

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

Date: 28 March 2017

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

Decision (including any steps ordered)

1. The complainant has requested a technical report relating to a caravan site. Hastings Borough Council initially withheld the information under the FOIA exemption for information provided in confidence (section 41) but, during the Commissioner's investigation reconsidered the request under the EIR and withheld the information under the exceptions for confidentiality of proceedings (regulation 12(5)(d)), commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)).
2. The Commissioner's decision is that Hastings Borough Council breached regulation 5(1) and regulation 14 and failed to demonstrate that the exceptions in regulations 12(5)(d), 12(5)(e) and 12(5)(f) 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.

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

4. On 22 June 2016, the complainant wrote to Hastings Borough Council (the "council") and requested information in the following terms:

"I would like a copy of the "Second" Coffey Geo Technical report concerning the Rocklands caravan site and Ecclesbourne Glen.

This is the report you previously refused to disclose to me in a previous FOI request due to the impending appeal with a Planning Inspector citing there was evidence of a sensitive nature that may be used for this appeal. Now the appeal is over and a decision has been published may I please have sight of this particular report."

5. The council responded on 26 July 2016 and stated that it was withholding the information under the exemption for information provided in confidence – section 41 of the FOIA.
6. Following an internal review the council wrote to the complainant on 6 October 2016. It stated that it was maintaining its position.

Scope of the case

7. On 12 October 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
9. During the course of the investigation the Commissioner advised the council that, in her initial view, it was likely that the withheld information constituted environmental information and fell to be considered under the EIR rather than the FOIA. The Commissioner invited the council to reconsider the request the request under the EIR.

The council reconsidered the request under the EIR and confirmed to the complainant that it was now relying on the EIR exceptions for confidentiality of proceedings (regulation 12(5)(d)), commercial confidentiality (regulation 12(5)(e)) and interests of the information provider (regulation 12(5)(f)) to withhold the information.

Reasons for decision

Is it Environmental Information?

10. 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.
11. 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...'*
12. 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.
13. In this case, the requested information relates to caravan sites, the use of land and planning. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the

environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

14. 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

15. 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.
16. In these circumstances the Commissioner believes that it is appropriate for her to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
17. As the council addressed this failing during the course of her investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(d) – Confidentiality of Proceedings

18. The council has withheld a copy of a Geo Technical report relating to Rocklands caravan site and Ecclesbourne Glen (the "report"). The report relates to a landslide at the southern end of Rocklands Caravan Park which borders Hastings Country Park and Ecclesbourne Glen in 2014. The report was produced by Coffey Geotechnics Limited ("Coffey") at the request of the council and provided to them once completed.
19. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

Proceedings

20. The term 'proceedings' is not defined within the EIR but the Commissioner considers that an activity has to have a degree of formality to qualify as such. For example it will include, but is not limited to, formal meetings to consider matters that are within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers and legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.
21. The council has stated that it:

"...issued a new site licence to the owners of Rocklands Caravan Park which has been appealed. The information requested will form part of this legal proceeding."
22. Although the council has not provided specific details of the nature of the legal proceeding, the Commissioner accepts that a site licence appeal qualifies as a "proceeding" within the context of the exception. She further accepts that the information would be likely to be considered confidential and would have been provided with an expectation of confidentiality. The withheld information is, therefore, not trivial and the Commissioner accepts that a common law duty of confidence exists.

Adverse Affect

23. Even where proceedings are confidential in the terms set out above, the exception is only engaged where disclosing the information would adversely affect that confidentiality.
24. "Adversely affect" means that there must be an identifiable harm to or negative impact on the interest identified in the exception. The threshold for establishing "adverse effect" is a high one, since it is not sufficient that disclosure may or could have some level of adverse effect, rather it is necessary to establish that disclosure *would* have an adverse effect. "Would" in this context means that it is more probable than not, that is, that there is a more than 50% chance that the adverse effect would occur if the information were disclosed.
25. Whilst the Commissioner acknowledges the importance of confidentiality being maintained, she considers that it is for public authorities to identify in any given case, what form harm would take and to demonstrate how disclosure would result in the harm being caused. For Regulation 12(5)(d) to be engaged, it is not sufficient to simply show that information falls into a certain category (as in the case of a class-based exemption under the Freedom of Information Act 2000) and to identify a vague outcome of disclosure. Harm must be clearly defined,

linked to the relevant information and the likelihood of harm must be shown to be more probable than not.

26. Having considered the council's submission, which provides no details of the specific nature of any harm which disclosure would cause, the Commissioner considers that it has failed to demonstrate that disclosure of the information *would*, in this case, result in adverse effect.
27. As the Commissioner has determined that the council has failed in this case to demonstrate that disclosure would result in adverse effect she has concluded that the exception is not engaged. She is, therefore, not required to go on to consider the public interest test.

Regulation 12(5)(e) – commercial confidentiality

28. The council has also applied the exception in regulation 12(5)(e) to withhold the requested report.
29. 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".
30. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
31. The council's submissions, whilst acknowledging the relevance of the above conditions to the engagement of the exception are confined to the following statement:

"We believe that the disclosure of this information is more likely to have an adverse effect on the economic interest of the owners of Rocklands Caravan Park."

32. Having considered the council's submissions and referred to the withheld information the Commissioner considers that it is not obvious from an analysis of the information in isolation that disclosure would result in adverse effects to the legitimate economic interests of the Caravan Parks. She also considers that the submissions she has received from do not clearly identify any specific adverse effects and link these effects to specific withheld information; nor do they explain the causal link between disclosure and any ensuing adverse effects.
33. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
34. The Commissioner considers that it is for public authorities to fully explain the relevant causes and effects and it is not her role to generate arguments on their behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.
35. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Regulation 12(5)(f) – interests of the information provider

36. The council has also applied the exception in regulation 12(5)(f) to withhold the requested report.
37. Regulation 12(5)(f) states:

'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure'

38. In the Commissioner's view, the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
39. With regards to engaging the exception, as recognised by the First-tier Tribunal (Information Rights), a four stage test has to be considered, namely:
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - Has the person supplying the information consented to its disclosure?¹

Adverse effects on the interests of the person who voluntarily provided the information

40. As with all the exceptions in Regulation 12(5), the threshold necessary to justify non-disclosure because of adverse effect is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.
41. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than

¹ *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012;
http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.

42. The council has not provided any submissions in relation to the grounds for engaging the exception, however, in its consideration of the public interest arguments for engaging the exception the council stated the following:
- *"The person providing the information has not consented to disclosure*
 - *The interests of the person providing the information to the public authority will be adversely affected by disclosure whereby the release of this information would clearly prejudice the owners commercial interests*
 - *The person providing the information was not under any legal duty to provide it*
 - *The public authority is not entitled to disclose the information provided, we must show a degree of trust and confidence that the information given to us would damage that trust if released*
 - *The release of this information will adversely affect the Council's position and legal proceedings "*
43. The council confirmed that it commissioned Coffey to produce the report and the report was supplied directly by Coffey to the council. The council explained that it had provided Coffey with copies of the 2 reports commissioned by the caravan site licensees as background information to help inform the report. It stated that the basis upon which the caravan site licensees gave the council the reports to assist Coffey was that they would be treated as 'privileged/confidential '.
44. In order for the exception to be engaged it must be shown that disclosure of withheld information would result the adverse effects to the interests of the information provider. In this case the information was provided to the council by Coffey.
45. The Commissioner acknowledges that information contained within the report was compiled, in part, from submissions made by the caravan site licensees. However, leaving this element to one side, the council's grounds for applying the exception are that "...the release of this information would clearly prejudice the owner's commercial interests".
46. The Commissioner considers that, in order for the exception to be engaged, specific harm must be identified. Furthermore, that it must be explained why it is more probable than not that harm would occur

reflects the fact that the test for engaging the exception is a higher test than 'might adversely affect', requiring a greater degree of certainty.

47. In this case, the Commissioner does not consider that it is self-evident that disclosure would "prejudice the owners commercial interests", as argued by the council. In addition to it being unclear who the "owners" are in the context of the voluntarily supplied information, the Commissioner considers that, as she has found in her consideration of regulation 12(5)(e) above, the council has not demonstrated that disclosure would result in harm to the legitimate economic interests of a party or parties.
48. In the absence of further arguments from the council in this regard the Commissioner must conclude that disclosure of the information would not result in harm to the interests of the information provider.
49. In relation to the council's argument that disclosure will adversely affect the council's "position and legal proceedings", it has not been explained to the Commissioner how the council's interests are a matter to be considered within the scope of this exception. In any event, the Commissioner considers that the identified harm is generic and speculative in nature and does not approach the level of certainty required for engaging the exception.
50. The Commissioner advised the council in her initial letter of the investigation that this represented its opportunity to set out its final position in relation to its handling of the request. She is mindful that in other section 50 cases which relate to comparable requests authorities have applied the exception for the course of justice (regulation 12(5)(b)) to withhold information. In this case the council has not done so and the Commissioner does not consider that the submissions provided are directly transposable to the conditions required by regulation 12(5)(b). In cases where an authority has failed to identify a relevant exception or not met the threshold needed to engage an exception the Commissioner does not have an obligation to generate arguments on an authority's behalf.
51. Having considered the council's submissions the Commissioner has concluded that it has failed to show that disclosure of the information would adversely affect the interests of the information provider. As the exception is not engaged she has not gone on to consider the public interest.

Right of appeal

52. 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

53. 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.
54. 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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