

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 August 2024

Public Authority: Folkestone & Hythe District Council
Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant requested various information in respect of a planning application within the boundaries of Folkestone & Hythe District Council ('the Council'). The Council provided some information but withheld information in respect of items 1,2,3, 4 and 7 of the request citing regulation 12(3) (personal information), 12(5)(b) (the course of justice) and regulation 12(5)(d) (confidentiality of proceedings) of the EIR. During the course of the Commissioner's investigation, the Council also sought to rely on regulation 12(5)(f) (interests of the information provider) in respect of the information it was withholding under regulation 12(5)(d).
2. The Commissioner's decision is that the Council has not complied with its obligations under regulation 5(1) of the EIR to identify all relevant information, that it was not entitled to rely on regulation 12(5)(d) and has failed to demonstrate that regulation 12(5)(f) is engaged. The Council has however, correctly cited regulation 12(5)(b) in respect of legal advice. In failing to provide its refusal notice within the required timescales, the Commissioner has recorded a breach of regulation 14(2) and a breach of regulation 11(4) as a result of the Council's failure to provide its internal review within the required timescales.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

- Issue a fresh response to the request which complies with regulation 5(1) of the EIR, ensuring that all information held by the Council which falls within its scope has been identified and considered for disclosure.
 - Disclose the information withheld under regulations 12(5)(d) and 12(5)(f) of the EIR with personal information redacted.
4. The Council must take these steps within 30 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

5. On 19 July 2023, the complainant wrote to the Council and requested the following information in respect of particular planning application at Fairfield Court Farm:

"The Planning Application was discussed at the Planning Committee on 11 July 2023. During the discussion [name redacted] and [name redacted] mentioned a number of items that I do not think have been made public. I would therefore like the following information:

1. 1995 Planning Permission.

It was stated that the planning team had received advice on the interpretation of the 1995 wording. The intent of the wording is quite clear that volumes of soil and sand should be restricted to 8000 tonnes a year. I would like copies of any internal or external advice given to and from the planning team and also any internal emails or meeting notes given on the interpretation of the 1995 Permission for this site to include movement of sand and soil or sand on its own or any other aggregate.

Furthermore at the meeting it was stated that the site is a brown field site but the normal definition is difficult to apply here. I would request any correspondence to or from the planning team or meeting notes or emails by the planning team on this site and how and when it determined that this site is now a brown field site.

2. Mansell v Tonbridge

This case was used by the Planning team as a reference for the Planning Committee to consider. I would welcome any legal advice or other advice and information and or correspondence given to the

planning team and any meeting notes or emails as to why it felt this case was particularly relevant.

3. Environment Agency

It has been stated that the EA has confirmed that a waste permit is not required to operate a mixed Soils and sand distribution business as outlined by the applicant. We have not seen the letter or opinion that this is EA's position and therefore I would like a copy of this and any other correspondence or conversation notes since the application was submitted with regard to sand distribution.

It was stated any volume of sand could be brought on site. I understand that if sand is not stored inside a suitable contained covered building, on hard standing with proper drainage it is a health hazard both in spores in the air when continuously blown around and breathed in. I also understand that there are many grades of sand for many different uses and that some sand is particularly toxic when continuously breathed in. With the high winds on the Marsh and seepage into the soil and ditches there could be a risk to the community. Is there any correspondence on this subject or advice obtained from the Council's Health and Safety Officers on Storage requirements and would this limit the volume brought on site.

4. Bund

Mention was made in the meeting as to the pile of waste and the fact that there is 6000 tonnes of waste in the so called bund.

The Planning Appeal confirmed that no planning permission had been given for a bund and that the Certificate of Lawfulness was rejected. The Council should have by now issued an enforcement order for the bund to be removed and I would like a copy of any correspondence in which the waste/bund is referred to.

5. Highways

It was stated that KCC Highways are happy with the proposal even though there could be an increase in traffic. Highways did state that it falls below the criteria for them to be involved. I would like a copy of any other correspondence with Highways both to indicate that additional information was given to them and their response.

In addition it was mentioned in the meeting that the proposed sand business would generate 20 HGV lorries a day. I would welcome any notes indicating how this was calculated as it appears extreme.

In the applicants Traffic Statement it indicates the proposed houses would generate 12 cars/vehicle trips a day and that the Council had confirmed this calculation. I would welcome any correspondence or meeting notes where this is mentioned and how the council confirmation is calculated to arrive at this figure.

6. Natural England

I would like the applicants response to Natural England's questions as this was not posted on the Planning Portal.

7. Discussions with the applicant

It was mentioned that the Planning Officers have been in discussion with the applicant over a 12 month period. I would welcome copies of any correspondence (or notes of conversations) with the applicant.

I suggest that this information should date from 1st January 2022."

6. The Council responded on 26 October 2023. It stated that "...the council holds the information you requested with regard to questions 1, 2, 3 in part, 4 and 7." However, the Council withheld the information in full citing regulations 12(3), 12(5)(b) and 12(5)(d). In respect of item 5, the Council provided some information and drew the complainant's attention to the link on the Planning Application to the Traffic Generation Statement. The Council also provided an explanation and stated some of the requested documents were on its website.
7. Following an internal review the Council wrote to the complainant on 26 April 2024. It clarified its position in respect of its reliance on personal information and confirmed that it was upholding its original decision to rely on regulation 12(5)(b) and 12(5)(d) of the EIR.

Scope of the case

8. The complainant originally contacted the Commissioner on 2 March 2024 to complain that they had not received an internal review. Following receipt of the internal review, the complainant contacted the Commissioner on 4 May 2024 to confirm that they remained dissatisfied, and outlined the nature of their complaint.
9. The complainant considers that not all relevant information has been provided, and does not accept that Legal Professional Privilege (LPP) applies to the legal advice falling within the scope of their complaint. In respect of the Council's reliance on regulation 12(5)(d) the complainant

considers that the confidentiality afforded to pre-application documents does not extend to documents created once the planning application is submitted.

10. The complainant subsequently confirmed to the Commissioner that they accepted the Council's refusal to provide personal information. This will not therefore form part of the Commissioner investigation.
11. During the course of the Commissioner's investigation, the Council also cited regulation 12(5)(f) for the information it was refusing under regulation 12(5)(d).
12. The scope of the Commissioner's investigation is to consider whether the Council has complied with its obligations under regulation 5(1) to either disclose or consider for disclosure, all information falling within the scope of the request, and to consider the Council's reliance on the exceptions cited in paragraph 1 of this notice.

Reasons for decision

Regulation 5(1) – duty to make available environmental information on request

13. Under regulation 5(1) of the EIR, a public authority must make environmental information available on request if it holds the information and it is not subject to an exception.
14. In scenarios where there is some dispute between whether the public authority holds additional relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
15. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any additional information which falls within the scope of the request (or was held at the time of the request).
16. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
17. The Commissioner notes that the complainant considers that the Council has not provided all relevant information falling within the scope of their request. In particular, in their post internal review correspondence to

the Council, the complainant queried whether they had received all correspondence with Kent Highways and the Environment Agency (EA). They added that they did not seem to have the full exchange with them. They commented that in the Planning Committee meeting (11 July 2023) it was stated that there would be a significant reduction in traffic, however, Highways stated that there would be no change. The complainant was therefore looking for some correspondence that would verify the statement by the Planning team.

18. The complainant also pointed out that at this meeting it was also stated that "the operator under the fall proposal could distribute soil without a permit." However, the Environment Agency said that this is highly unlikely. The complainant added that they were not sure whether there is further correspondence to verify the statement made or an explanation as to why this response from the EA was not included in the portal at the time.
19. The Commissioner asked the Council to provide full details and evidence of its searches, particularly in respect of Kent Highways and the EA.
20. The Council said that it had conducted reasonable and proportionate searches for the information. It added that officers request information from teams, explaining what is required and asking for all information relating to the subject to be supplied to them. It further stated that information officers exercise their judgement in determining what information falls within the scope of the request and then liaise with the relevant officer to agree what will be withheld.
21. The Council further informed the Commissioner that all information relating to this request is held electronically on either the Council's network drive or its email system, by the relevant teams. It was supplied 'whole' as 'raw' data to the information governance team. The Council added that no particular search terms were required as all data related to the case is held and filed electronically by the relevant teams and all emails related to the subject are identifiable through the subject line and recipient.
22. The Council confirmed that to the best of its knowledge, no information had been deleted or destroyed. It said that there is a seven year retention period for electronic data.
23. The Commissioner has considered the details of the search outlined by the Council. He considers it somewhat generic; merely outlining what happens when it receives a request for information under the EIR or FOIA. There were no details regarding which team or teams the Council consulted or which individuals. Additionally, the Council did not

specifically address the complainant's concerns regarding the information relating to Kent Highways and the EA.

24. Whilst the Council may well have conducted a reasonable and proportionate search, the Commissioner cannot be satisfied that this was the case, and therefore has no option but to conclude that it has not complied with its obligations under regulation 5(1) of the EIR.

Regulation 12(5)(b) – the course of justice

25. Regulation 12(5)(b) of the EIR states that information is exempt if disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to, information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
26. The information withheld under this exception is three separate documents and applies to items one, two and four of the complainant's request.
27. The Council has confirmed that it is withholding the information under this exception on the basis of LPP. LPP is not defined under the FOIA/EIR or in any other legislation but is a common law concept shaped by the courts over time.
28. LPP is intended to protect the confidentiality of communications between a professional legal advisor and their client.
29. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA* (EA/2007/0136; 8 August 2008).
30. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

31. The Council confirmed that it considers the information to attract 'advice' privilege'. The Council also confirmed that the information remains confidential
32. The Council said that the information constitutes legal opinions and other confidential communications between professional legal advisors engaged externally by the Council for the purposes of seeking and giving legal advice in relation to a potential breach of environmental legislation.
33. The Commissioner is satisfied that the withheld information constitutes confidential legal advice provided by a legal adviser to their client. This means that this information is subject to LPP.
34. The Commissioner is aware of no evidence suggesting that this privilege has been waived.
35. The exception provided by regulation 12(5)(b) of the EIR is therefore engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

Public interest test

36. The Council has acknowledged that there will always be a public interest in transparency and openness.
37. However, the Council considers that the public interest in this case is limited as it is only a small scale development and believes that the balance of public interest is weighted in favour of maintaining the exception.

The Commissioner's conclusion

38. The Commissioner he has taken into account the presumption in favour of disclosure required by Regulation 12(2) of the EIR. Additionally, the Commissioner also acknowledges that there will always be a general public interest in transparency and accountability. In this case, the Commissioner accepts that disclosure would provide the public with information to allow them to better understand decisions the Council has taken in relation to the development in question. However, this has to be weighed against the very strong public interest arguments in favour of maintaining a claim of LPP.
39. LPP is a fundamental principle of justice and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.

40. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy¹ case when it stated that:
- “...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest... It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”.
41. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a significant number of people, or evidence of misrepresentation, unlawful activity or a lack of appropriate transparency. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed.
42. The Commissioner also notes that at the time of the request, the legal advice was recent and directly related to an on-going issue regarding the development in question.
43. The Commissioner is therefore satisfied that in all the circumstances of the case, the balance of the public interest favours the exception being maintained.
44. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated above, in this case, the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

¹ Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

Regulation 12(5)(d) – confidentiality of proceedings

45. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority, where such confidentiality is provided by law.
46. The engagement of the exception rests on three conditions being met:
- What are the proceedings?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
47. In his guidance on regulation 12(5)(d)², the Commissioner interprets 'proceedings' as possessing a certain level of formality.
48. The Council has argued that the information withheld under this exception relates to a confidential pre-planning application advice service offered by the Council for a fee. The Commissioner understands that where a Council receives pre-application advice requests, officers provide an impartial assessment of the proposals and indicate any potential policy conflicts or shortcomings with the application as well as areas where further information may be required.
49. The Commissioner has previously acknowledged in a range of decisions that such a process represents a 'proceeding' for the purposes of engaging regulation 12(5)(d).³
50. The second condition requires that this confidentiality must be provided by law. The Council has explained that the pre-application advice is confidential and subject to a fee. It considers that breach of this confidence would undermine the integrity of the Council and prejudice

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-d-confidentiality-of-proceedings-environmental-information-regulations/>

³ See for example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028767/ic-264856-g0v2.pdf>
<https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028093/ic-261144-d2h6.pdf>
<https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027925/ic-253477-s4d1.pdf>

the future working relationships with both residents, applicants and future developers.

51. The Commissioner acknowledges that the pre-application advice process is a voluntary process rather than a statutory function. It is intended to assist developers to identify and address any potential issues early on during the planning process, prior to submitting a planning application for formal consideration. While the planning application and its supporting documents are made available for public consumption and consultation, pre-application advice does not form part of the planning application process or outcome (the applicant may choose to take the advice or not). It is regarded as confidential by both the Council and planning applicants.
52. The complainant has disputed that regulation 12(5)(d) applies to the information as their request was for information created after the original application had been submitted.
53. The Commissioner notes that the planning application was submitted on 4 October 2021, and the complainant's request was for information from 1 January 2022. Having viewed the withheld information under this exception, the Commissioner is mindful that with the exception of a few emails, it post dates the submission of the planning application.
54. The Commissioner considers it pertinent that the complainant highlighted this to the Council in their request for an internal review. However, the Council did not address this point in its internal review, nor did it provide an explanation in its correspondence with the Commissioner regarding why the confidentiality afforded to the pre-application documents should continue once the planning application was submitted.
55. The Commissioner is not therefore persuaded that the confidentiality afforded the pre-planning application process applies to the information withheld under this exception, and has concluded that it does not meet the second condition necessary to engage regulation 12(5)(d). The Commissioner has not therefore gone on to consider the third condition or the public interest test and has no option but to conclude that regulation 12(5)(d) is not engaged for this information.
56. As the Council retrospectively applied regulation 12(5)(f) to the same information, the Commissioner has now gone on to consider whether the Council was entitled to refuse the information under this exception.

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

57. 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 -

(i) the interests of the person who provided the information where that person -

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

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

(iv) has not consented to its disclosure;”

58. As with all the exceptions in regulation 12(5), the threshold necessary to justify non-disclosure because of adverse affect is a high one. In the case of regulation 12(5)(f), the adverse effect must be on the interests of the person who voluntarily provided the information.

59. In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party’s interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause harm.

60. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this a higher test than ‘might adversely affect’ which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party’s interests.

61. Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided, however there may be instances where it may be necessary to consult the information provider at the time of the request.

62. Whilst consultation with the person who provided the information is encouraged in the majority of cases, the Commissioner recognises that there will be instances where, due to its knowledge of the particular circumstances of the case and its overall experience of the context in

which the information was provided, the public authority will be able to explain the harm to the provider without such a consultation.

63. However, in all cases, the onus is on the public authority to demonstrate how disclosure of the requested information would lead to the adverse effect, based on the circumstances at the time of the request.⁴
64. In applying the exception, the Council stated the following:

“Pre-planning advice requests are not planning applications and are not subject to the normal formal reporting of plans that planning applications are. There is a cost to the applicant for receiving pre-app advice from the Council, and due consideration must be given to the fact that pre-app advice is in confidence. Breach of this confidence would undermine the integrity of the Council and prejudice interaction and future working relationships with both residents, applicants and future developers.

As a Council we will always wish to demonstrate our commitment to upholding standards and regulations across the district as well as maintaining good working relationships and open communication with residents, applicants and developers. The prejudice to this relationship would be both reputationally damaging and could lead to financial damage as a result of putting off future developers / applicants.”

The Commissioner’s conclusions

65. As confirmed in paragraph 58 of this notice, the Commissioner would point out that the adverse effect identified must be to the individual who provided the information, not to the Council. He would also point out that even if the adverse effect to the Council referred to above was a valid argument in support of this exception, it is entirely generic with no details relating to this particular request. Additionally, it has already been established earlier in this notice (paragraphs 53 and 54) that the information does not constitute pre-planning advice as it post-dates the date the application was submitted.

⁴ This is confirmed in the code of practice issued under regulation 16 of the EIR:
https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

66. The Commissioner would also wish to highlight that whilst ordinarily he will allow a public authority one opportunity to provide its full and final arguments in support of any exceptions relied on, due to the particular circumstances the Council found itself in, the Commissioner worked with the Council in the hope of ensuring that its response would be sufficient for him to make an informed decision regarding the withheld information.
67. The Commissioner is therefore disappointed that the Council does not appear to have taken on board his advice, as it is self-evident from the Council's arguments alone that it has not demonstrated how disclosure would result in an adverse effect to the information provider. It is also not the Commissioner's duty to generate arguments on the Council's behalf, and he does not consider it appropriate to provide the Council with further opportunities to generate arguments when it has already been given ample opportunities to set out its position.
68. In view of the above, the Commissioner has concluded that the Council failed to demonstrate that regulation 12(5)(f) is engaged. He has not therefore gone on to consider the public interest test.

Procedural matters

Regulation 14 – Refusal to disclose information

69. Regulation 14 of the EIR concerns the refusal to disclose information and regulation 14(2) states that:

"The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request."

70. In this case, the request was submitted to the council on 19 July 2023, but the Council did not issue its response until 26 October 2023. Its response therefore fell outside of the required timescale by a significant degree. The Commissioner would point out that this is an unacceptable delay particularly when the complainant has referred to the time sensitive nature of their request. He has therefore recorded a breach of regulation 14(2) of the EIR.

Regulation 11 – Representations and reconsideration

71. Regulation 11(4) of the EIR requires a public authority to complete a reconsideration (internal review) of its response within 40 working days of being asked to do so.

72. The complainant requested an internal review on 27 October 2023. However, the Council did not provide its internal until 27 April 2024.
73. In failing to undertake an internal review, the Commissioner has recorded a breach of regulation 11(4) of the EIR.

Right of appeal

74. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF