

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 May 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about ideas submitted to Hastings Brough Council (the Council) for community projects on which to spend money awarded through the Towns Fund. The Council refused to disclose the information, citing regulations 12(5)(e) (Confidentiality of commercial or industrial information) and 12(5)(f) (Interests of the person who provided the information) of the EIR.
2. The Commissioner's decision is that the Council has not demonstrated that it was entitled to rely on either regulation to withhold the requested information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information. In doing so it should redact personal data, in accordance with regulation 13 (Personal data) of the EIR.
4. 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 FOIA and may be dealt with as a contempt of court.

Background

5. Hastings is one of 101 towns across England selected to receive financial support from government through the Towns Fund. The overarching aim of the Towns Fund is to drive the sustainable economic regeneration of towns to deliver long term economic and productivity growth¹.

6. During 2020, the Council invited the public to submit suggestions for local projects on which funding could be spent:

“We launched an open call for proposals and ideas over the summer of 2020 through an Expression of Interest (EOIs) form. We deliberately designed the form to enable easy access for a resident with just something to say or an organisation with a more developed idea. In response, we received 155 applications, which ranged from comments, one-line project ideas to more well-developed proposals. Every project proposal received feedback and engagement on their submission, whether their submission helped influence our vision or was moved on to the next phase of assessment. We now have some individual residents as well as organisations, businesses and investors who are in a position to see their project ideas become a reality.”²

7. Following the consultation, a board (made up of businesses, business and community representative organisations, the public sector and other partners committed to improving the town) drew up a plan which was submitted to government on 21 January 2021. The plan detailed how the Council proposed to spend the funding. On 8 June 2021, the Town Investment Plan was agreed and £24 million was awarded to Hastings from the Towns Fund.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926422/Towns_Fund_further_guidance.pdf

2

https://static1.squarespace.com/static/5f7f010070f9e842586da8d6/t/6022b5257b4c1d2bfb9da3ec/1612887351916/Hastings_Town+Investment+Plan.pdf

Request and response

8. On 7 December 2020, the complainant wrote to the Council and requested information in the following terms:

"The Town Deal prospectus requires publication of the Borough Council proposals for spending of the support funding allocation of £173029. "2.23 The Lead Council should publish the Town Deal Board's governance structure and ways of working, such as a statement for how the board will engage stakeholders and agree decisions over time. Lead Councils should set out how capacity funding will be spent, and how that will support the process of developing a good Town Investment Plan." I couldn't find the information about capacity funding in the reports to or the minutes of the Town Deal Board. (Possibly I have overlooked it). **I should be grateful to receive a copy of any report setting out how the capacity funding was to be spent. I should also be grateful to be advised on what the money has actually been spent (up to the meeting of the Board on 26 November).**

I understand that by the deadline of 25 September a total of 150+ ideas from various sources had been collected and were passed to a working group for assessment and prioritisation. A report on these was made to the Board on 26 November in private session. **I should be grateful to be provided with a list of the 150+ ideas, which organisations submitted the proposals, and the assessment of each made by the working group.** I am happy that where individuals submitted ideas on their own behalf that this is indicated and their names are redacted."

9. The Council responded on 21 January 2021. Addressing the first part of the request, it provided links to published information on its website about how money was to be spent. With regard to the second part of the request, it said that it was not obliged to disclose the information due to the exception at regulation 12(5)(e) (Confidentiality of commercial or industrial information) of the EIR.
10. The complainant requested an internal review on 22 January 2021. The Council provided the internal review on 11 February 2021. It disclosed additional information in respect of the first part of the request. It maintained that regulation 12(5)(e) had been correctly applied to withhold the information described in the second part of the request.

Scope of the case

11. The complainant contacted the Commissioner on 8 June 2021 to complain about the way his request for information had been handled. He disagreed with the Council's decision to refuse the second part of the request (ie a list of the 150+ ideas, which organisations submitted the proposals, and the assessment of each made by the working group). He said about the open call:

"Nowhere was it suggested that submitted ideas could or would be regarded as commercially confidential. That indeed would have been an absurdity since the Government's clear objective was to stimulate a wider public debate of all incoming ideas...It is only at the next stage after the harvesting of ideas that the Town Board would start to prioritise and work up the most promising ideas. Only at that stage, e.g. talking to particular private firms about involvement in possible projects, might considerations of commercial confidentiality apply. I have only requested the list of initial ideas and the assessment criteria used in the initial sifting. I am very happy for the submitters to be anonymised."

12. During the Commissioner's investigation the Council said that in addition to regulation 12(5)(e), the requested information was also excepted from disclosure under regulation 12(5)(f) (Interests of the person who provided the information) of the EIR.
13. The analysis below considers the Council's claims that it was entitled to rely on regulations 12(5)(e) and 12(5)(f) of the EIR to refuse the second part of the request.

Reasons for decision

Is the information environmental information?

14. Environmental information must be considered for disclosure under the terms of the EIR. Regulation 2(1)(c) of the EIR defines 'environmental information' as any information on:

"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 [regulation 2(1)](a) and (b) as well as measures or activities designed to protect those elements."

15. The request in this case is for information on proposed community projects, involving urban regeneration, planning and land use. On this point, the Council's website states:

"The Town Deal funding can only be used for capital projects - such as new or repurposed buildings, places or assets..."³

16. The Commissioner is satisfied that the request is for information on a measure or measures likely to affect the state of soil and land (regulation 2(1)(a)). The Commissioner therefore considers that the Council correctly dealt with the request under the EIR.

Regulation 12(5)(e) – Confidentiality of commercial or industrial information

17. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.

18. However, regulation 12(5)(e) of the EIR states 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.

19. The Commissioner has published guidance on the application of this exception⁴. As the guidance explains, the exception can be broken down into a four-stage test. All four conditions must be satisfied in order for the exception to be engaged:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

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<https://www.hastings.gov.uk/regeneration/towndeal/#:~:text=What%20is%20the%20Towns%20Fund,in%20the%20Town%20Fund%20Prospectus.>

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

20. The Commissioner has viewed the withheld information, which comprises a spreadsheet with various headings, including: "project name", "project proposer", "assessment of project status", "assessment for potential fit with interventions and challenges - impact rating", "comments/notes", "ESSC Comments", "action after assessment" and "If rejection, reason for rejection". 28 of the submitted ideas are marked 'confidential' from a drop down box.

Is the information commercial or industrial in nature?

21. The Commissioner's guidance on regulation 12(5)(e) states that for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The guidance goes on to cite information about planning and development plans for land as an example of information which is commercial in nature.
22. The Council's submissions on this point were as follows:
- "Some of the proposals are for private and public investment in the town centre. Some identify specific investment proposals on specific locations and are business proposals of investment and commercial exploitation."
23. In considering this point, the Commissioner has had regard to the stated purpose of the Towns Fund, which is to drive the sustainable economic regeneration of towns to deliver long term economic and productivity growth. Although not all the proposers come from a business background (nearly half appear to be private individuals simply making suggestions about how their community might be improved), the withheld information as a whole relates to proposals made in pursuit of economic regeneration and growth. He is therefore satisfied that the information relates to a commercial activity.

Is the information subject to confidentiality provided by law?

24. Confidentiality may be imposed on any person by the common law of confidence, contractual obligation or statute. The exception covers information obtained from a third party and information jointly created or agreed with a third party. The exception protects confidentiality owed to a public authority by a third party, as well as confidentiality the public authority owes a third party.
25. In considering whether the information is subject to a common law of confidence, there are two key issues to consider:

- Does the information have the necessary quality of confidence? If the information is not trivial nor in the public domain, it has the necessary quality of confidence. If it has been shared with a limited number of people then it may still keep its quality of confidence, as long as it has not been disseminated to the general public. Even if it is all in the public domain, it is still possible for information to keep its quality of confidence, if it would take time and effort to find and collate it from multiple sources.
 - Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties and any previous or standard practice regarding the status of information.
26. A useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information has been provided to them in confidence.
27. The Council's entire submissions on this point were as follows:
- "We do not have the expressed consent, people have submitted their proposals in good faith under the expectation that their business ideas would not be shared with potential competitors.
- Common law – when submitting their ideas it is the duty of Hastings Borough Council to hold and keep the information confidential. Should the information be shared people/investors may refrain from submitting ideas and engaging with us in the future knowing that their information is not kept confidential."
28. The Commissioner understands that this was an open call for ideas on the spending of the funding. The ideas submitted range from very simple, one-line project ideas on what the Council might do with the funding (eg place more street lighting in location X) to more developed 'shovel-ready' proposals, which were effectively bids for funding by the proposer. The Council has not offered any evidence that assurances of confidentiality were made to those intending to make submissions.
29. The arguments the Council has presented to the Commissioner assume that all the information is of the very highest commercial sensitivity. However, around half of the suggestions submitted were simple, one-line ideas, submitted by individuals who do not appear to have any commercial interest in their suggestion being taken forward. Rather, they appear to be local residents making suggestions about how their community might be improved.

30. When considering whether their suggestions have the necessary quality of confidence described in paragraph 25, the Commissioner has concluded that the information regarding their suggestions is 'trivial', due to its broad nature and lack of detail. That is not to say that it does not have value or that the individual ideas do not merit consideration. However, the suggestions are of a type that anyone with a knowledge of the area might reasonably have made and they lack any working detail as to how they should be put in place. The Commissioner cannot identify anybody who would be commercially disadvantaged by these suggestions being placed in the public domain or that there was an expectation of confidence attached to them by the proposer.
31. Turning to the more 'developed' suggestions, each contains a brief summary of the project aims and, in some cases, how they might be achieved, in broad terms. Of the entries marked 'confidential', the Council has not clarified whether this was its own assessment of the appropriate security marking, or the security marking it was supplied with. In most cases the Commissioner can see little that would merit a security marking of 'confidential', given the brevity and lack of detail set out in the submissions. He has also been able to identify some project proposals which are in the public domain, such as the local press. Such proposals cannot be considered confidential.

Is the confidentiality provided to protect a legitimate economic interest?

32. The confidentiality must be "provided...to protect a legitimate economic interest". The Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011)⁵ that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
33. It is not enough that some harm **might** be caused by disclosure. The Commissioner considers that it is necessary to establish, on the balance of probabilities (ie be more probable than not), that some harm **would** be caused by the disclosure. In order to do this it is

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_\(GRC\)_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_(GRC)_20110104.pdf)

necessary to identify what the legitimate economic interest is that would be harmed, and the nature of the harm.

34. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
35. The Council's entire submission on this point was as follows:

"The fact they have an idea, they are looking to explore and potentially develop that idea. Even if the person maybe unsuccessful with Hastings Borough Council they may wish to pursue funding initiatives elsewhere to exploit the idea financially."
36. Elsewhere in its response to the Commissioner, it stated:

"Adverse effect

As detailed in our internal review Hastings Borough Council received 150+ list of projects, the ideas are the proposers intellectual property and therefore were not completed on the assumption that they would be publicly available for all to view. Furthermore some project proposers may still wish to proceed with their project through other means or funding routes and therefore would wish that information to remain confidential until they have progressed further."
37. All arguments supplied by the Council relate to the interests of third party respondents being affected. The Council has not argued that its own commercial interests would be damaged, despite itself having submitted some suggestions for projects that the funds could be spent on. It has alluded to "people/investors" potentially being less inclined to engage with it in future, due to confidentiality concerns, but it has not provided any cogent evidence that suggests this is a likely outcome of disclosure in this case, or what the impact of this would be on the Council.
38. The Commissioner has considered whether premature disclosure of the information under EIR might have left the Council's deliberations over which ideas to take forward vulnerable to outside interference. It might have been damaging to the Council's commercial interests if it was not permitted a 'safe space' to consider all options. However, he notes that the Council responded to the request on the same day that it made its final submission of

its Town Plan to government. Disclosure of the withheld information at this time would therefore not have interfered with the Council's deliberations over which projects to take forward.

39. Furthermore, the Council has not submitted any evidence from the third parties themselves that disclosing the withheld information would harm their legitimate economic interests, or how they would be harmed. Its arguments appear to be speculative and do not establish a causal relationship between the disclosure of the information under the EIR and harm to any commercial interests.

Commissioner's decision

40. The Commissioner notes that community engagement and openness is at the heart of the Towns Fund process. The Towns Fund guidance states:

"Where possible, communities should be part of originating ideas, setting objectives and visions rather than just giving feedback on proposals that are already some way along. If communities feel heard and are invested in the success of the project(s), this should ultimately help develop a sense of pride and connectivity to place and community."⁶

41. The guidance also asks:

"Feedback: How will you feed back the results of engagement to the wider community and agencies affected, and show the impact this engagement has had".

42. The Commissioner has also had regard to regulation 12(2) of the EIR, which states that a public authority shall apply a presumption in favour of disclosure. The Council's attention was drawn to this in the Commissioner's correspondence.
43. Against this background, the Commissioner considers that the arguments provided by the Council fail to convince that the applicability of the exception has been properly considered. The Council's submissions do not properly address the second and third conditions required to engage the exception and they fail to make clear any causal link between the disclosure of the specific

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926422/Towns_Fund_further_guidance.pdf

information requested and any adverse effect to a legitimate economic interest. Mere assertions, lacking detail and evidence, that in future, "...people/investors may refrain from submitting ideas and engaging with us" and "people have submitted their proposals in good faith under the expectation that their business ideas would not be shared with potential competitors", are not sufficient to show that the exception is engaged in this case.

44. The overall impression the Commissioner has is that the Council has decided that the information as a whole should not be made public and it has sought to apply the exception on a 'blanket' basis in order to facilitate this. It has not shown that it has analysed the submissions individually with a view to establishing the extent to which each one genuinely engages the exception. It is clear to the Commissioner from reviewing the information that the individual residents who have responded to the consultation are unlikely to have commercial interests in their suggestions being taken forward.
45. Drawing on his experience of considering commercially sensitive information, the Commissioner acknowledges that a case might be made for a small amount of the information to be withheld where a proposer's particular business intentions are revealed. However, the Council has been given sufficient opportunity (and guidance) to enable it to make its case for the application of regulation 12(5)(e) and it has failed to do so. The Commissioner explained in his initial letter to the Council that it was responsible for making its own case as to why an exception is engaged and that it had one opportunity to do so before a decision notice would be issued. He provided links to his guidance on the exception and to decision notices on his website, demonstrating his approach to its application. Had the Council properly engaged with the questions put to it, it may have been able to demonstrate to the Commissioner's satisfaction that regulation 12(5)(e) was engaged for at least some of the information. As it is, the final position it outlined was vague and unspecific. It did not persuasively demonstrate a causal relationship between disclosure under the EIR and adverse effect on a legitimate economic interest.
46. The Commissioner cannot speculate or "fill in the gaps" for weak or inadequate submissions and he cannot "second guess" what may or may not be suitable for disclosure. It is not the Commissioner's role to go through voluminous amounts of withheld information to consider non-disclosure exceptions on the Council's behalf.
47. The Commissioner has concluded that the Council has failed to show that disclosure would result in harm to a legitimate economic interest. Since, for regulation 12(5)(e) to be engaged, it is

necessary that this condition be met, he has determined that the exception is not engaged.

48. The Commissioner has not, therefore, gone on to consider the public interest. However, had he done so, he notes that the Council has also failed to provide a meaningful consideration of the public interest test (it merely repeated what it had outlined to the complainant and provided no additional analysis). In the absence of such arguments he finds it unlikely that he would have been able to conclude that the public interest in maintaining the exception was stronger than that in disclosure.

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

49. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 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.

50. The Commissioner's guidance on the exception⁷ explains that its purpose is to protect the voluntary supply to public authorities of information which might not otherwise be made available to them.
51. The guidance also explains that it is helpful to consider a four-stage test, as broken down by the First-tier Information Rights Tribunal in the case of *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273)*⁸:

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https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

- 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 other than under the EIR?
 - Has the person supplying the information consented to its disclosure?
 - Would disclosure adversely affect the interests of the person who provided the information to the public authority?
52. To engage the exception, it is necessary that all four elements of the test are met.
53. The Commissioner's initial casework letter to the Council, asking for its submissions in respect of regulation 12(5)(e) of the EIR, included the following statement:
- "If, when reviewing this matter, you decide to change your response to the request, you may do so...If you decide to apply a new exception, you should inform the complainant of your revised position and let me have answers to the questions in respect of the corresponding exception, which can be found at: <https://ico.org.uk/for-organisations/key-questions-for-public-authorities-eir-2004/>".
54. In its response, and further to its regulation 12(5)(e) submissions, the Council stated the following:
- "Hastings Borough Council would also like to engage Exception 12(5)(f) – 'Interest of the person who provided the information to the public authority' for the reasons set out [sic] below:
- The person/s providing the information has not consented to disclosure
- The person/s 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 public interest in maintaining the exception outweighs the public interest in disclosing the information."

55. These were the Council's only representations in respect of regulation 12(5)(f). They do not answer the specific questions about 12(5)(f) which were linked to in the Commissioner's letter.

Commissioner's decision

56. For substantially similar reasons to those detailed under regulation 12(5)(e), above, and which will not be repeated here, the Council has failed to convince the Commissioner that the applicability of the exception has been properly considered. Specifically, in this case it has not shown how the interests of the providers of the information, who the Commissioner is satisfied are not all pursuing a commercial interest when making their suggestions, would be adversely affected by disclosure, nor has it provided any meaningful explanation of its consideration of the public interest test.
57. Faced with no meaningful attempt by the Council to answer the questions it had been advised it would need to address, it is not for the Commissioner to speculate or "fill in the gaps" for weak or inadequate submissions and he cannot "second guess" what may or may not be suitable for disclosure. It is not the Commissioner's role to go through voluminous amounts of withheld information to consider non-disclosure exceptions on the Council's behalf.
58. The Commissioner has determined that regulation 12(5)(f) is not engaged in this case.

Action required

59. As the Commissioner is not persuaded by the Council's submissions that regulations 12(5)(e) and 12(5)(f) are engaged, the presumption in favour of disclosure is to be applied and the withheld information is to be disclosed.
60. To the extent that the withheld information also consists of the personal data of individual respondents, in accordance with regulation 12(3) (and as specified in the request), that information is to be redacted.

Right of appeal

61. 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

62. 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.

63. 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

Samantha Bracegirdle
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