

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 26 March 2024

Public Authority: Thanet District Council
Address: Cecil Street
Margate
Kent
CT9 1XZ

Decision (including any steps ordered)

1. The complainant requested information about the proposal for the extension of Brett Aggregate's operations at the Port of Ramsgate. Thanet District Council (the Council) withheld the information requested under regulation 12(5)(e) (Confidentiality of commercial or industrial information) of the EIR. During the course of the Commissioner's investigation, the Council also sought to rely on regulation 12(5)(f) in relation to the request.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(e) to the request. The Commissioner does not require any steps to be taken.

Request and response

3. On 9 April 2023 the complainant wrote to the Council and requested information in the following terms:

"Paragraphs 6.2 of Agenda item 4 which will be discussed at the council's Cabinet meeting on 2 March 2023, states that the council has received a proposal for the extension of Brett Aggregate's operations at the Port of Ramsgate. Please provide me with a copy of these proposals.

Please also advise me if the proposals will have to be considered and approved by Thanet or Kent County Council planning officers or their respective planning committees”.

4. The Council responded on 10 May 2023 and stated that it considered the information held relating to the request was exempt under regulation 12(5)(e) of the EIR.
5. On 17 August 2023 the complainant requested an internal review of the Council’s refusal to disclose the information requested. They submitted detailed representations to support their view that regulation 12(5)(e) was not applicable.
6. The Council provided the outcome of its internal review on 31 August 2023 and upheld its decision that regulation 12(5)(e) applied to the request.

Scope of the case

7. The complainant contacted the Commissioner on 5 December 2023 to complain about the way their request for information had been handled.
8. The scope of the Commissioner’s investigation into this complaint is to determine whether the Council has correctly withheld the information requested.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
10. The Commissioner has viewed the withheld information in this case, which comprises an email from Brett Aggregates (BA) to the Council and a draft plan relating to a proposal/expression of interest to extend its operations at the Port of Ramsgate (the Port). The Commissioner is satisfied that any proposal to extend BA's operations at the Port of Ramsgate is a measure likely to affect both the state of the environment (regulation 2(1)(a)) and factors likely to affect elements of the environment (regulation 2(1)(b)). As such, the withheld information is therefore environmental information by virtue regulation 2(1)(c) of the EIR.

Regulation 12(9) – information on emissions

11. Regulation 12(9) EIR states that, "To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g)."
12. The complainant considers that the activities currently undertaken by BA at the Port already result in emissions including particulate matter, gases and fumes into the atmosphere, noise and contaminants released into the sea or other water bodies. The complainant considers that any proposal for BA to increase its activities will have an effect on these emissions. In light of this, the complainant suggested that some, if not all of the information requested constitutes information on emissions, and as such the Council would be unable to rely on regulation 12(5)(e) to withhold it.
13. Whilst the Council acknowledges that, if the proposal to expand operations were to be implemented, it may have an effect on emissions, the information requested in this case, which comprises one email and a

draft concept plan does not constitute information on emissions. It does not include any estimate of any intended emissions or any measures to reduce emissions. As such, the Council's position is that none of the withheld information constitutes information on emissions.

14. Regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions.
15. This interpretation is in line with European Directive 2003/4/EC, Article 4(2) which states that "...Member States may not by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."
15. This interpretation is also supported by the Advocate General's Opinion in a case concerning Article 4(2) of the Directive, *Ville de Lyon C - 524/09*. Advocate General Kokott found that information on the sale of emission allowances was environmental information because licence holders are permitted to release substances and transaction details would allow the public to ascertain who has the right to produce emissions.
16. However he also found that it was doubtful that, "restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emission in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation". He went on to say that if the exception regarding confidentiality of commercial or industrial information could not apply to information indirectly linked with emissions then the scope of that exception would be severely restricted as most environmental information can be linked indirectly with emissions.
17. The Commissioner concurs with the Council's assessment and is satisfied that information relating to a proposal to expand operations at the Port is not information which is directly linked to emissions. In light of this, the Commissioner is satisfied that regulation 12(9) does not apply in this case.

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

18. Regulation 12(5)(e) states 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. As set out in the Commissioner's guidance¹, the exception can be broken down into a four-stage test. All four elements are required 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.

Is the information commercial or industrial in nature?

20. For information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.

21. The Port is owned and operated by the Council. BA is a major commercial customer at the Port and its plant at the Port supplies ready mixed concrete for commercial and small load, domestic projects.

22. The Council holds limited information relating to the request, given the matter is at a very early stage of the process and the Council has not concluded that BA's plans meet the Councils' requirements under its Best Value Duty. The withheld information comprises an email and draft concept plan relating to BA's expression of interest to expand its aggregate operations at the Port.

23. It is the Commissioner's opinion that the withheld information relates to a commercial activity, that being the use of Council-owned facilities by BA, for profit. He is therefore satisfied that it is commercial in nature.

Is the information subject to confidentiality provided by law?

24. In considering this matter the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-e-commercial-or-industrial-information/>

25. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
26. The Commissioner considers that confidence 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.
27. The Council advised the Commissioner that BA's activities at the Port are covered by a Facilities Agreement (the Agreement). In its representations to the Commissioner relating to the request which is the subject of this notice, the Council also referred to its submissions in relation to an earlier request for a copy of this Agreement. This request was the subject of a previous decision notice².
28. The Council explained that:

"The Agreement is a deed which is the facility agreement between landlord and tenant, setting out tenancy matters for Brett Aggregates' use of the port land. The activities covered by the Agreement are protected by a confidentiality clause, which is common to all Brett Aggregates' port operations. The purpose of the clause is to protect the economic interest of the operator and to not give a competitor information which could be used against them, i.e. additional conveyors and crushing of raw materials, and they believe is a credible threat in their endeavours to remain a leading operator in the aggregates industry in this region".
29. The Council pointed out that the Agreement stipulates that any information provided by the disclosing party should be treated in confidence and should not be disclosed without the written consent from the other party.
30. The Council confirmed that it had consulted with BA in relation to the information requested in this case and they refused consent. The Council provided the Commissioner with a copy of BA's response to the consultation. BA contends that a tenant and a landlord should be able to discuss potential future activities or expansion without fear that such information would be made public. In addition, the Council added that it had been informally advised through verbal discussions with BA that

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022677/ic-139554-q9d4.pdf>

disclosure of the information requested at this stage in the process could lead to BA abandoning its proposals for expansion.

31. Subject to Cabinet approval, BA's expression of interest to expand operations will be reviewed alongside other options for the future delivery of operations at the Port. The Council considers that it is essential that the withheld information is not disclosed "until Cabinet approval to prevent any misrepresentation of any aspect of this developing regeneration project as it is very much in the draft stages and subject to change or even rejection".
32. The Council confirmed that no decision had yet been made as to whether to proceed with BA's expansion proposals. It is currently "in a competitive multi-stage procurement process including a tender stage to attract and secure a port operator for the two primary roll on roll off (ro-ro) berths, by way of a services concession, and associated port side land".
33. To the Commissioner's knowledge, the withheld information is not in the public domain; furthermore, he is of the view that it is not trivial in nature, and that such information has the necessary quality of confidence. The Commissioner therefore considers that the second stage of the test is met in respect of the withheld information.

Is the confidentiality provided to protect a legitimate interest?

34. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
35. 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 on the balance of probabilities that some harm would be caused by the disclosure.
36. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests: "Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

37. The Council considers that disclosure of the withheld information would adversely affect both its own economic interests and the economic interests of BA. The Council explained that the Port "has been in financial deficit for a number of years due to the ending of both passenger and freight ferry operations and significant land space that has not been utilised by the Council for some time". It also advised that significant endeavours are being made to regenerate the Port to make it profitable, boost the local economy and obtain a source of income. The regeneration is the subject of a successful bid to the Department of Levelling Up, Housing & Communities Levelling Up Fund. BA's expansion proposal is one component of this significant regeneration work.
38. The Council currently has a significant debt, equating to around £140 per resident. As such, the Council maintains that there is a significant economic interest of both the Council and the wider community to ensure that the Port becomes profitable.
39. The Council considers that it has been as transparent as it can be about the plans for regeneration of the Port. However, it has endeavoured to ensure that information it has published does not undermine any party's commercial interests, particularly where plans or draft concepts have not been fully developed. The Council explained that once any plans or proposals are no longer in draft form or subject to negotiation it will publish information about proposals accordingly.
40. In light of the above, the Council argues that the timing of the request is crucial in this case. The proposal is at a very early stage in the development process. BA has indicated to the Council that it may consider abandoning the proposal if details of it are disclosed prematurely. If BA were to abandon the proposal, this would cause harm to both BA's and the Council's commercial interests.
41. Based on the representations provided by the Council and having regard to the wider circumstances relating to the subject matter relating to the request, the Commissioner is satisfied that the confidentiality is protecting a legitimate economic interest of the Council itself, as well as that of BA.

Would the confidentiality be adversely affected by disclosure?

42. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosing truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.

43. Since the four elements of the exception test have been met, the Commissioner is satisfied that the information that the Council is withholding under regulation 12(5)(e) of the EIR engages that exception. He has gone on to consider the associated public interest test.

Public interest test

44. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the information being disclosed.
45. Regulation 12(2) also provides that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosure

46. The Council accepts that there is a public interest in transparency and accountability as it assists the public in understanding decisions taken by public authorities. This in turn fosters trust in public authority decision making.
47. The Council also acknowledges that disclosure may increase public participation in the decision making process and allow the public to understand how taxpayers' money is being spent.
48. The Council also recognises that "concerns around the environment and in particular the matter of emissions, generate interest in the proposals at the Port of Ramsgate as many residents will be concerned about any potential impact on air quality".
49. The complainant considers that there is a significant public interest in disclosure of the requested information. They referred to a report by the Independent Monitoring Officer (IMO) dated 16 May 2022 which raised concerns about the management of the Berth 4/5 at the Port. They pointed out that this is a key component of the information requested.
50. The IMO recommended that the Council undertake a review of the Berth 4/5 project to identify causes for delays and cost overruns. The independent review that was undertaken was critical of the management of the port and the management of information about it. The complainant stated that the report:

"raises serious issues about the Council's lack of public engagement in relation to a matter which is integral to the ongoing negotiations with Brett Aggregates. It also suggests that the use of commercial sensitivity restrictions in response to requests for information about projects at the port, such as this one, might be a questionable and possibly unfair practice"

51. The complainant advised the Commissioner that the Port has made significant operation losses of around £25million over the last 10 years. These losses have had an impact on council tax and business rate payers. The expanded berthing facility which was recently completed cost an estimated £2.5 million, which was also funded by council tax and business rate payers. In light of this the complainant alleges that there is a significant public interest in the "financial fortunes" of the Port, including any proposals which will impact on its financial position.
52. In addition, the complainant contends that there is also a significant public interest in the environmental impacts of any expansion of BAs activities at the Port, in terms of the increase in emissions which will result from any expansion.

Public interest in maintaining the exception

53. The Council argues that there is a strong public interest in ensuring that the economic and commercial interests of third party businesses, in this case BA, are not undermined or damaged through disclosure of confidential commercial information which could have an adverse effect on future business. This effect "can undermine the economic regeneration and growth of the district, and hamper the betterment of socio-economic outcomes for our residents".
54. The Council explained that it does not wish to impede accountability and transparency as it has disclosed a significant amount of non-sensitive information about the Port. However, it argues that disclosure of the information requested in this case "will breach the obligation of the law of confidence and undermine the relationship and the trust between confidant and confider".
55. The Council argues that disclosure would also "affect engagement with expression of interest processes by removing the safe space for confidential discussions and in turn makes the Council a less attractive partner by businesses in the private sector that are not subject to freedom of information". It considers that pre-bidding engagement by prospective applicants has the potential to improve the effectiveness and efficiency in the future development of the Port.
56. The Council contends that disclosure of commercially sensitive information received from BA is very likely to damage the commercial interests of the Port and undermine both current and future engagement with the aggregates and marine/port industry. This in turn would make it more difficult for the Council to operate a profitable municipal port and thus would be detrimental to the effective development of the Port, and profitability of the Council.

57. The Council is of the view that disclosure would undermine its relationship with BA, who have made it clear that they consider premature disclosure of the information “would significantly and negatively impact their business interests and could undermine the viability of the proposals if competitors became aware”.

Balance of the public interest test

58. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public’s confidence in the decisions made by a public authority.
59. The Commissioner fully appreciates that plans for the Port in general, and any potential expansion of BA’s activities at the Port will have an impact on the local community and environment; furthermore, there is always a public interest in knowing whether the Council is following proper processes, attaining value for money, and taking appropriate steps to protect the public purse.
60. However, whilst the Commissioner accepts there is a public interest in the Council being transparent about the development of the Port, a disclosure of the withheld information at the time of the request could undermine the ability of the Council to achieve best value, or could even threaten the viability of the proposal. In practical terms, the public interest in the exception being maintained may therefore temporarily outweigh that in disclosure until such time as the circumstances allow for the information to be disclosed without those negative effects occurring.
61. The Commissioner views the public interest in protecting the Council’s commercial interests, and its ability to discuss proposals about how to get best value for money to be strong. The Commissioner notes that the withheld information is very limited and relates to a proposal that has not been fully developed. It could therefore be subject to considerable change or the proposal may not be taken forward at all.
62. In reaching a decision in this case the Commissioner has considered both the complainant’s and the Council’s arguments, the withheld information and the circumstances of the case. Whilst there is always a public interest in public authorities being open and transparent regarding funds and spending of public money, the Commissioner considers that there is a greater public interest in protecting both the Council’s and BA’s commercial interests, and the Council’s ability to discuss proposals about how to get best value for money to discuss the options available, and in maintaining trust with its tenants, to be strong.

63. The Commissioner's decision is, therefore, that the balance of the public interest favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.
64. 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.
65. As the Commissioner has determined that regulation 12(5)(e) applies to the information requested, he has not gone on to consider the Council's application of regulation 12(5)(f) to the request.

Right of appeal

66. 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

67. 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.
68. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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