks advised the council that they did not consent to the information being disclosed because they considered the information was not a matter for public consumption and that they were concerned that disclosure would inflame relationships with a local protest group.
39. In relation to arguments (i) and (ii), the Commissioner notes that the council has not explained why the disclosure of, for example, information showing the positioning of ablution blocks or refuse points

would result in harm to the legitimate economic interests of the Caravan Parks.

40. As noted above, in order for the exception to be engaged, explicit harm needs to be identified and a link made between the harm and the disclosure of specific information. In stating its position the council has simply defined the information as being "commercially sensitive" with no explanation of how disclosure of the information would benefit competitors to the detriment of the Caravan Park(s) in question. Neither the specific harm nor the causal link has been identified.
41. Contrary to the council's assertion, the Commissioner considers that it is not clear that the withheld information would be of benefit to competitors and in the absence of an explanation why she must conclude that, on the balance of probabilities, it has not been shown that disclosure would result in harm being caused.
42. In relation to arguments provided by the Caravan Site Parks, the Commissioner considers that, since the implementation of the EIR, third parties engaged in correspondence with public authorities should be aware or should be made aware by the authority in question, that all information can be subject to disclosures in response to requests for environmental information. There is no blanket exclusion for categories of information.
43. In relation to the specific concerns voiced about scrutiny or other attention being focussed on Caravan Parks following disclosure, the Commissioner considers that these are not matters which are relevant to the application of the exception under consideration. At any rate, the council has not explained why they should be considered to be relevant arguments.
44. Having considered the council's submissions and referred to the withheld information the Commissioner considers that it is not obvious from an analysis of the information in isolation that disclosure would result in adverse effects to the legitimate economic interests of the Caravan Parks. She also considers that the submissions he has received from do not clearly identify specific adverse effects and link these effects to specific withheld information nor do they explain the causal link between disclosure and any ensuing adverse effects.
45. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.

46. The Commissioner considers that the council's arguments, whilst identifying possible effects, fail to make these effects sufficiently concrete and fail to identify the causal link with the withheld information. The Commissioner considers that it is for public authorities to fully explain the relevant causes and effects and it is not her role to generate arguments on their behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.
47. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

48. 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

49. 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.
50. 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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