

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

Date: 20 February 2017

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information relating to plans to develop the Cliftonville Lido site. Kent County Council initially handled the request under the FOIA, disclosing some information and withholding other information under the exemption for information provided in confidence (section 41). During the Commissioner's investigation the council reconsidered the request under the EIR, disclosing further information and applying the exceptions for intellectual property rights (regulation 12(5)(c)) and commercial confidentiality (regulation 12(5)(e)) to withhold other information.
2. The Commissioner's decision is that Kent County Council:
 - Wrongly handled the request under FOIA and as a result breached regulation 5(1) and regulation 14 of EIR;
 - failed to demonstrate that regulation 12(5)(c) and regulation 12(5)(e) are 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 22 March 2016, the complainant wrote to Kent County Council (the "council") and requested information in the following terms:

"I'm writing for information under the Freedom of Information Act 2000. Specifically, I'd like information you hold regarding discussions and plans to develop the Cliftonville Lido site and adjacent land on the clifftop (where the Little Oasis Skate Park was built next to the Viking Playground is situated).

I'd like details of meetings, minutes and agendas, emails and proposals from June 1st 2014 to 22nd March 2016."

6. The council responded on 18 April 2016 and disclosed some information, withholding other information under the exemption for information provided in confidence – section 41 of the FOIA.
7. Following an internal review the council wrote to the complainant on 17 May 2016. It stated that it was maintaining its reliance on section 41 and also applying the exemptions for prejudice to commercial interests (section 43(2)) and section 21 (information accessible by other means) to withhold the requested information.

Scope of the case

8. On 29 September 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

At the outset of the investigation the Commissioner advised the council that her initial view was that the request identified environmental information and fell to be considered under the EIR rather than the FOIA. The Commissioner invited the council to reconsider the request under the EIR and advise the complainant of its considerations.

10. On 6 February 2017 the council wrote to the complainant and disclosed additional information. It also confirmed that it had reconsidered the request under the EIR and withheld some information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and intellectual property rights (regulation 12(5)(c)). The Commissioner has considered whether the council has correctly applied the exceptions.

Reasons for decision

Is it Environmental Information?

11. 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.
12. 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...'

13. 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.
14. In this case the focus of the withheld information is the potential development of land. The information, therefore, relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
15. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the

16. 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 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)(c) – intellectual property rights

21. The withheld information constitutes a small quantity of redacted elements of meeting minutes of the Margate Seafront Development Steering Group.
22. Regulation 12(5)(c) states:

“12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(c) intellectual property rights”
23. Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets.

24. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:

- the material is protected by IP rights;
- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
- the identified harm is a consequence of the infringement or loss of control over the use of the information; and
- the potential harm or loss could not be prevented by enforcing the IP rights.

25. In determining whether this exception has been correctly applied the Commissioner considers that the onus is on the public authority to identify the specific IP right that would be adversely affected and its owner. The Commissioner considers that there are three main forms of IP rights: copyright, database rights, and copyright in databases. In demonstrating that information falls within the scope of the exception, public authorities must, therefore, identify the form of IP right which information is protected by and explain why.

26. In its submissions the council has stated:

"The presentation was done by the third party and they own the intellectual property rights to it and not us."

"The third party has not given their permission to disclose any information contained in the presentation. If we disclosed information given in confidence this could severely damage its relationship and trust with the third party in the future."

27. Having viewed its submissions, the Commissioner considers that the council has failed to define the specific IP right which is being protected in this case. Simply stating that a third party owns IP rights to information or asserting that information has been provided "in confidence" does not explain information subject to an IP right or demonstrate that this is the case.

28. Having considered the council's submissions and referred to the withheld information the Commissioner has concluded that the council has failed to demonstrate that the information falls within the scope of the exception. It follows that the exception is not engaged and she has not, therefore, gone on to consider the public interest test.

Regulation 12(5)(e) – commercial confidentiality

29. The withheld information constitutes a small quantity of redacted elements of meeting minutes of the Margate Seafront Development Steering Group.
30. 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”.
31. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He 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?

32. 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.
33. The withheld information relates to potential redevelopment prices obtained through negotiations with a third party provider.
34. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information relates to a commercial activity, namely the redevelopment of land. This element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

35. 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.

36. 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.

37. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*¹

38. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.

39. In applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing."*²

¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

40. In relation to the 'reasonable person' test, another relevant question is whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that this 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.
41. The council has explained that the withheld information forms part of a presentation made to the council by a third party. The council has stated that it is *"...confidential information that could be actionable by the third party and would adversely affect our relationship with the third party if the information was disclosed."*
42. The council has confirmed that the information has not been shared more widely and the Commissioner notes that the information is not trivial in nature.
43. The Commissioner considers that, where information relates to the sale of land, particularly where such processes are incomplete and where other contingent factors would be affected by such disclosure (such as associated land acquisition), it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. 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, the Commissioner is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

44. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
45. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
46. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He 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".

47. The council has argued that:

"...If the information was disclosed it could lead to potential underbidding by third party in a competitive process and could lead to potential underbidding by third bidders.....

"...this is confidential information that could be actionable by the third party and would adversely affect our relationship with the third party if the information was disclosed."

"....disclosure could have major financial impact on the third party's intended use for the site and its business plan if competitors obtained this information. If the information was released then the third party may be reluctant to enter into dialogue with the Steering Group in case a competitor obtained information that affected its business model. This could have serious implications for the project going forward and maybe other projects in the Margate area with that party of other third parties."

48. Having considered the council's submissions the Commissioner first notes that the arguments presented are high level and generic in nature. The Commissioner notes that the council has not linked the potential adverse effects to explicit elements of the withheld information nor has it explained how disclosure would produce the ascribed effects.

For example, the council does not explain how disclosure would affect the third party's intended use for the site or its business plan or indeed how disclosure would facilitate competitors in achieving these ends. The Commissioner also notes that the council does not clearly define whose legitimate economic interests would be affected by disclosure of the information. In the Commissioner's view, references to a "third party" do not provide a sufficient level of detail or certainty in this context. Moreover the Commissioner considers that, taken in concert, these elements of the council's arguments suggest that the matter has not been given sufficient thought and that the council has sought to rely on the exception on a general basis.

49. The Commissioner further observes that the council repeatedly suggests that disclosure "could" result in certain prejudicial effects. The Commissioner is mindful that the evidential threshold for engaging the exception requires authorities to demonstrate that adverse effects *would* result. In view of the language used by the council the Commissioner has concerns that the ascribed effects are speculative in nature and not sufficiently concrete to meet the evidential burden.

50. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing; however, he considers that it is for authorities to fully explain the relevant causes and effects in any given instantiation of this principle. In this case, the Commissioner considers that the council has failed to do this.
51. 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.
52. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner does not consider that she has a duty to generate arguments on its behalf.
53. In this instance, having considered the council's arguments and referred to the withheld information, 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

54. 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

55. 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.
56. 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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