

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 26 February 2020

**Public Authority:** Hastings Borough Council

**Address:** Queens Square  
Hastings  
TN34 1TL

### **Decision (including any steps ordered)**

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1. The complainant has requested information held relating to the establishment of certain conditions that were included within a specific site licence about the stabilisation of that site.
2. The Commissioner's decision is that the council is entitled to rely on regulation 12(5)(e) of the EIR as its basis for withholding the information relevant to the request, and that the public interest rests in favour of maintaining this exception.
3. 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.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

### **Request and response**

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

*'In a response to the Ombudsman draft decision document dated 16/09/2016 [council officer name redacted] comments against paragraph 47 that:*

*"It is difficult to get the engineers to agree a set of special site licence conditions to try and prevent further land-slips given the instability of the site."*

*Please supply the following information regarding special site conditions to prevent further landslips:*

- *Copies of documents and correspondence concerning the establishment of site licence conditions to stabilise the site*

*This information is critical to the full understanding of the causes of the landslide and potential remedial action to stabilise it.*

*Please take this as a formal request under EIR 2004 regulations'*

6. The council responded on 5 January 2017. It stated that it was refusing the request under regulation 12(5)(e) of the EIR. When making its decision the council advised that it had considered 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.*
7. The council informed the complainant that it believed that the disclosure would have an adverse effect on the economic interests of the owners of the site. It confirmed that consideration had been given to the public interest test and that it regarded the factors for disclosure to be *'transparency and accountability.'*
8. The council went on to say that it regarded the public interest factors against disclosure to be the following:
  - Adverse effect on the economic interest of the owners of the site
  - Maintaining commercial confidences.
  - The release of the information could lead to *'further harassment'* to the owners.
  - The reports contained highly sensitive and confidential information and that disclosure is likely to prejudice the owners' commercial interests.
  - Disclosure could harm the owners' commercial interests.
  - The disclosed information could be used by competitors and potential purchasers to the financial detriment of the site owners.
9. The council stated that *'in all communications of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.'* It then went on to say that, when applying the exception at

regulation 12(5)(e), it must demonstrate what harm would be caused and that it considered this to be the following:

- *Unfounded (critical and defamatory) reviews and postings about the business and resultant bad press/media, leading to a loss of trade.*
- *Diversion of their attention away from the efficient running of their business.*
- *A material reduction in the funds they have available to invest in their business.*
- *Undue upset and worry for the caravan owners and holiday makers.*
- *Loss of privacy for the caravan owners, holiday makers and themselves, including via the use of drones, invasive photography and spying.*
- *Harm to their good reputation.*
- *A reduction in the value of their park/business.*

10. On 14 January 2017 the complainant requested an internal review.

11. On 23 November 2018 the council responded to the complainant confirming that the original decision to apply the exception at regulation 12(5)(e) of the EIR was to be upheld. This was because '*negotiations relating to any caravan site license is a private matter between the local authority and the licensee of the caravan park*' and that the '*licence does not require public consultation*'.

## Scope of the case

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12. The complainant contacted the Commissioner on 6 February 2019 to complain about the way his request for information had been handled.

13. The complainant's concerns included the following:

- That the council failed to provide sufficient explanation as to why the information is commercially confidential and did not provide any details as to whom the confidentiality applies.
- That the council has refused several requests about the same issue using the same argument that the information is commercially confidential, and that disclosure would cause harm. He states that the requests are not being properly considered on a case by case basis and that a '*blanket*' approach has been taken.
- That disclosure is in the public interest as it concerns the Country Park '*which is owned by the people of Hastings*'.

- That the council's decision has been influenced by its knowledge of the campaign group which the requester indicates that he is representing.
  - That the council has referred to alleged harassment and harm caused to the site owners by the actions taken by the relevant campaign group. The complainant has provided a copy of a police report which he states supports his claim that such allegations are unfounded.
  - The licence process is now complete and any argument that the information relates to a process that is ongoing is no longer relevant.
  - The council took too long to provide its internal review response.
14. Firstly, the Commissioner notes that in the penultimate bullet point set out above the complainant has argued that, given the time that had passed by the time of the internal review, the reasons originally given for withholding the information are no longer valid.
15. The Commissioner would refer to page 6 of her guidance '*Internal Reviews under the EIR*'.<sup>1</sup> This recognises that there is a possibility that circumstances will have changed by the time that an internal review is carried out but then goes on to say:
- 'However, any review must take into account the circumstances which applied at the time of the request (or at the latest, the time limit for responding, which will normally be 20 working days after the request is received) rather than those in place at the time of the internal review.'*
16. The guidance goes on to say that a public authority may decide at the internal review stage that, as a result of a change in circumstances, it is now able to release the information that it previously withheld. In most cases it would be practicable to take such action; however, a public authority is not statutorily obliged to do so under the EIR.
17. As a result, whilst the Commissioner has some sympathy with the complainant with regards to the time that it took the council to inform him of the final outcome of his request, in this particular instance she

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1613/internal\\_reviews\\_under\\_the\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1613/internal_reviews_under_the_eir.pdf)

intends to consider the circumstances that were relevant at the time of the original request.

18. With regards to the scope of the request, during the investigation the complainant confirmed to the Commissioner that he was primarily seeking copies of any information provided by the geotechnical engineers concerning site stability. The Commissioner notes that some of the withheld information that has been provided by the council for her consideration was not provided by the geotechnical engineers. However, she accepts that it was not unreasonable for the council to have considered this additional information to be relevant to the terms of the request and therefore intends to take into account when making her decision.
19. The withheld information provided for the Commissioner's consideration by the council includes details of the conditions set out within a draft version of the licence. This particular information has already been considered in some detail within decision notice FS50830896<sup>2</sup>, issued on 29 January 2020, and decision notice FER0826308, issued on 25 February 2020.
20. The Commissioner has had some difficulty ascertaining what value would be gained by any party if she set out in detail what she regards to be a repeat of the findings already provided for within these decision notices. As a result, having had regard to the particular circumstances of this case, the Commissioner has decided that it is appropriate to exclude the content of the relevant draft version of the licence from her consideration in the instance. It will therefore not form part of her final decision on matters.
21. However, whilst the information contained within the copy of the draft licence itself will not be referred to further, any additional comments, annotations, discussions etc. made by various parties about the conditions of the draft licence that are deemed to be relevant to the terms of the request, and which are not already in the public domain, will be considered by the Commissioner.
22. Taking all factors into account, the Commissioner considers the scope of her investigation to be whether the council was correct to apply

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617144/fs50830896.pdf>

regulation 12(5)(e) of the EIR to the withheld information (with the exclusion of the draft version of the licence). In addition, as requested by the complainant, she has considered the council's compliance with the procedural aspects of the EIR.

## **Reasons for decision**

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### **Is the information environmental information?**

23. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than the Freedom of Information Act 2000 (FOIA), if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
24. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
25. The information requested relates to the stability of land and the formulation of conditions contained within a particular site licence. She is satisfied that these conditions have an effect on the land and its use, and that all the relevant information fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

### **Regulation 12(5)(e)-commercial confidentiality**

26. 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.
27. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

28. 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.
29. The Commissioner has considered each point of the above test. When doing so, she has viewed it to be relevant to consider certain comments made by the First-tier (Information Rights) Tribunal in the case of *Hastings Borough Council v IC EA/2017/0084*<sup>3</sup> (the Tribunal case). That case directly relates to decision notice FS50650700<sup>4</sup> issued by the Commissioner on 28 March 2017.
30. In the Tribunal case, the request under consideration was for a report produced on 23 January 2015 by Coffey Geotechnics Limited (Coffey). This report had been commissioned by the council and contained information about landslips which had affected both the site and Ecclesbourne Glen. Whilst the council had disclosed the report, certain parts were redacted with the council advising that it believed this information to be exempt from disclosure under the EIR. The Tribunal decided that the council was correct to withhold those parts of the report where the information was based on, or related to, technical information that had been obtained by the site owners and provided to the council on a voluntary basis.
31. The request under consideration within this decision notice and the information that has been withheld in response relates to the same landslips and site. However, the Commissioner accepts that the Tribunal decision will not be relevant to every request that is received by the council on such matters. In addition, the request under consideration is not for the same information that the Tribunal considered.
32. However, having taken all factors into account, the Commissioner is satisfied that there are sufficient similarities in both cases for her to conclude that the Tribunal's comments are, at least in part, of relevance to her consideration of this case.

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[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)

<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013849/fs50650700.pdf>



### **Is the information commercial or industrial in nature?**

33. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services for profit.
34. 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.'*

35. Whilst accepting that the Tribunal's comments set out in paragraph 31 of this decision notice were in reference to a different request, the Commissioner is satisfied that there are sufficient similarities with regards to both the context and content of the information, that the description of what is commercial information can be extended to the information that has been withheld in this instance.
36. The Commissioner is satisfied that information held by the council that is relevant to the request, and which relates to the conditions set out within the site licence, have an effect on how the site owners can use their land. This, in turn, may lead to certain incurred costs or restrictions on how the site owners can use their property/land for business purposes.
37. As a result, the Commissioner has determined that the withheld information can be considered to be commercial for the purposes of the EIR.

### **Is the information subject to confidentiality provided by law?**

38. With regard to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law of confidence, contractual obligation or statute.
39. The Commissioner has not been made aware of any statutory duty of confidence in this instance. She has therefore gone on to consider the common law of confidence, which has two key tests:



- Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
40. The information that has been withheld relates to a site licence which will impose certain conditions as to how the site owners run their business, and use their land. The Commissioner therefore considers that the information, in the main, is not trivial.
41. The Commissioner is of the view that the withheld information contains details that are based both on historic and recent information relating to the site. It also includes information provided by third parties.
42. The council has argued that any issues relating to the licence are a private matter between the site owners and the council, that the process is not subject to public consultation and, as such, is viewed to be confidential. In addition, the council states that negotiations are conducted in private and should not be disclosed.
43. The Commissioner notes that the licence was not issued until February 2017 and was then the subject of an appeal until an agreement was reached in April 2018. Therefore, the information that has been withheld was, at the time of the request, still being considered as part of an ongoing process, that being to issue a new licence for the site.
44. It is the Commissioner's view that it is not unreasonable for all parties to have expected that communications about the draft licence would be treated in confidence. This includes not only information that may have been provided by the site owners and their representatives, but also extends to any discussions that may have taken place between the council and its own advisors.
45. The Commissioner is satisfied that the withheld information that is being considered within this decision notice is not trivial in nature and 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?**

46. 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.

47. 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.
48. The Commissioner again regards it to be pertinent to refer to the same Tribunal case referenced throughout this decision notice. Paragraph 27 of the Tribunal's decision sets out its reasoning for accepting that, in respect of the withheld information it was considering, the confidentiality was required to protect a legitimate economic interest. It states the following:

*'The legitimate economic interest which the confidentiality protects is that of the owners to run their business free of any unlawful interference, to have confidential exchanges with their insurers and with the council in the context of negotiations which may break new ground in the application of environmental considerations to site licencing.'*

49. Later in the same paragraph the Tribunal states:

*'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.'*

50. In the case currently under consideration, the requester was asking for information that relates directly to the conditions of a site licence that was still in draft at the time of the request. Communication with third parties, including the site owners and the geotechnical engineers about such conditions, were already underway.
51. The Commissioner, once again, regards the Tribunal's comments to be relevant to her consideration of matters in this case. She accepts that the withheld information extends further than the exchanges between the council and the site owners which were the subject of paragraph 27 of the Tribunal decision. However, she is satisfied that the Tribunal's description of the legitimate economic interests (set out in paragraphs 48 and 49 of this decision notice) that were relevant to its consideration of the application of regulation 12(5)(e) in that case are directly transferable to both the information that has been withheld, and the circumstances, relating to this case.

52. As a result, taking all factors into account, the Commissioner is satisfied that the third part of the test as set out in paragraph 27 of this decision notice is met.

**Would the confidentiality be adversely affected by disclosure?**

53. Although this is a necessary element of the exception, should the first three tests set out in paragraph 43 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**

54. 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. When carrying out the test the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
55. In this case, the council states that it considers the factors in favour of disclosure to be transparency and accountability.
56. The Commissioner is aware that the landslips which have occurred in Ecclesbourne Glen have not only had an impact on the landscape but led to the closure of several footpaths, some of which remain closed. The complainant states in his original request that the *'information is critical to the full understanding of the causes of the landslip and potential remedial action to stabilise it.'*
57. The Commissioner appreciates that the landslips are likely to have generated a lot of local interest and that there will be some concerns amongst residents about what did, or did not, cause or contribute to their occurrence. It also appears that there may now be a lack of trust between parties about how certain issues relating to the landslips have been dealt with and this has potentially contributed to the large number of information requests that the council has received about the issue.
58. However, when considering the important factors of transparency and accountability, the Commissioner has had regard to the information which was already in the public domain at the time of the request. This provides some detail about the investigations which were carried out into the landslips and the actions which were taken following their

occurrence. In 2014 the council published a statement<sup>5</sup> on its website which provided links to a number of documents, including a report<sup>6</sup> (the Coffey Report) produced by geotechnical engineers in the same year. The Commissioner also notes that the council has continued to release information about matters relating to both the site and the landslips. This includes further advice and reports issued by the geotechnical engineers about the landslips, and ground stability in the surrounding area.

59. In addition, the Commissioner regards it to be pertinent that the information requested relates to a process that was still incomplete and that copies of licences are, in the main, made available to the public once they have been formally issued (which subsequently occurred in this instance). This will provide the public with full details of the conditions that are set within any one licence, once the process is complete.
60. The council's representations to the Tribunal had included details of alleged harassment caused to the site owners by certain parties, referring in particular to one campaign group, 'Save Ecclesbourne Glen'. The council had argued that the alleged harassment was having a detrimental impact on the site owners, and the value and revenue of their business. In the council's response to the complainant it had also stated that it believed that the disclosure of the information that he had requested could result in '*further harassment*' to the site owners.
61. However, the complainant refutes the allegations of harassment and has provided the Commissioner with a police report which he believes provides evidence that no harassment has occurred in the way that has been described.
62. The validity of the allegations of harassment that have been made are clearly in dispute. However, after consideration of all the public interest factors relevant to this case, the Commissioner is satisfied that any conclusions she might reach in relation to this point would not affect the balance of those factors that she regards to weigh in favour of, or against, disclosure so significantly that it would alter her final decision.

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<sup>5</sup> [https://www.hastings.gov.uk/planning/news/ecclesbourne\\_glen/](https://www.hastings.gov.uk/planning/news/ecclesbourne_glen/)

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[https://www.hastings.gov.uk/content/parks\\_gardens\\_allotments/pdfs/ecclesbourneglen\\_lan\\_dslides\\_report.pdf](https://www.hastings.gov.uk/content/parks_gardens_allotments/pdfs/ecclesbourneglen_lan_dslides_report.pdf)

Given this, the Commissioner does not regard it to be necessary, or appropriate, to provide any further comment on this particular matter in this particular case.

63. The Commissioner accepts that some importance must be placed on the concept of confidentiality of communications between all relevant parties during the process of issuing a licence. This extends beyond the negotiations between the site owners and the council. She is of the view that the disclosure of the withheld information at the time of the request would have undermined the licencing process and prevented the council from fulfilling its statutory obligations effectively. The Commissioner regards this to carry some considerable weight to the balance against disclosure.
64. The Commissioner is therefore satisfied that the disclosure of that information relating to the formulation of the conditions of the licence which related to the stability of the site, would not have been in the public interest at the time of the request. As a result, she is satisfied that the council was correct to have withheld the information that is under consideration in this instance.

### **Procedural matters**

65. The complainant has requested that the Commissioner also consider the general handling of this request by the council.
66. 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. Regulation 11(4) requires a public authority to inform a 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.
67. The complainant made his request on 30 November 2016 and the council then issued a refusal notice on 5 January 2017. The complainant then asked for an internal review on 14 January 2017, but the council did not provide its response until 23 November 2018.
68. The council has provided some explanation for the time taken to deal with information requests in other representations it has made to the Commissioner and these have also been taken into account as part of her consideration of this case.
69. The council has advised that it has had to deal with a large number of requests about the site, the landslips and Ecclesbourne Glen and this has been difficult and placed a burden on its limited resources. It has also referred to the fact that negotiations and the appeal relating to the site licence were ongoing until April 2018 and the Tribunal appeal in

relation to decision notice FS50650700 was only decided on 26 March 2018. The council has advised the Commissioner that the majority of the requests encountered delays because they had been put on hold pending the conclusion of the two appeals.

70. Whilst the Commissioner appreciates the difficulties faced by the council, it is not in dispute that it failed to issue a refusal notice within 20 working days of receiving the original request and that it did not respond to the request for an internal review within 40 working days. Indeed, the council took some 20 months to provide an internal review response in this case. The pending appeals do not provide adequate justification for the council's failure to respond to the request appropriately and within the relevant timescales. As a result, the Commissioner is satisfied that the council has breached regulations 14(2) and 11(4) of the EIR respectively.

## Right of appeal

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71. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.
73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**