

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 March 2020

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a report held by Hastings Borough Council (the council) which relates to a proposed investigation into the stability of a particular area of land that has been affected by landslips.
2. The council refused the request under regulation 12(5)(e) of the EIR.
3. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(e) in respect of only part of the information that has been withheld. This is specifically in relation to the quotes which were attached to the main report that is under consideration, and also any breakdown of the estimated costs, or fees, contained within the report itself. Furthermore, the Commissioner is satisfied that the public interest favours maintaining regulation 12(5)(e) in respect of this information.
4. With regards to all the remaining information held relevant to the request, the Commissioner has concluded that regulation 12(5)(e) is not engaged.
5. The Commissioner also finds that the council has breached regulation 14(2) of the EIR as it failed to issue a refusal notice within the statutory 20 working days.

6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - Disclose the information contained within the report, with the exception of any individual financial costings/fees provided by third parties. The information to be disclosed should, however, include details of any final total of costs cited.
7. The council 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

8. On 5 July 2018 the complainant wrote to the council and requested information in the following terms:

'Following an FOI request (80591946) for a list of Coffey reports you have identified a report titled:

"Ecclesbourne Glen Landslide: - Proposal for Investigation and Assessment – 23 June 2015"

Please supply me with this report under EIR.

I note that FOI request 80591946 took over 7 months-I would be grateful if the requested report is provided within the statutory 20 days.'

9. The complainant subsequently raised concerns with the Commissioner about the council's failure to respond to his request. Following the Commissioner's intervention, the council responded to the complainant on 16 October 2018, advising that it was refusing the request under regulation 12(5)(e) of the EIR.
10. The council confirmed that when making its decision, consideration had been given to the adverse effect on the economic interest of the owners of the site, and commercial confidentiality. The council went on to say that the disclosure of the '*commercial information*' requested was more likely to have an adverse effect on the economic interest of the owners of the site.
11. The council also advised that it had given consideration to the request being a '*manifestly unreasonable use of council's resources in constant use of FOI/EIR. The council could have used refusal notices but in the spirit of the Act have tried to comply with providing as much information*

as possible. In doing so this has caused a backlog of work for the Information Officer as nearly every request is fol owed [sic] by an internal review or chal enged [sic] in another way.'

12. With regards to the public interest test, the council advised that the factors weighing in favour of disclosure were '*transparency and accountability*' and that the factors weighing against disclosure were as follows:

'-If the information is disclosed it would be used to seek harm on the owners commercial interests.

-This report contains highly sensitive and confidential information and the disclosure of this report is likely to prejudice the owners commercial interests.

-Were such information disclosed, then it could be used by competitors and potential purchasers to the owners financial detriment.

-Unfounded critical publicity (and defamatory) reviews and postings about their business via social media and press leading to a loss of trade by virtue of a long running campaign since 2013.

-Significant diversion of their attention away from their efficient running of their business.

-A material reduction in the funds they have available to invest in their business.

-Undue upset and worry for caravan owners which has significantly affecting [sic] their health.

-A reduction in the value of their park/business proved by lack of bookings for holiday lets and proved by valuations.

-Constant bad publicity by SEG [Save Ecclesbourne Glen] hampers the owners ability to be able to eventual y sel [sic] their land and business for a fair value.'

13. On 27 October 2018 the complainant requested an internal review and the council provided its response on 13 December 2018. It stated that the report requested is '*clearly marked "Commercial in Confidence"*' and that information '*of this nature is exempt from disclosure*' for the reasons which had been set out in its refusal notice of 16 October 2018. The council went on to confirm that, given this, it was to uphold its original decision.

Scope of the case

14. The complainant initially contacted the Commissioner to complain about the council's failure to respond to his request. He then contacted the Commissioner again on 16 January 2019 to complain about the council's internal review decision, and the way it had handled his request generally.
15. During the investigation, the council provided the Commissioner with a copy of the report titled '*Ecclesbourne Glen Landslide: - Proposal for Investigation and Assessment - 23 June 2015*' (the Proposal Report) for her consideration. However, the Proposal Report which, as the title suggests, sets out proposals for further investigation of certain landslips that have occurred, also refers to other 'attached' documents. Whilst the council did not include such attachments for the Commissioner's consideration in relation to this particular request, it has provided them as part of its response to a separate complaint about its handling of another request.
16. The Commissioner is satisfied that the information contained within these attachments is sufficiently relevant to the content of the Proposal Report that they should also have been considered by the council when dealing with this particular request.
17. The Commissioner considers the scope of her investigation to be whether the council was correct to apply regulation 12(5)(e) of the EIR to the information that is contained within the Proposal Report itself, and also the attachments. In addition, as requested by the complainant, she has considered the council's compliance with the procedural aspects of the EIR.

Reasons for decision

Is the information environmental information?

18. 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.
19. 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.

20. The information requested relates to proposals that concern investigation into the stability of the land following landslips, and the costs to carry out such an investigation. The Commissioner is satisfied that it is information that fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

Regulation 12(5)(e)-commercial confidentiality

21. 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.
22. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
 - 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?
23. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive. This is because, if the information was disclosed under the EIR, it would cease to be confidential.
24. The Commissioner will, most often, consider the four-stage test in the order set out in paragraph 22 of this decision notice. Given the nature of the questions posed, it is apparent that, in most instances, it will be the most logical order to follow.
25. However, in this particular case, the Commissioner has decided that it would be appropriate to reverse the order of the first two stages of the test when considering whether regulation 12(5)(e) is engaged. Given this, she will firstly consider whether the withheld information is subject to confidentiality by law before then going on to consider if it is commercial or industrial in nature. She will then consider the final two stages of the test in the same order set out in paragraph 22 of this decision notice.

Is the information subject to a duty of confidence provided by law?

26. 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.
27. 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:
 - Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
 - Was the obligation shared in circumstances importing an obligation of confidence? This can be explicit or implied.
28. The information that has been withheld relates to certain proposals that are connected to the landslips which occurred, and the costs associated with such proposals. The Commissioner considers that the information, in the main, is not trivial.
29. In this particular instance, when considering the duty of confidence the Commissioner has decided that it is appropriate to separate the withheld information into two distinct parts.
30. Therefore, she intends to firstly consider the information held relating to the details of the proposals/study contained within the Proposal Report. She will then go on to consider separately any financial details contained both within the Proposal Report, and attachments, which set out the estimated costings/quotes to implement those proposals.

Details of the proposals contained within the Report

31. In this case the council has placed significant weight on the First-tier (Information Rights) Tribunal case of *Hastings Borough Council v IC*, EA/2017/0084¹ (the Tribunal case) in support of its decision to withhold the information contained within the Proposal Report. Whilst the council has not provided the Commissioner with much further explanation as to why it regards the Tribunal case to be relevant to all the withheld

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)

information, it has made reference to the reasons which it set out in its original refusal notice to the complainant.

32. The Tribunal case considered 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. It confirmed that the public interest lay in favour of withholding this information and upheld the council's decision.
33. The Commissioner is mindful that whilst the Tribunal case considered information that related to the same site, the same area of land, the same landslips etc, that the withheld information relates to, it does not necessarily follow that the same decisions of the Tribunal will apply to this request.
34. The Commissioner has also taken into account the fact that, unlike the information that was considered by the Tribunal, the information that has been requested in this case was not provided to the council by the site owners, and it is not subject to the exact same set of circumstances. Furthermore, information should not be considered to be '*commercial in confidence*' as claimed by the council simply because it is contained within a document which has been marked to this effect. Its content has to be truly confidential in order for this to apply.
35. The council has confirmed that it considered disclosing a redacted version of the Proposal Report but that it had concerns about the release of any of the information into the public domain because it '*affects the majority of the land*' at the site, '*and not council owned land*'. However, the Commissioner does not accept this to be sufficient justification for withholding all the information in response to the complainant's request. Furthermore, as she notes that the council had, at the time of the request, already released a number of reports about the landslips which contained some substantive information that can be linked directly to the land at the site, she regards such an argument, in isolation, to carry very little weight in this instance.
36. The Commissioner considers the information which was already in the public domain at the time of the complainant's request to be of some importance to her consideration of whether all the withheld information is subject to a duty of confidence.

37. Firstly, the Commissioner has identified certain extracts which are contained within the Proposal Report to be exact copies of information set out within the Coffey 2 Report. Whilst part of the information contained within the Coffey 2 report was redacted before its release into the public domain², the relevant extracts were disclosed in full by the council.
38. In addition, the Commissioner has taken into account the information which is contained within the 'first' Coffey Report dated May 2014³. This report, which has been published on the council's website in its entirety, recommends further study of the stability of the land affected by the landslips; the Commissioner regards this information to be intrinsically linked to details that are included within the Proposal Report. By way of example, the Commissioner would refer to the summary of the first Coffey Report which includes the following information:

'We recommend that an initial stability assessment and hazard zonation of the main landslide is undertaken. In order to do this, a detailed topographical survey of the landslide will need to be carried out to enable its dimensions/extent and features to be determined more accurately.'

The initial stability assessment and hazard zonation should then be carried out utilising existing soil/rock parameters from previous work for the Council and British Geological Survey (BGS) records.

For a more definitive stability assessment and hazard zonation, we would recommend further ground investigation which may include exploratory hole formation and the installation of monitoring instrumentation.'

39. The Commissioner also regards the information that is in the public domain relating to a response to a written question at a meeting of the full council on 10 February 2016⁴ to further weaken any claim that all

²<https://www.whatdotheyknow.com/request/589159/response/1406900/attach/html/4/FOI131066053%20Redacted.pdf.html>

³https://www.hastings.gov.uk/content/parks_gardens_allotments/pdfs/ecclesbourne_glen_landslides_report.pdf

⁴ <https://www.hastings.gov.uk/my-council/freedom-of-information/date/?id=FOI226766>

the information contained within the Proposal Report is confidential:

'The consultants recommend that the Council and the caravan site owners work together on investigations and stabilisation of the land rather than engage in dispute.'

'The cost of a survey would be £37k and we could be confident that the likelihood is that both substantial costs and other challenges would arise from such a study.'

40. A further written question about the landslip which was submitted to the full council meeting held on 15 February 2017 is also viewed to be of some relevance by the Commissioner. It makes reference to the council's response to the question that had been raised at the 10 February 2016 meeting (referred to in paragraph 39 of this decision notice). The Commissioner regards point 3 and point 12 of the written question to be particularly pertinent to her consideration of this case. They were as follows (the council's responses follow each point and are set out in bold):

'3. What work has been carried out together by HBC and Rocklands on investigating the landslip and stabilising the land?

The Council asked the caravan site owners if they would be willing to jointly fund works to investigate the slope stability and they declined.'

'12.Has the council negotiated with Rocklands to half fund the costs of a geotechnical study and what were the results of these negotiations?

As mentioned earlier the Council asked the caravan site owners if they would be willing to jointly fund works to investigate the slope stability and they declined.'

41. Having taken into account the information that is already in the public domain about the proposals for investigating the land affected by the landslips, the Commissioner has had some difficulty understanding why the council believes that all the information held within the Proposal Report is confidential and, in particular, that there is a confidentiality owed to the site owners in respect of this particular information.
42. In the Commissioner's view, the information contained within the Proposal Report is, at least in part, the same, or an extension of that information which is already in the public domain. Furthermore, the council has already made public comment about the outcome of the negotiations with the site owners about the proposal to conduct an investigation into the land stability, and the estimated full cost to do this.

43. Having taken all factors into account, the Commissioner is not persuaded that all the withheld information contained within the actual Proposal Report itself is subject to the same duty of confidence that was described in the Tribunal case. Given this, she does not accept that the decision made by the Tribunal is directly transferable to all the information that has been withheld.
44. The Commissioner has decided that the information contained within the Proposal Report which sets out the actual details of the proposals is not subject to a duty of confidentiality. She therefore concludes that regulation 12(5)(e) is not engaged in respect of this particular information and that it should be released.

Financial information held within the Report and the information contained within the attachments

45. With regard to the total estimate of the costs of carrying out the study as set out within the Proposal Report, at the council meeting held on 10 February 2016 details of one of the estimates that had been quoted by a third party company was released. Evidence of this is already set out in paragraph 39 of this decision notice. Given this, the Commissioner believes that any argument that the final figures quoted should be withheld on the basis that they are confidential is somewhat eroded.
46. As a result, the Commissioner does not regard the figures for the total costs for the work to attract a duty of confidence. Therefore, it is her decision that regulation 12(5)(e) is not engaged in respect of this particular financial information and it should be released.
47. However, this decision does not extend to the details contained within the 'attached' quotes and the breakdown of costs and fees associated with the proposals. The Commissioner views it to be the case that this information would have been shared with the council with an expectation by the various contractors, including Coffey, that it would be treated as confidential, and not made public.
48. The Commissioner also notes that the services offered by the contractors differ and that this is reflected in a variation in the final estimate of costs submitted by both. She accepts that the relevant companies would not have expected details of how they propose to carry out the works (essentially their bids for the contract) to be put into the public domain, particularly as they appear to have offered different services and costings.
49. The Commissioner is therefore satisfied that the common law of confidence applies to all the information contained within the attachments and also the details of any breakdown of fees, or costings,

which are contained within the Proposal Report itself. As a result, the Commissioner has concluded that this stage of the test has been met in respect of this information. She will therefore go on to consider whether it is commercial or industrial in nature.

Is the information commercial or industrial in nature?

50. 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.
51. The council has stated that the Proposal Report covers the majority of the land contained within the relevant site and '*therefore is commercial information*'. It has also referred to the Tribunal case where the withheld information was viewed to directly relate to the commercial activities of the site owners.
52. In light of the comments made by the Tribunal, the Commissioner has adopted a much broader approach to what can be considered to be commercial information in this case. However, despite this, she does not regard all the information that still remains under consideration within this decision notice to be linked to the commercial activities of the site owners.
53. The council commissioned the report and, as far as the Commissioner is aware, the site owners were not involved in this decision. In addition, by the time of the request, the council had publicly confirmed that the site owners were not willing to share the costs of the proposed study detailed within the Proposal Report.
54. The Commissioner would add that it may, or may not, be the case that the information that she has already determined is not subject to a duty of confidence can, in some way, be seen to relate to the commercial activities of the site. However, given that she has already determined that such information should be released, her consideration of this stage of the test is now restricted to cover only the remaining part of the withheld information.
55. In paragraphs 47-49 of this decision notice, the Commissioner set out the reasons why she regarded certain information which had been provided by the various contractors to be subject to a duty of confidence. Whilst she does not accept the council's claim that all the remaining withheld information is commercial in relation to the site owners and their business, she does still find that it all relates to a commercial activity-namely the proposals for further study of the stability of the land and the costings which are associated with this

study, and for which, importantly, third party companies will achieve a commercial return by way of payment from the council for their services.

56. The Commissioner is therefore satisfied that the information which she has already accepted is subject to a duty of confidence is also commercial in nature.

Is the confidentiality required to protect a legitimate economic interest?

57. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
58. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish that on the balance of probabilities, some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets '*would*' to mean '*more probable than not*'.
59. The Commissioner has already confirmed that she is not persuaded by the council's argument that the disclosure of the information requested in this instance (that is subject to a duty of confidence) can be linked to the economic interests of the site owners. However, she does consider it to relate to the commercial interests of the contractors who have been asked to provide quotes, and also Coffey.
60. There were two companies who were competing for the same contract. The Commissioner believes that the disclosure of their 'bids' would prejudice their commercial interests in terms of any future processes and negotiations. Each company would be able to see how their competitor had set out their bids and came to arrive at their full costings. Other companies competing in the same market would also have access to this information. The same critique can be applied to the estimate of fee costs charged by Coffey for providing services relating to the proposals.
61. The Commissioner therefore accepts that the disclosure of the information contained within the attachments, and any additional breakdown of fees or costings contained within the Proposal Report, would have an adverse effect on the legitimate interests of the third party companies, and that this part of the test is engaged.

Would confidentiality be adversely affected by disclosure?

62. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it inevitable that this element will be satisfied.
63. With regard to the information contained within the attachments, and any other detailed breakdown of the costs and fees held within the Proposal Report, it is the Commissioner's view that the first three elements of the tests cited at paragraph 22 of this notice have been established.
64. As a result, the Commissioner has concluded that regulation 12(5)(e) is engaged in respect of all the information contained within the attachments, and any other financial breakdown of costings and fees contained within the Proposal Report itself. She has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the disclosure of the information.

Public interest test

65. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
66. The council confirmed in its responses to the complainant that the public interest arguments in favour of disclosure are '*transparency and accountability*'.
67. The complainant has stated that it is important that the Proposal Report, together with certain other information (that does not fall within the scope of the request under consideration), is released into the public domain. He states that it will provide the public with a better understanding of '*why Ecclesbourne Glen has been harmed*' but also so that '*potential remedial action to reopen the glen and the footpaths*' can be explored. He refers to the fact that footpaths have been closed for over 6 years as a result of the landslips and that it is important that the public can be reassured that all relevant information is being considered in any decisions that are being made about the area.
68. It is clear that the complainant, and the campaign group he represents, have made some assumptions about what the Proposal Report contains. He refers to the belief that it may be the concluding part of the Coffey 2 investigation. However, if there is public uncertainty about the purpose of the Proposal Report, whilst the disclosure of its contents, and the

attachments, in full would provide for complete openness and transparency and provide the complainant with answers to a number of questions this, in isolation, would not necessarily be sufficient justification for its disclosure.

69. In the council's responses to the complainant it set out a number of arguments in support of its decision to withhold the information. These primarily relate to the effect that disclosure would have on the site and its owners, and are set out in paragraph 12 of this decision notice.
70. The Commissioner is mindful that the companies who provided details of the costings and their bids for the work will be negotiating terms of similar contracts with other parties. Should the breakdown of how they came to their estimate, and the terms of their service, be released, it could affect their position and put them at a disadvantage. The Commissioner believes that, in the circumstances of this case, this particular factor carries some significant weight.
71. The Commissioner has found it hard to see what value there would be in releasing the full breakdown of the estimates of the costings, or the details of how each company proposed to carry out the work. As far as she is aware, the council did not instruct the relevant companies to carry out the work set out in the Proposal Report, so there was no impact on the public purse and there was no liability undertaken by the council that could then come under further scrutiny. Whilst the quotes would have been of some use to the council when deciding what action to take, and how much it would cost, it is difficult to see what value this information would be to the public in this particular instance, should it be disclosed; however, the information could be of value to competitors of the companies who submitted the estimated costs.
72. The Commissioner has taken into account the fact that the council has already released a figure relating to the estimated costs of carrying out the proposals. This, she believes, would go some way in satisfying any public interest in knowing the impact that carrying out the study would have had on the public purse. Revealing details of how either company came to these final costings by providing the quotes would provide little value as far as the Commissioner can see. It could, however, cause real and significant detriment to the companies who provided the estimates.
73. Given the above, the Commissioner has decided that, in this particular instance, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in maintaining the exception. She is therefore satisfied that the council was correct to withhold the quotes and details of any breakdown of the costs and fees held within the Proposal Report in this instance.

Procedural matters

74. The complainant has requested that the Commissioner also consider the general handling of his request by the council.
75. Regulation 14(2) of the EIR states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
76. The complainant made his request to the council on 5 July 2018 but did not receive the council's refusal notice until 16 October 2018. The council has provided a number on reasons for the delay in dealing with this, and a number of other requests relating to similar issues. In particular, it has stated that it was unable to respond to any requests that concerned information that was likely to be relevant to two separate appeals that only reached conclusion in March 2018 and April 2018.
77. However, this request was submitted after the conclusion of both the appeals referred to by the council. Whilst the Commissioner accepts that it was likely that, at the time of the receipt of this request, the council was still working through a number of other requests that had been put on hold because of the appeals, this would not, under EIR, provide adequate justification for the council's failure to respond to the request within the relevant timescales. As a result, the Commissioner is satisfied that the council has breached regulation 14(2) of the EIR.

Right of appeal

78. 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

79. 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.

80. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF