

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 31 May 2022

**Public Authority:** Rodmersham Parish Council

**Address:** info@rodmershampc.org

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Rodmersham Parish Council in Kent ("the Parish Council") about a proposal to install posts around the village green. The Parish Council provided some of the information. After reconsidering the request under the EIR, it confirmed that one of the requested pieces of information (a plan) was not held, and withheld the remainder of the information under regulation 12(5)(e) of the EIR: adversely affect the confidentiality of commercial information.
2. The Commissioner's decision is that the requested plan is not held. He is also satisfied that the Parish Council correctly withheld the remainder of the requested information under regulation 12(5)(e) of the EIR, and that the balance of the public interests favours maintaining the exception.
3. The Commissioner does not require the Parish Council to take any steps.

#### **Request and response**

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4. On 17 December 2020, the complainant made the following request for information (points numbered for ease of reference):

"I would be grateful for the full details of the proposals to install posts around the village green. The information requested includes but not limited to:

- 1) Minutes of all the Parish Council meetings relating the proposal which prompted the distribution of a 'flyer' dated 15th August 2020 to residents,

- 2) All correspondence with third parties,
  - 3) Plan showing the location of the posts,
  - 4) Specification of the posts,
  - 5) Details of parties chosen to provide quotations,
  - 6) Requests for quotations,
  - 7) Details of research carried out to validate the installation of the posts.”
5. The Parish Council responded in a letter dated 17 January 2021. It provided some extracts of minutes (point 1). It relied on section 22 of FOIA (future publication) to withhold the information requested at points 2, 3 and 4. It relied on section 43 of FOIA (commercial interests) to withhold the information requested at points 5 and 6. It provided an email dated 11 September 2017 in respect of point 7.
  6. The complainant requested an internal review on 16 March 2021. The Parish Council provided the outcome of its internal review in a letter dated 15 April 2021. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 14 June 2021 to complain about the way his request for information had been handled.
8. The Commissioner contacted the Parish Council and advised it that the requested information would be likely to fall within the definition of “environmental” information at regulation 2(1)(c) of the EIR: information on measures and activities likely to affect the environment.
9. The Parish Council reconsidered the relevant parts of the request under the EIR and stated that it did not hold a plan of the posts, as requested at point 3. Regarding points 2, 4, 5 and 6, it explained that it held some information which fell within scope, but that it considered that disclosure would adversely affect the confidentiality of commercial information; that is, that the information was exempt under regulation 12(5)(e) of the EIR.
10. The complainant still considered that the Parish Council was likely to hold a plan, and considered that the withheld information should be made available to the public.

11. This notice covers whether the information which the Parish Council holds, falling within the scope of the request, is exempt under regulation 12(5)(e). It also covers whether the Parish Council holds a plan of the proposed posts.

## Reasons for decision

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### **Regulation 12(5)(e) – adverse effect on the confidentiality of commercial or industrial information**

12. Regulation 12(5)(e) of the EIR states 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.
13. The Commissioner has published guidance<sup>1</sup> on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.
14. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:
  - The information is commercial or industrial in nature;
  - It is subject to confidentiality provided by law;
  - The confidentiality is protecting a legitimate economic interest; and
  - The confidentiality would be adversely affected by disclosure.

#### **Is the information commercial or industrial in nature?**

15. The Commissioner has considered the withheld information, and notes that it comprises correspondence between the Parish Council and a number of different parties, and relates to the cost of providing and installing posts.

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<sup>1</sup> <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

16. The Commissioner is satisfied that the information is commercial in nature.

**Is the information subject to confidentiality provided by law?**

17. The phrase "confidentiality provided by law" in this circumstance can include the common law duty of confidentiality, which is what the Parish Council considers to exist in respect of the information in this case. It informed the Commissioner that it considered it had a duty, towards the providers of quotes, to keep commercially sensitive information confidential.
18. For a common law duty of confidentiality to exist, it is required (a) that the information has the necessary quality of confidence, and (b) that it was imparted in circumstances which gave rise to an obligation of confidence.
19. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public.
20. The Commissioner notes that, whilst the correspondence is informal in tone, it relates to a proposed professional contractual arrangement to provide services to the Parish Council, and is therefore not trivial. The Parish Council has confirmed that the correspondence has not been made public. The Commissioner is satisfied that the information has the necessary quality of confidence.
21. Regarding (b), he has also considered the circumstances in which the correspondence was exchanged, and whether these gave rise to an obligation of confidence. As stated, the tone is informal, although one party included a comment to the effect that they expected the information to be handled in confidence.
22. In this case, regardless of the tone and whether or not any expectations about confidentiality were, explicitly, expressed, the Commissioner considers that all parties were entitled to expect the Parish Council to keep the correspondence confidential.
23. He has reached this view on the basis that it is not the Parish Council's normal practice to publish competing quotes. He has also considered the "reasonable person test" established by Megarry J. in *Coco v AN Clark Engineers Ltd* [1968] FSR 415 and has concluded that a reasonable person would have expected the correspondence to have been provided in confidence.
24. Although the Commissioner notes the complainant's view that all information relating to such matters should be made available for public

scrutiny and that no obligation of confidence should arise, he has determined that, taking into account the nature of the information and the usual practices of the Parish Council, the circumstances in which the correspondence was exchanged in this case gave rise to an obligation of confidence.

25. The Commissioner is therefore satisfied that the information is subject to confidentiality provided by law.

**Is the confidentiality provided to protect a legitimate economic interest?**

26. As the Tribunal confirmed in the case of *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) (“Elmbridge”), to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person(s) the confidentiality is designed to protect.
27. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.
28. In this case, the confidentiality was designed to protect the interests of the companies providing the quotes, affording them the freedom to negotiate commercially, here and elsewhere, and also the interests of the Parish Council, allowing it to be assured of receiving competitive quotes. The Commissioner is satisfied that these comprise legitimate economic interests.
29. As explained in his guidance, the Commissioner’s approach is that the wording of this part of the exception – it may be engaged “where the confidentiality is provided by law to protect a legitimate economic interest” – should be interpreted strictly. It is not sufficient to engage the exception if the confidentiality **was** required to protect the interest, at some previous time. The Commissioner’s guidance explains that the wording indicates that the confidentiality must be objectively required at the time of the request.
30. The Parish Council has explained that, at the date of the request, a contractor had not been selected, and that, in fact, the matter of obtaining the posts and having them installed remains a live issue, since the project has been delayed. The Commissioner accepts this, and is satisfied that disclosure, at the time of the request, would have caused harm.

31. He is therefore satisfied that the Parish Council correctly asserted that the confidentiality is required to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

32. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
33. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have been identified.
34. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
35. The Commissioner is satisfied that the exception is engaged.

**Regulation 12(5)(e): the balance of the public interests**

36. Regulation 12(5)(e) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception. In addition, under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

**Factors in favour of disclosure**

37. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.

38. With regard to transparency, in this case, the complainant considers that this “should be to the fore”. He has commented that there is “a fundamental duty of care” which he considers should be open to scrutiny with regard to the Parish Council’s dealings, and cited an example of an (unrelated) occasion when he considered that the Parish Council’s choice of contractor may not have been the best option.

### **Factors in favour of maintaining the exception**

39. By finding the exception at regulation 12(5)(e) to be engaged in this case, the Commissioner has already accepted that releasing the withheld information would negatively affect the legitimate economic interests of the Parish Council and the companies providing the quotes. It is not, generally, in the public interest to allow harm to legitimate economic interests, although the extent of the harm needs to be considered, and it needs to be weighed against any countervailing considerations.
40. The Commissioner notes in this case that the negotiations were ongoing at the date of the request, and that this in fact remains a “live” issue. In his view, this lends further weight to the exception being maintained.
41. The Commissioner also considers that there is an inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected. It is important to preserve trust in public authorities’ ability to keep third party information confidential.

### **Regulation 12(5)(e): the Commissioner’s decision**

42. In this case, correspondence was exchanged between the Parish Council and a number of service providers, with a view to obtaining quotes for providing and installing posts around the village green.
43. The Commissioner notes that any proposed measures to protect the green from cars being parked on it, are certainly of interest to residents.
44. However, focusing on the contents of the withheld information, the Commissioner is satisfied that any public interest in the disclosure of the correspondence does not outweigh the significant public interest in maintaining commercial confidentiality, maintaining trust between the parties, and ensuring the Parish Council’s ability to negotiate freely in future.
45. He has reached this view on the basis that the correspondence does not give rise to any concerns over the Parish Council’s conduct in this matter, such as could lend sufficient weight in favour of disclosure.

46. On balance, the Commissioner's decision is that the balance of the public interests favours the exception being maintained.
47. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
48. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
49. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

#### **Regulation 12(4)(a) – information not held**

50. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received". In this case, the Parish Council informed the complainant that it did not hold "a plan showing the location of the posts" as requested at point 3) of the request.
51. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether further information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

#### **The complainant's view**

52. The complainant considered that a plan would "have necessarily been supplied to the firms invited to tender" and commented that "the Parish Council confirmed it received a quotation which must certainly have been based on the plan".



**The Parish Council's position**

53. The Parish Council has stated, simply, that a plan had not yet been produced. It has pointed out that the withheld information demonstrates that this is so.

**Regulation 12(4)(a): the Commissioner's decision**

54. The Commissioner agrees that the withheld information indicates that a plan had not yet been produced.
55. He is satisfied that, on the balance of probabilities, the Parish Council does not hold a plan showing the location of the proposed posts.

## Right of appeal

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56. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Sophie Turner**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**