

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 July 2020

Public Authority: Hastings Borough Council
Address: Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant has requested information relating to a Land Stability Site Management Plan (detailed plan) submitted to Hastings Borough Council (the council) by a local caravan park (the site).
2. Whilst the council provided some information to the complainant, both at the internal review stage, and during the course of the Commissioner's investigation, it advised that the remainder of the information was either not held, or was exempt from disclosure under regulation 12(5)(e) and 12(5)(b) of the EIR.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(e) in respect of all that information which has been withheld in response to the request. In addition, the Commissioner is satisfied that, on the balance of probabilities, the council was correct when it advised the complainant that it did not hold part of the information that he had requested.
4. However, the Commissioner has found that the council has breached regulation 14(2) of the EIR by failing to issue a refusal notice to the complainant within 20 working days. It has also breached regulation 14(3) by failing to cite regulation 12(4)(a) where no recorded information was held.
5. Furthermore, where the council did provide information in response to part of the request, it failed to do so within the prescribed time period and has therefore also breached regulation 5(2) of the EIR.
6. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

7. On 13 May 2019, the complainant wrote to the council and requested information in the following terms:

'The Rocklands caravan site licence issued in April 2018 stipulates that:

"Lower slopes

9) The licensee shall within 6 weeks of the date of issue of the licence (or any other timeframe subsequently agreed by the licensing authority), submit for the written approval of the licensing authority a detailed plan produced by a competent person for the management of land stability within the caravan site. The plan should include details of:-

1. Regular visual inspections to identify and monitor signs of land instability affecting the caravan site and infra-structure (including the foul drainage system), to be carried out by the licensees and/or their staff at least every month and also following severe weather events.

2. Circumstances identified through the regular inspections that will trigger the need for a competent person to be consulted for additional advice (for example if signs of land instability are recorded near to vulnerable site infra-structure or caravans).

3. Contingency measures to be implemented to ensure the safety of any occupants and visitors to the site in the event of further serious land slips occurring.

4. Proposals to mitigate the risk of the foul drainage system being compromised by slope instability.

5. Contingency measures to be implemented to safeguard people or the site and the natural environment, in the event of serious land slips compromising the foul drainage system. Such measures shall include details of rapid action to isolate and pump out and contain effluent from the damaged sections of the foul drainage system to prevent pollution of the adjacent ground and ground waters."

I formally request under EIR the following:

'Please supply the date that the detailed plan documents were submitted.

Please confirm that HBC holds copies of the detailed plan documents

Please supply a list of the documents supplied to HBC for the detailed plan

Please supply copies of the detailed plan documents

Please provide the date HBC gave written approval to the detailed plan

Please provide the implementation date of the detailed plan'

8. The council responded on 4 July 2019. It stated that it was withholding the requested information under regulation 12(5)(e) and 12(5)(b) of the EIR.
9. The complainant requested an internal review on 3 September 2019. He stated that the council had failed to provide answers to points 1,3,5 and 6 of his request. With regards to point 4 of the request (for copies of the detailed plan documents), the complainant argued that the council had not demonstrated how this information was exempt from disclosure under regulation 12(5)(e), or 12(5)(b), of the EIR.
10. The complainant also raised concerns that the reasons for refusal may have been 'predetermined' and that this suggested that the council was applying a blanket ban on requests for information that related to the issues concerning the site, the Glen and the landslips.
11. On 25 October 2019, the council notified the complainant of the outcome of the internal review. It provided the following information in response to the six points which were set out in the complainant's original request:

I have investigated this case and can advise as follows:

Hastings Borough Council has not predetermined refusals or given a blanket ban on requests, each request is dealt with individually and either the information is disclosed or the appropriate exemption/exception is used.

1. *Please supply the date that the detailed plan documents were submitted.*

28 June 2018

2. *Please confirm that HBC holds copies of the detailed plan documents*

Yes

3. *Please supply a list of the documents supplied to HBC for the detailed plan*

Information not held-The Freedom of Information Act (FOI) and Environmental Information Regulations (EIR) is based on recorded information that is held by a local authority. The

information you requested is not recorded and would need to be created which is against the rules of FOI and EIR.

4. Please supply copies of the detailed plan documents

You state that marking a document 'strictly confidential' has no weight and does not override the provisions of the EIR. The requested information is between the owners of Rocklands Caravan Parks Solicitor and Hastings Borough Council of which the Solicitor have made it clear to the council that they do not give their permission for any information in relation to Rocklands Caravan Park be disclosed into the public domain. Hastings Borough Council has a moral compass to act accordingly. I am satisfied that the council has correctly refused and has subsequently demonstrated the factors for non disclosure.

5. Please provide the date HBC gave written approval for the detailed plan.

23 August 2018

6. Please provide the implementation date of the detailed plan

Information not held

12. The council went on to refer to the First-tier (information Rights) Tribunal case of Hastings v IC EA/2-17/0084¹ (the Tribunal case) as being relevant to its decision to withhold certain information relevant to the request.
13. In addition, the council referred to a local campaign group, 'Save Ecclesbourne Glen' (SEG), claiming its actions had been detrimental to the site owners and their business.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20\(26.03.18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2167/Hastings%20Borough%20Council%20EA.2017.0084%20(26.03.18).pdf)

Scope of the case

14. The complainant contacted the Commissioner on 4 November 2019 to complain about the way his request for information had been handled.
15. The Commissioner notes that, at the internal review stage, the council provided the complainant with the information relevant to points 1, 2 and 5 of the request.
16. With regard to point 3 and point 6 of the request, the council advised the complainant that this information was not held. However, during the Commissioner's investigation, the council advised that it was going to provide the complainant with some information in response to point 3 of his request. It did not revise its position in respect of point 6 of the request.
17. With regard to point 4 of the request, the council advised the complainant that the relevant information was to be withheld under regulation 12(5)(e) and 12(5)(b) of the EIR.
18. The council has provided the Commissioner with a copy of the detailed plan in its entirety. However, it goes on to refer to one specific part of the detailed plan when explaining its consideration of the request; that part which is directly connected to the details contained within the site licence which the complainant quotes in his request.
19. The Commissioner accepts that it was not unreasonable for the council to have interpreted the complainant's request to be for that information held that relates directly to the part of the licence conditions which are quoted in his correspondence.
20. However, the Commissioner notes that in the six points set out by the complainant in his request, he refers persistently to the 'detailed plan'. He does not specify at any point that the information he requires is restricted to those conditions which he had quoted at the beginning of the request.
21. In addition, in the complainant's representations to the Commissioner, he puts forward arguments about why he believes the council was not correct to withhold the 'land management plan' in response to his request.
22. Given this, the Commissioner has decided to take a broader approach to the request than that which was taken by the council. She intends to take into account all of the information contained within the detailed plan when considering point 4 of the request. However, this is the only information which she intends to consider when determining whether

the council was correct to withhold information in response to the complainant's request.

23. The detailed plan is a single 'stand alone' document. It does not form part of a series of documents and, as far as the Commissioner can see, there were no other documents which were provided with the plan in support of the information contained therein (such as other reports etc). Given this, whilst the council may hold correspondence and/ or other records that refer to, or contain information about, the detailed plan, it is the Commissioner's view that such information would not fall within the terms of the complainant's request.
24. Having taken into account all the above factors, the Commissioner considers the scope of her investigation to be as follows:
 - To consider whether, on the balance of probabilities, the council holds any information relevant to point 6 of the request.
 - To consider whether the council was correct to apply regulation 12(5)(e) of the EIR to all the information contained within the detailed plan document in response to point 4 of the request. If necessary, she will then go on to consider whether regulation 12(5)(b) is engaged in respect of any information contained within the detailed plan document which remains.
 - To consider the council's compliance with the procedural aspects of the EIR, as requested by the complainant.

Reasons for decision

Is the information environmental information?

25. Information is 'environmental information', and must be considered for disclosure under the terms of the EIR, rather than the Freedom of Information Act 2000 (FOIA), if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
26. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
27. The request is for a copy of the information contained within documents held by the council that relate to a '*detailed plan produced by a*

competent person for the management of land stability within the caravan site'.

28. The Commissioner is satisfied that the information that has been withheld can be considered to have an effect on the land and its use, and that it fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

Regulation 12(4)(a)- information not held.

29. The council has advised the complainant that it does not hold information that is relevant to point 6 of his request, which was for the implementation date of the detailed management plan.
30. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information if it does not hold that information when in receipt of an applicant's request.
31. The Commissioner is required to make a judgment based on the information which has been made available to her whether, on the balance of probabilities, the requested information is held or not.
32. When making her decision, the Commissioner has considered the contents of the detailed plan. This, as the details quoted within the complainant's request from the licence suggest, contains information about how the site will comply with the various conditions set out within the licence.
33. Having considered the content of the detailed plan, the Commissioner accepts that it is not necessarily the case that a specific date would be held by the council where the details set out within the plan itself were 'implemented.' It may, or may not, be the case that the council holds confirmation that the site owners have carried out certain activities, or put in place certain processes, in relation to the various conditions set out within the licence that are referenced in the detailed plan. However, this, in the Commissioner's view, is not what the complainant specifically requested.
34. The Commissioner accepts that there is no evidence which would lead her to believe that the council holds information which would directly answer the specific terms of point 6 of the complainant's request. She therefore concludes that, on the balance of probabilities, the council does not hold information which would provide a direct response to this part of the complainant's request.

Regulation 12(5)(e)-commercial confidentiality

35. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
36. The exception can be broken down into the four-stage test which was adopted by the Information Rights Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*², 24 May 2010. All four elements are required in order for the exception to be engaged and are as follows:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
37. For clarity, if the first three questions can all be answered in the positive, the fourth question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

38. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
39. In the Tribunal case previously referred to in paragraph 12 of this decision notice, consideration was given to whether the council had been correct to withhold certain information in response to a request for a copy of a particular report (the Coffey 2 Report). The Tribunal accepted that the withheld information could be linked to two other reports (a geotechnical report and a drainage report) that had been supplied to the council by the site owners. It went on to conclude that the site owners had provided this information to the council with the expectation that it

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i392/Bristol CC v IC & PBSA \(0012\) Decision 24-05-2010 \(w\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&PBSA_(0012)_Decision_24-05-2010_(w).pdf)

would be treated in confidence, and that its disclosure would cause harm to their economic interests. The Tribunal confirmed that the public interest lay in favour of withholding this information and upheld the council's decision.

40. In the Tribunal case the Commissioner was described as having taken a restrictive approach to the issue of whether the information that had been withheld was commercial or industrial. The Tribunal advised that it would be hard to see a more commercial piece of information than that which relates to a major asset of a business venture and stated the following:

'To a greater or lesser extent the disputed information may give indications of costs or problems which might (or might not) restrict the use which the property could be put and the expenditure which might need to be incurred to ensure the continued exploitation of the asset. It is rather hard to see a more commercial piece of information than that.'

41. The withheld information that relates to point 4 of the request consists of a detailed plan which was commissioned by the site owners. It is clear from the conditions set out in the licence quoted by the complainant in his request that the content of the detailed plan will relate to activities that are directly associated with the land. In addition, these activities will have a direct impact on the site, how the land is to be used and managed, and the expenditure which might be incurred by the business as a result.
42. Therefore, having had regard to the Tribunal's comments, the Commissioner is satisfied that the withheld information can be considered to be commercial for the purposes of the EIR.

Is the information subject to confidentiality provided by law?

43. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
44. The Commissioner has not been made aware of any statutory duty of confidence in this instance. She has therefore gone on to consider the common law of confidence, which has two key tests:
- a. Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.

- b. Was the obligation shared in circumstances importing an obligation of confidence? This can be explicit or implied.
45. The withheld information relates to a document compiled in response to a condition set out within a site licence which required a detailed plan to be produced on behalf of the site owners '*by a competent person for the management of land stability within the caravan site*'. The Commissioner considers that such information is not already in the public domain and, in the main, is not trivial.
46. The Commissioner is satisfied that whilst the licence itself may be publicly accessible, the site owners would have had a reasonable expectation that a report which they had commissioned that sets out plans as to how they will comply with certain conditions set out within that licence, would be treated in confidence.
47. In addition, the council has previously provided the Commissioner with correspondence from the site owners' representative which requests that certain communications sent between the relevant parties be treated in confidence and not disclosed.
48. The Commissioner is satisfied that the information which is relevant to point 4 of the complainant's request can be regarded to form part of those communications which the site owners have requested that the council do not release into the public domain.
49. The Commissioner concludes that the information that has been withheld that is relevant to point 4 of the complainant's request is not trivial in nature, and that it has the necessary quality of confidence.

Is the confidentiality required to protect a legitimate economic interest?

50. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
51. The Commissioner considers it to be necessary to establish that, on the balance of probabilities, some harm would be caused, rather than might be caused, as a result of disclosure.
52. In this instance, the Commissioner has given further consideration to the approach which was taken in the Tribunal case referred to by the council. In that case, it was regarded to have been important that the two reports, which provided details about the site and the land, had been commissioned by the site owners, and were supplied to the council on a voluntary basis. In this case, whilst the Commissioner notes that

the detailed plan was once again commissioned by the site owners, it was provided to the council in order to meet certain stipulations set out within the site licence, i.e., the site owners were required to provide the information. However, despite this, the Commissioner still regards the Tribunal's comments to be directly relevant to the information that has been withheld in this case.

53. The Commissioner considers paragraph 27 of the Tribunal case to be particularly pertinent to her consideration of the withheld information. This states the following:

'We must have regard to the terms of regulation 12(5)(e) and assess whether the commercial confidentiality at issue is "provided by law to protect a legitimate economic interest." There is no legitimate economic interest in running an unsafe site or a site that causes and may continue to have an adverse environmental impact. There is a legitimate economic interest in trying to reach an agreement on site regulation which meets both legitimate environmental concerns and the fair treatment of an established business.'

54. The Commissioner regards it to be important to the process that the council is able to work with licensees about matters that relate to the licence. In order to do this, the Commissioner accepts that a degree of trust and ability to, at times have a frank and free discussion about the position of both parties, is required. If this is not possible, it will have a direct impact on the site, and the running of the business, and would cause harm to the economic interests of the site owners.
55. The Commissioner also views it to be the case that the information, if released, would provide an insight into the operation of parts of the business, and decisions which have been reached, which would not ordinarily be in the public domain. It is likely that this would put the site owners at a disadvantage commercially and this would, in turn, harm their ability to run their business effectively.
56. The council, in its representations to the Commissioner, has also made reference to alleged harassment caused by the campaign group, SEG, and the detrimental effect that this has had on the site owners and their business. The Commissioner is aware that SEG refutes the allegations of harassment.
57. Whilst the Commissioner does not intend to adjudicate on the validity of claims of actual harassment, she does regard the following comment by the Tribunal to be of some relevance to her consideration of the withheld information. She has highlighted in bold that part which is most pertinent to her consideration of matters:

*'While there is clear evidence of economic harm caused to the business, teasing out the contributions of the landslide (with consequent reduction in the number of pitches) and the campaigning about the landslide as the causes of that harm presents some challenges. **However, it is clearly foreseeable that further disclosure would have resulted in more adverse publicity and some economic harm would flow from that.***

58. Having taken all factors into account, the Commissioner is satisfied that there is sufficient evidence for her to conclude that the disclosure of the withheld information in response to the complainant's request would harm the legitimate economic interests of the site owners. Furthermore, the Commissioner accepts that the disclosure of the withheld information would also result in the '*adverse publicity*' referred to by the Tribunal and that '*some economic harm would flow from that.*'
59. The Commissioner therefore concludes that the third part of the test as set out in paragraph 36 of this decision notice is met.

Would the confidentiality be adversely affected by disclosure?

60. Although this is a necessary element of the exception, should the first three tests set out in paragraph 36 be met, the Commissioner considers it inevitable that this element will also be satisfied. It is her view that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

The public interest test

61. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider whether the public interest in the disclosure of the information relevant to point 4 of the complainant's request outweighs the public interest in maintaining the exception.
62. When carrying out the test, the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
63. The complainant has claimed that there have been a number of infringements of the site licence and of planning controls. He has provided the Commissioner with examples to support this claim. He has also referred to enforcement action taken against the site owners by the council for a number of breaches of planning control.
64. The Commissioner acknowledges that considerable weight can be attached to the public interest arguments of transparency and accountability in relation to planning matters and licencing. She

therefore accepts that there is some merit to the argument that there is a public interest in ensuring that proper processes are being followed in this instance.

65. However, when considering matters such as this, she must also give consideration to the information that is already in the public domain.
66. The licence itself has been published by the council. The complainant has set out details of certain conditions that were set out within the licence and the council has provided him with some information about these conditions, including confirmation of when the detailed plan was submitted, and the date it was approved.
67. The Commissioner appreciates that matters relating to the site's licence, planning permissions and the stability of the land on the site (and surrounding area) are of interest to the public, and in particular the local community. She agrees that it is important that there is confidence that proper processes are being followed by the council, and the site. However, this does not necessarily mean that all the information that is held that relates to a planning or licensing matter should be released into the public domain in order to achieve this. The site owners' right to privacy is also an important factor to be considered.
68. The Commissioner accepts that the arguments for transparency and accountability carry some weight in support of disclosure. However, she regards the details which have already been released about the licence to go some way in satisfying the public interest in this particular instance. She is not persuaded that any value that may be derived from the disclosure of the withheld information would outweigh the potential harm which would be caused to the site owners right to run their business with some degree of privacy.
69. Taking into account all relevant factors, the Commissioner is satisfied that the disclosure of the requested information would not be in the public interest. The harm disclosure would cause to the site owners weighs the balance in favour of withholding the information in this instance. Given this, the Commissioner concludes that the council was correct to have withheld the information relevant to point 4 of the request.
70. Given that the Commissioner is satisfied that the council is entitled to rely on regulation 12(5)(e) in respect of all the withheld information, she does not intend to consider its application of regulation 12(5)(b).

Procedural matters

71. The complainant has requested that the Commissioner also consider the general handling of his request by the council.

Regulation 14

72. Regulation 14(1) of the EIR requires a public authority that refuses a request for information to provide a refusal notice in writing, and in accordance with the provisions of this regulation.
73. Regulation 14(2) requires the refusal notice to be issued within 20 working days of receipt of the request.
74. Regulation 14(3) requires that the refusal notice should specify the reasons for withholding the information which has been requested. Regulation 14(3)(a) states that this should include any exception which is relied upon under regulations 12(4), 12(5) or 13.
75. In this instance, the complainant submitted his request on 13 May 2019 and the council issued its refusal notice on 4 July 2019. As the council failed to issue a refusal notice within 20 working days of receiving the complainant's request, the Commissioner has found that the council has breached regulation 14(2) of the EIR.
76. In addition, the council failed to specify that it was applying regulation 12(4)(a) to part of the request, as some of the information was not held. Given this, it is the Commissioner's decision that the council has also breached regulation 14(3) of the EIR.

Regulation 5(2)

77. Regulation 5(2) provides that *Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.*
78. Whilst the council did provide some information to the complainant, as it failed to do so within the required 20 working days of receipt of the request, the Commissioner has found there to be a breach of regulation 5(2).

Right of appeal

79. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.

81. 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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