

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 May 2020

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

Decision (including any steps ordered)

1. The complainant has requested correspondence that relates to a Planning Contravention Notice (PCN) issued by Hastings Borough Council (the council).
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) as its basis for withholding the requested information, and the public interest rests in favour of maintaining this exception.
4. However, the Commissioner has found that the council has breached regulation 14(2) by failing to issue a refusal notice within 20 working days. In addition, the council has also breached regulation 11(4) by failing to provide its internal review response within the required 40 working days.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 30 November 2016 the complainant wrote to the council and requested information in the following terms:

'A Planning Contravention Notice (attached) was issued against Rocklands concerning issues on the lower slopes on the 08/10/2014.

We believe that Rocklands responses to this PCN are relevant to issues affecting stability and drainage on the lower slopes.

They are also relevant in establishing when the unauthorised works on the lower slopes were carried out by Rocklands.

It is in the public interest that this information be released as it is pertinent to the ongoing landslide that has closed Ecclesbourne Glen. This public interest outweighs any issues of confidentiality.

Please provide us with a copy of the response made by Rocklands to this PCN. '

7. On 6 January 2017 the council responded to the complainant advising that the information that he had requested was exempt from disclosure under regulation 12(5)(e) of the EIR. The council stated that when making this decision it had given consideration to the following:

- *Is the information commercial or industrial*
- *Is the information subject to confidentiality provided by law*
- *Is the confidentiality protecting a legitimate economic interest*
- *Would disclosure adversely affect the confidentiality*

8. The council advised the complainant that it believed that the disclosure of the information was likely to have an adverse effect on the economic interests of the owners of the relevant site. It went on to confirm that it had also considered the public interest test and that it believed the factors in favour of disclosure to be '*transparency*' and '*accountability*'. The factors the council regarded to be against disclosure were as follows:

1. *If the information is disclosed it could be used to seek harm on the owners commercial interests*
2. *The release of this information could lead to further harassment to the owners causing undue upset and worry.*
3. *Were such information disclosed, then it could be used by competitors and potential purchasers to the owners financial detriment.*
4. *Maintaining commercial confidences.*

9. On 14 January 2017 the complainant requested an internal review. The council's response on 10 April 2019 stated the following:

'The subject of Rocklands Caravan Park and Ecclesbourne Glen has been ongoing for the past 5 years. Hastings Borough Council has provided you with information that has been requested subject to redaction and exemptions/exceptions.

You have requested copies of responses made by the owners of Rocklands Caravan Park in connection with a planning contravention notice dated 8 October 2014, this information has been refused as it also consists of correspondence with GVA the owners agents, which in the past has been refused. The owners of Rocklands Caravan Park do not want any correspondence released into the public domain as this would cause harm to their economic interests. In addition to this, he requested information is of a similar nature to that which was discussed and determined in an appeal hearing EA?2017/0084-Hastings Borough Council vs Information Commissioner dated March 2018, the causes of harm was also fully discussed and recognised at this tribunal hearing.

Hastings Borough Council will not be disclosing any of this information for the reasons above and previously given.'

Scope of the case

10. The complainant contacted the Commissioner on 16 May 2019 to raise concerns about the way his request for information had been handled by the council.
11. The complainant believes that his request may not have been considered '*on its own merits*' and that the council did not give proper consideration as to how the disclosure of the information would cause harm to the economic interests of the site owners. He states that the council has also failed to demonstrate that it would lead to '*further harassment*' as claimed, or that it could '*lead to financial detriment by competitors.*' In addition, the complainant has argued that, given the information which is already in the public domain, the details he has requested would have no further effect on the site business.
12. The Commissioner considers the scope of her investigation to be whether the council is correct to have withheld information in response to the complainant's request. She will also 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?

13. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition is 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...'
14. 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.
15. The Commissioner notes that the withheld information relates to decisions regarding planning, specifically an alleged contravention of planning. She has considered whether this information can be classed as environmental information, as defined in Regulation 2(1), and she has concluded that it can for the reasons given below.
16. In this case the subject matter of the withheld information relates to correspondence sent to the council about matters that are directly connected to the land/landscape. It contains details which could determine or affect, directly or indirectly, decisions taken by the council.
17. Therefore, the Commissioner considers that it is environmental information that falls within the category of information covered by regulation 2(1)(c). This is because the information can be considered to

be a measure affecting or likely to affect the land/landscape, or a measure designed to protect the land/landscape.

Regulation 12(5)(e)-commercial confidentiality

18. 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.
19. 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 required by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
20. 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.

Is the information commercial or industrial in nature?

21. The withheld information consists of correspondence which was sent by the site owners in response to a PCN issued by the council.
22. When considering whether this stage of the test is met the Commissioner has had regard to the First-tier (Information Rights) Tribunal case of *Hastings Borough Council v IC EA/2017/0084*¹ (the Tribunal case).
23. The Tribunal case gave consideration to information contained within an engineer's report (the Coffey 2 Report) which had, in part, been withheld by the council. This report contained information about the landslip which had affected both the site and Ecclesbourne Glen. The Tribunal accepted that part of the Coffey 2 Report could be linked to

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 which was contained in two other technical reports that had been provided by the site owners to the council with an expectation that they would be treated in confidence.

24. 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. It 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.'

25. It is the Commissioner's understanding that a PCN is served when it appears that a breach of planning control may have occurred and information is required to decide what, if any, action is required. The information that has been withheld represents the site owners' submissions to the council in response to the details set out within the PCN.
26. The Commissioner is satisfied that as the information relates to a PCN, it is not unreasonable to conclude that it is likely that it will also relate to some form of planning restriction, or consent, on the land or property at the site. Any decisions made about the use of the land, or property, will have an effect, in some way, to the site business, and the costs and expenditure relating to this. Given this, the Commissioner is satisfied that the descriptions set out in the Tribunal case of what is a '*commercial piece of information*' should be extended to the information that has been withheld in this case.
27. The Commissioner therefore concludes that the information that has been withheld can be considered to be commercial for the purposes of the EIR.

Is the information subject to confidentiality provided by law?

28. 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.
29. 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.
30. The information contains representations made to the council by the site owners in response to the PCN. The Commissioner therefore considers that the information, in the main, is not trivial.
31. The Commissioner is aware that the regulations that relate to planning allow for certain information to be made publicly available. This is to provide for openness, fairness, and transparency in the processes which are followed and increase public confidence in the decisions that are reached. However, this does not extend to all that information held about every planning matter and would not, ordinarily, extend to negotiations between the relevant parties about a potential planning contravention.
32. The council has provided evidence that it was not within the site owners expectations that the information which was contained within the relevant correspondence would be disclosed.
33. In paragraph 24 of the Tribunal case reference is made to '*implicit duties of confidence being the norms of many situations.*' It is the Commissioner's view that the confidentiality expected between parties in relation to certain aspects of the planning process provides for a more open, free and, in some cases, frank and honest discussion and this makes for a more effective process.
34. The Commissioner is satisfied that there would have been a reasonable expectation by all relevant parties that, in the circumstances of this case, the withheld information would be treated in confidence. In addition, she does not regard it to be the case that the duty of confidence which existed whilst the negotiations about the PCN were ongoing has diminished in any way with the passage of time.
35. The Commissioner therefore concludes that the withheld information that is being considered within this decision notice is not trivial in nature, and it has the necessary quality of confidence. She has therefore gone on to consider whether the third criteria is met in relation to the withheld information.

Is the confidentiality required to protect a legitimate economic interest?

36. 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.
37. The Commissioner considers 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.
38. The Commissioner considers paragraph 27 of the Tribunal case to be pertinent to her consideration of this stage of the test. This stated 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.'
39. The Commissioner regards it to be the case that the withheld information directly relates to the underlying aim to '*reach an agreement on site regulation*' that the Tribunal regarded to be of some importance in its consideration of the application of regulation 12(5)(e). Whilst in the Tribunal case it was licencing regulations that were of relevance, the Commissioner is satisfied that the same principle can be applied to the planning regulations which are of relevance to the information currently under consideration.
40. The Commissioner has taken into account the time that passed between the time that the negotiations took place between relevant parties about the PCN (2014) and the date of the complainant's request (2017) and has considered whether the commercial confidentiality which was required to protect the site's legitimate economic interest would still apply. In this particular instance, the Commissioner is satisfied that the passage of time does not change the position in relation to this factor.
41. The council has made reference to alleged harassment caused by a particular campaign group and the detrimental effect that this has had on the site owners and their business. It regards this to be a factor to support its decision to withhold the requested information. The

Commissioner is aware that the campaign group refutes these claims of harassment.

42. The Commissioner does not regard it be necessary to consider whether the allegations of harassment are valid or not. However, she is of the view that there is enough evidence to indicate that some of the publicity relating to the landslips and the site has presented the site in a negative light. That being said, negative publicity does not necessarily provide sufficient grounds for withholding the information. Such publicity may be warranted, it may not; that is not the issue which is to be determined by the Commissioner. It is only considered to be of relevance in the context of whether the release of the withheld information would cause harm to the legitimate economic interests of the site owners.

43. The Commissioner has considered the following comments by the Tribunal:

'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.'

44. Having taken all factors into account, the Commissioner is satisfied that there is sufficient evidence for her to conclude that, despite the time that has passed since the negotiation about the PCN took place, there is still a realistic possibility that the disclosure of the withheld information would harm the legitimate economic interests of the site owners. In addition, she 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.'*

45. The Commissioner therefore concludes that the third part of the test as set out in paragraph 19 of this decision notice is met.

Would the confidentiality be adversely affected by disclosure?

46. Although this is a necessary element of the exception, should the first three tests set out in paragraph 19 be met, the Commissioner considers it inevitable that this element will also be satisfied. In her view, 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

47. 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 the requested information outweighs the public interest in maintaining the exception.
48. When carrying out the test the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
49. In this case, the council states that it considers the factors in favour of disclosure to be transparency and accountability. The complainant has argued that, given the information which is already in the public domain, there is no justification in the council's claim that disclosure would have a detrimental effect to the site owners. He argues that it is important for the public to have a full understanding of any factors which may relate to, or have an affect on, the area of land in Ecclesbourne Glen which was damaged by a landslip, and the stability of that land.
50. The Commissioner agrees with the complainant that there is a strong public interest in understanding the causes of the landslips and the future management of the land. She also recognises that there has been some public concern about the operation and management of the site itself.
51. The Commissioner appreciates that certain members of the public may have strong views on matters relating to the site, and the landslips, and she notes that, rightly or wrongly, there appears to be a lack of trust between parties about how some matters have been dealt with. This has consequently led to a large number of information requests being submitted to the council.
52. However, when considering the important factors of transparency and accountability, the Commissioner regards it to be pertinent to note that information about Ecclesbourne Glen, the landslips/ land stability and the site has been placed in the public domain. This has provided a good understanding of what information is held by the council about the potential causes of the landslips, and the options available for the future management of the affected land. There is also planning information (including planning applications and permissions) which relate to the site that is publicly available. In this instance, the complainant also appears to have a copy of the actual PCN which was issued.
53. Whilst certain parts of the planning process should be open and transparent and should provide for matters to be subject to public scrutiny, the Commissioner believes some importance must be placed on allowing parties to be able to communicate in confidence in respect of

certain aspects of the planning process. It is, in her view, an intrinsic part of the process and if this were not possible it would undermine the planning process and affect the public authority's ability to fulfil its statutory obligations effectively. The Commissioner also believes that whilst it is right and proper that the public are provided with information which will increase their understanding of the causes of the landslips and any remedial action which is to be taken, this does not provide a right of access to all the information held by the council about the site and its business. The site owners right to privacy is also an important factor for consideration.

54. The Commissioner accepts that the arguments for transparency and accountability carry some weight in support of disclosure. However, 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.
55. Taking into account all relevant factors, the Commissioner is satisfied that the disclosure of the requested information would not be in the public interest. The harm disclosure would cause to the site owners weighs the balance heavily in favour of withholding the information in this instance. Given this, the Commissioner concludes that the council was correct to have withheld the relevant information.

Procedural matters

56. The complainant has requested that the Commissioner also consider the general handling of this request by the council.
57. 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.
58. Regulation 11(4) requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.
59. The council has stated that it has had to deal with a number of requests about the landslip, the Glen and the site and that this has put a considerable strain on what are already limited resources. The Commissioner is also aware that the council placed a number of requests it had received 'on hold' pending the Tribunal case outcome and also an appeal submitted against a site licence issued; these only came to conclusion in March 2018 and April 2018 respectively.

60. The Commissioner appreciates that the council was in receipt of a high number of requests about the landslips, the Glen and the site and that this would have placed some burden on its resources.
61. However, these arguments are not sufficient for the Commissioner to be able to conclude that the council has met its obligations under the EIR in relation to its handling of this request. It is of particular concern that the internal review response was provided a year after the conclusion of the two appeals, and over two years after the complainant's internal review request.
62. In this instance the complainant submitted his request on 30 November 2016 and the council provided its response on 6 January 2017. As the council failed to provide this response within the prescribed 20 working days, the Commissioner must find that the council has breached regulation 14(2) of the EIR.
63. In addition, the complainant submitted his internal review request on 14 January 2017, but the council did not provide its response until 10 April 2019. Given this, the Commissioner also finds that the council has breached regulation 11(4) of the EIR.

Right of appeal

64. 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

65. 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.
66. 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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