

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 erection of signage and fencing on a local caravan park site (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

Within 6 weeks of the date of issue of this license (or any other timeframe subsequently agreed by the licensing authority), the licensee must submit suitable proposals to the licensing authority for the fencing and signage of the area hatched red on the site plan. Within 8 weeks of the licensing authority consenting to any such proposals (or any other timeframe subsequently agreed by the licensing authority), the licensee must erect the fencing and signage."

I formally request under EIR the following:

Please supply the dates that these proposals were submitted.

Please confirm that HBC holds copies of such proposals.

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

Please supply copies of these proposals.

Please provide the date of consent to these proposals.

Please provide the implementation date of these proposals.'

The council issued a refusal notice on 28 June 2019, advising the complainant that:

'Under the terms of the site licence for Rocklands Caravan Park records submitted to the council in connection with the land management are strictly confidential. '

8. The council went on to confirm that the information was to be withheld under regulation 12(5)(e) and 12(5)(b) of the EIR. It also advised that it had considered the public interest test, and that it regarded the public interest to weigh in favour of maintaining the exceptions.
9. On 3 September 2019, the complainant requested an internal review. He complained that the council had failed to provide an answer to the questions set out in points 1,3, 5 and 6 of his request. In addition, with regard to point 4 of the request (for copies of the proposals), the

complainant stated that he was concerned that the council had not properly considered whether the information was truly confidential. He argued that fencing and signage would not be subject to the same duty of confidence that might apply to other information.

10. The complainant also questioned whether the council had properly considered the public interest test. He stated that he was concerned that the council had made reference to harassment as a factor in its consideration of the request, and believed that the council may have applied a 'blanket ban' to information that had been requested.
11. On 25 October 2019, the council provided its internal review response. It advised that it had not 'predetermined' refusals and had not applied a 'blanket ban' on the requests that it had received.
12. With regard to the points set out within the complainant's original request, the council responded as follows:

1. *Please supply the dates that these proposals were submitted.*

28 June 2018.

2. *Please confirm that HBC holds copies of such proposals.*

Yes.

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

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 these proposals.*

You state that marking a document 'strictly confidential' has no weight and does not override the provisions of 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 of consent to these proposals.*

23 August 2018

6. *Please provide the implementation date of these proposals.*

Information not held.

13. The council informed the complainant that it was satisfied that it had demonstrated the factors for non disclosure, referring to, and quoting from, the First-tier (Information Rights) Tribunal case of Hastings Borough Council v IC EA/2017/0084¹ (the Tribunal case).
14. In addition, the council went on to refer to a local campaign group, 'Save Ecclesbourne Glen' (SEG), claiming that its actions had been detrimental to the owners of the site, and their business.

Scope of the case

15. The complainant contacted the Commissioner on 4 November 2019 to complain about the way in which the council had handled his request.
16. The Commissioner is satisfied that the council provided sufficient answers to point 1,2 and 5 of the request as part of its internal review response, and therefore she does not intend to consider these points further within this decision notice.
17. With regard to point 3 and 6 of the request, the council had informed the complainant that it did not hold this information. During the course of the Commissioner's investigation, the council confirmed that it was now intending to provide the complainant with some information that was relevant to point 3 of his request. However, it did not revise its position with regards to point 6 of the request.
18. The council has also maintained its position with regards to point 4 of the request, confirming that it believes the relevant information which it holds to be exempt from disclosure under regulation 12(5)(e) and 12(5)(b) of the EIR.

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)

19. The Commissioner therefore 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 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 that 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?

20. 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.
21. 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.
22. The request is for a copy of the information contained within documents held by the council that relate to proposals for signage and fencing to be erected on the site.
23. 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.

24. 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 proposals to erect signage and fencing on the site.

25. 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.
26. The Commissioner is required to make a judgement based on the information which has been made available to her as to whether, on the balance of probabilities, the requested information is held or not.
27. The Commissioner has interpreted the complainant's request for the 'implementation' date to be that date held by the council when the signage and fencing were erected by the site owners. The Commissioner accepts that it is not necessarily the case that a specific date would be held by the council. It may, or may not, be the case that the council holds confirmation that the site owners have carried out certain activities relating to the conditions set out in the licence, including that which may relate to the erection of signage and fencing on the site. However, it is the Commissioner's view that this is not what the complainant specifically requested.
28. When making her decision, the Commissioner has considered the withheld information that has been made available to her by the council. She 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.
29. The Commissioner therefore concludes that, on the balance of probabilities, the council does not hold information which would provide a direct answer to point 6 of the complainant's request.

Regulation 12(5)(e) - commercial confidentiality

30. 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.
31. 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?
32. 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.
33. The withheld information which the council has provided for the Commissioner's consideration includes a Land Stability Site Management Plan (the 'detailed plan') which the Commissioner accepts is, in part, relevant to the request.
34. 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 decision notice FER0887780, were made on the same day, and the circumstances in relation to each are directly comparable.
35. 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 and that the council is correct to withhold this information in response to the complainant's request.
36. The Commissioner sees no value to any party in providing a full explanation of the reasoning for her decision, as this has already been set out in some detail within decision notice FER0887780.

37. Therefore, 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?

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 13 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.
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 information held by the council about proposals for signage and fencing which had been set out in a site licence. The Commissioner views such activities to be 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. 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 information that has been withheld relates to the proposals which were set out within a site licence relating to the erection of signage and fencing on the land of that 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 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.
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 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.
52. 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 the erection of signage and fencing on 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.'
53. 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.
54. 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.

55. 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.
56. 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.***

57. 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.'
58. The Commissioner therefore concludes that the third part of the test as set out in paragraph 31 of this decision notice is met.

Would the confidentiality be adversely affected by disclosure?

59. Although this is a necessary element of the exception, should the first three tests set out in paragraph 31 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

60. 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 that information which has been withheld that is relevant to point 4 of the complainant's request outweighs the public interest in maintaining the exception.

61. When carrying out the test, the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
62. The complainant believes that information relating to the proposals about signage and fencing on the site should not be regarded to be 'secret', and that the disclosure of such information is unlikely to cause the site owners and their business harm.
63. 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.
64. 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, including confirmation of the dates that the proposals were submitted to, and consent was given by, the council about the signage and fencing.
65. 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. She would, in particular, make reference to a request dated 24 June 2019 which was considered in decision notice FS50891120³. The Commissioner notes that in that case some information about the fencing on the site was also released into the public domain.
66. 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 signage and fencing, this is something that could have an impact on both safety and the visual aspects of the area surrounding the site. The Commissioner also understands 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

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617952/fs50891120.pdf>

public domain in order to achieve this. The site owners' right to privacy is also an important factor to be considered.

67. 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 be separate avenues to follow should any person be concerned that the council is not following proper processes.
68. 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.
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 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.
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 28 June 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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