

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 held by Hastings Borough Council (the council) relating to proposals for the management of surface water drainage at a particular caravan park site (the site).
2. Whilst the council provided some information to the complainant, both in its initial response to his request, and during the Commissioner's investigation, it withheld the remaining information relevant to the request under regulation 12(5)(e) 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.
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 of receipt of the request. Furthermore, as the council failed to communicate that information which the complainant was entitled to receive in response to his request within the prescribed time period, it has also breached regulation 5(2) of the EIR.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 13 May 2019, the complainant submitted a request for information to the council. For ease of reference, both the complainant's request, and the council response of 19 July 2019, are set out below (the council's responses are highlighted in bold):

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

"I3 Car Parking

3. Within 3 months of the date of issue of this license (or any other timeframe subsequently agreed by the licensing authority), the licensee must submit proposals for the consideration and consent of the licensing authority, to improve the drainage of surface water running over the sloping area of concrete hard standing coloured green, and the short area of roadway that extends from it into the area hatched red on the site plan.

The licensee must implement any such proposals within 3 months of the Council granting consent for them (or any other timeframe subsequently agreed by the licensing authority). "

I formally request under EIR the following:

Please supply the dates that these proposals were submitted.

Council Response: Q1. 21 March 2017

Please confirm that HBC holds copies of such proposals

Council Response: Q2. Yes

Please supply a list of the documents supplied to HBC for these proposals

Council Response: Q3. Information not held.

Please supply copies of these proposals

Council response: Q4- [The council issued a refusal notice in response to this part of the request, citing regulation 12(5)(e) of the EIR].

Please provide the date of consent to these proposals

Council Response: Q5-27 March 2018.

Please provide the implementation date of these proposals.

Council Response: Q6. Hastings Borough Council were informed on 29 May 2018. '

7. The council issued a refusal notice in response to point 4 of the complainant's request, stating that it believed this information was exempt from disclosure under regulation 12(5)(e) of the EIR. It went on to confirm that it had considered the public interest test, and that it believed that the public interest lay in favour of withholding the information in this instance.
8. The complainant requested an internal review on 3 September 2019. He raised concerns that the council had stated that it did not hold information in response to point 3 of the request. In addition, he questioned the council's decision to apply regulation 12(5)(e) to all the information that it held that was relevant to point 4 of his request.
9. On 25 October 2019, the council provided its internal review response. It maintained its previous position that it did not hold information relevant to point 3 of the request.
10. With regards to point 4 of the request, the council also maintained its previous position. It advised the complainant that the information requested is between the site's solicitor and agent, both of whom had '*made it clear that information about the site should not be released into the public domain*'. The council went on to refer to the First-tier (Information Rights) Tribunal case of Hastings Borough Council v IC EA/2017/0084¹ (the Tribunal case) in support of its decision.

1

[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

11. The complainant contacted the Commissioner on 4 November 2019 to complain about the way his request for information had been handled.
12. The concerns raised by the complainant, both in his internal review representations to the council, and in his complaint to the Commissioner, focus on the council's response to points 3 and 4 of his request. He did not accept the council's assertion that it did not hold any information that would answer point 3 of his request, and he was unhappy that information had been withheld in response to point 4 of the request.
13. During the course of the Commissioner's investigation, the council confirmed that it now intended to provide the complainant with information held in response to point 3 of the request.
14. Taking all the above factors into account, the Commissioner considers the scope of her investigation to be limited to whether the council was correct to withhold the information relevant to point 4 of the request under regulation 12(5)(e) of the EIR.
15. The Commissioner also intends to consider certain procedural matters, as requested by the complainant.

Reasons for decision

Is the information environmental information?

16. 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.
17. 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.
18. The request is for a copy of information relating to the proposals to improve the surface water drainage on certain areas on the land of the site.

19. 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(5)(e) - commercial confidentiality

20. 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.
21. 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?
22. 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.
23. The council has provided a bundle of withheld information that it considers to be relevant to the request. This includes a Land Stability Site Management Plan (detailed plan) which the Commissioner accepts is, in part, relevant to the request.
24. The information which is contained within the detailed plan has already been considered in decision notice FER0887780. In that case, the Commissioner decided that the council was entitled to rely on regulation 12(5)(e) when withholding all the information contained within this document. The current request and that which was considered under

2

[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)

decision notice FER0887780 were made on the same day, and the circumstances in relation to each are directly comparable.

25. The Commissioner is satisfied that any decision regarding the disclosure of the information contained within the detailed plan that is relevant to this request should concur with the findings set out within decision notice FER0887780. Given this, she concludes that regulation 12(5)(e) must be engaged in respect of the information that is contained within the detailed plan that is relevant to the complainant's request.
26. The Commissioner sees no value to any party in providing a full explanation of the reasoning for this part of her decision, as this has already been set out in some detail within decision notice FER0887780.
27. The Commissioner will now go on to consider the remaining information that was withheld by the council in response to the complainant's request.

Is the information commercial or industrial in nature?

28. 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.
29. In the Tribunal case previously referred to in paragraph 10 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 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.
30. 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 went on to state 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.'

31. The withheld information that relates to point 4 of the request consists of information held by the council about proposals for the improvement of surface water drainage on an area within the site.
32. The Commissioner believes it appropriate to clarify at this point that whilst the council advised the complainant in its internal review response that *'the requested information is between the owners of Rocklands Caravan Parks Solicitor and Agent'*, the information that was provided for her consideration does not form such communications. It would appear that the reference to communications between the site owners' agent and their solicitors may therefore have been an error.
33. The Commissioner does accept that the bundle of information which has been provided by the council for her consideration is relevant to point 4 of the request, and that it is likely that this is all the information that is held. She therefore still regards it to be appropriate to consider whether the council was entitled to rely on regulation 12(5)(e) when withholding this information.
34. The Commissioner views the information which has been withheld in response to point 4 to relate to proposals that 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.
35. Therefore, having had regard to the Tribunal's comments set out within paragraph 30 of this decision notice, 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?

36. 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.
37. 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.
38. The information that has been withheld relates to the proposals which were set out within a site licence relating to the improvement of surface water drainage on the site. The Commissioner considers that such information is not already in the public domain and, in the main, is not trivial.
39. The Commissioner is satisfied that whilst the licence itself may be publicly accessible, the site owners would have had a reasonable expectation that details and correspondence sent between the parties about how it was to meet the conditions set out within that licence, would be treated in confidence.
40. 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.
41. 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.
42. 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?

43. 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.
44. The Commissioner regards 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.
45. In this instance, the Commissioner has considered 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, details relating to the proposals for surface water drainage on an area of the site were created in response to certain conditions that

were set out within the site licence. However, the Commissioner still regards the Tribunal's comments to be relevant to this case; paragraph 27 is of particular relevance and 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.'

46. 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.
47. 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, negotiations which took place 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.
48. The council, in its representations to the Commissioner, has also referred 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.
49. The Commissioner does not wish to become embroiled in a debate regarding the validity of claims of actual harassment, and she does not regard it to be necessary for the purposes of this complaint to express a view on this. However, 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.'

50. 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.*'
51. The Commissioner therefore concludes that the third part of the test as set out in paragraph 21 of this decision notice is met.

Would the confidentiality be adversely affected by disclosure?

52. Although this is a necessary element of the exception, should the first three tests set out in paragraph 21 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

53. 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 withheld information outweighs the public interest in maintaining the exception.
54. When carrying out the test, the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
55. The complainant believes that the council has not provided sufficient argument to justify withholding the information that has been requested, and goes on to state that the licence itself does not specify that the information relating to the conditions should be kept '*secret*'. He also questions whether the disclosure of the withheld information would cause the site owners and their business the harm which was described by the council in its correspondence to him.
56. The Commissioner acknowledges that some weight can be attached to the public interest arguments of transparency and accountability in relation to planning matters and licencing. She accepts that the disclosure of the requested information would help towards achieving such aims.

57. However, the Commissioner also regards it to be of some relevance that the licence itself has been published by the council. Indeed, the complainant has quoted an extract from this within his request. In response, the council has provided him with some of the information about the management of the surface water drainage on the site.
58. The Commissioner is also aware that the council has released some information about the site licence into the public domain in response to other information requests that it has received. This has included some details about drainage. For example, the Commissioner would refer to decision notice FS50819028³ which also considered a request relating to water drainage on the site and surrounding area. In that case, reference is made to information that was already accessible about this matter; in addition, the council was required to release some further information into the public domain in response to that request.
59. The Commissioner appreciates that matters relating to the site's licence are of interest to the public and, in particular, the local community. In addition, with regards to the matter of surface water drainage, she understands that following the occurrence of landslips in the local area, some of the local community may want reassurance that this is a matter that has been dealt with properly.
60. The Commissioner acknowledges 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 licencing matter should be released into the public domain in order to achieve this. The site owners' right to privacy is also a pertinent factor to be considered.
61. It is important to bear in mind that the principle behind the EIR is that providing public access to environmental information will encourage greater awareness of the issues that affect the environment. It helps increase public participation in decision making, makes public bodies more accountable and transparent, and builds up public confidence and trust. However, whilst the EIR can help to provide a greater understanding of decisions that have been reached, it is not intended to be a mechanism for individuals to 'interrogate' a public authority about each and every point that is made about a particular matter. There will

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617664/fs50819028.pdf>

be separate avenues to follow should any person be concerned that the council is not following proper processes.

62. Whilst the Commissioner accepts that the arguments for transparency and accountability do carry some weight in support of disclosure in this case, 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.
63. Taking into account all relevant factors, the Commissioner is satisfied that the disclosure of the requested information would not be in the public interest in this instance. The harm disclosure would cause to the site owners weighs the balance in favour of withholding the information. Given this, the Commissioner concludes that the council was correct to have withheld the information relevant to point 4 of the request.

Procedural matters

Regulation 14

64. 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.
65. Regulation 14(2) requires the refusal notice to be issued within 20 working days of receipt of the request.
66. In this instance, the complainant submitted his request on 13 May 2019 and the council issued its refusal notice on 19 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.

Regulation 5(2)

67. 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.'*
68. 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

69. 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

70. 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.
71. 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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