

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

### **Decision notice**

**Date:** 25 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 correspondence between Hastings Borough Council (the council) and its geotechnical advisors about certain conditions relating to a caravan park site licence.
2. The council refused the request, confirming during the course of the Commissioner's investigation that the information had been withheld under regulation 12(5)(d) – confidentiality of proceedings, and regulation 12(5)(e) – commercial confidentiality.
3. The Commissioner's decision is that the council is entitled to rely on regulation (12)(5)(e) as its basis for withholding some of the requested information, and the public interest rests in favour of maintaining this exception.
4. However, the council has failed to demonstrate that regulation 12(5)(d), or regulation 12(5)(e), is engaged in respect of the remaining information that has been withheld.
5. Furthermore, the Commissioner has found that the council has breached regulation 14(2) of the EIR by failing to issue a refusal notice within 20 working days of receipt of the request. In addition, the council failed to specify what exception it was relying on, or its consideration of the public interest test, in its responses to the complainant. As a result, the Commissioner is satisfied that the council has also breached regulation 14(3)(a) and 14(3)(b) of the EIR.

6. The Commissioner requires the council to take the following steps:
  - Release the version of the draft licence conditions that it has withheld in response to this request.
7. 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 the Act and may be dealt with as a contempt of court.

## Background

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8. Following reports of land-slippage in the Ecclesbourne Glen area of Hastings Country Park, in June 2014 the council issued a statement<sup>1</sup> on its website about the matter. It also published a number of documents, including a report by Coffey Geotechnics Ltd (Coffey) whom it had commissioned to carry out further investigation of the landslips.
9. The report<sup>2</sup> (the Coffey Report) sets out details of a desk study, a site walkover and a site inspection. It refers, in the main, to one small landslip at the base of Ecclesbourne Glen and a larger landslip that had extended across sections of both the country park and a particular caravan park site (the site). It also provides details of the investigations which were carried out and some possible factors which may have caused, or contributed to, the occurrence of the landslips.
10. With regards to future action to be taken as a consequence of the landslips, the Coffey Report recommended that any further investigations should be undertaken '*in full co operation*' with the owners of the site to manage '*adverse impacts*' on the country park.
11. The council's published statement advised that the landslip had revealed a number of '*unauthorised developments*' on the site and this had led to concerns being raised by a number of local people and '*lobby groups*' about various planning permissions, allegations that

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<sup>1</sup> [https://www.hastings.gov.uk/planning/news/ecclesbourne\\_glen/](https://www.hastings.gov.uk/planning/news/ecclesbourne_glen/)

<sup>2</sup>

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

actions taken by the site owners had led directly or indirectly to the landslips, and also the licence conditions at the site. The council's statement provided a summarised response to the main concerns that had been raised.

12. In February 2017, a new site licence issued to the owners of the caravan park became the subject of an appeal. Following negotiation between parties an agreement was reached and the new licence took effect from April 2018. The request under consideration within this decision notice relates to communications sent between the council and its geotechnical advisors about the licence whilst it was still in the stages of being drafted.

## Request and Response

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13. The Commissioner is aware that extensive communications have been sent between the complainant and the council during the period of time to which this request relates. The following paragraphs, which set out a chronology of the request and the council's responses, include reference only to those communications which the Commissioner regards to be pertinent to the complaint under consideration.
14. On 1 December 2016 the complainant made the following request for information:

*'In comments made to the first draft Ombudsman report [council officer name redacted] states:*

*The process of issuing a new site licence is complex and time consuming. It has Required Consultation with the licensees, the council's planning service and the Fire and Rescue Service. **We have also had extensive correspondence with our geotechnical advisors in relation to proposed new conditions.***

*Please provide us with copies of this extensive correspondence between the geotechnical advisors referred to in this comment.*

*This information is relevant to an understanding of the landslip issues that continue to keep Ecclesbourne Glen closed.*

*Please treat this as a formal request under EIR 2004.'*

15. On 22 March 2017 the council contacted the complainant about a number of his information requests that remained outstanding. It advised that the owners of the relevant site had submitted an appeal against a new site licence that the council had issued and the evidence used as part of the proceedings would include *'geotechnical information and may involve correspondence from Natural England, East Sussex Fire and Rescue Service and GVA.'*
16. The council confirmed to the complainant that as it could not release any information that may prejudice the site licence appeal process, it was refusing all information under regulation 12(5)(d) until the site licence had been heard by the Magistrates Court. The council also confirmed that it considered the public interest to weigh in favour of maintaining the exception. It went on to say that, as a result, it would not be responding to the complainant's outstanding requests for information, nor would it be conducting any internal reviews in relation to any refusal notices that had already been issued. The council did, however, confirm that any requests that did not involve potential evidence for the appeal would be dealt with *'in the normal manner.'*
17. On 22 March 2017 the complainant contacted the council to express his dissatisfaction with its application of what *'appears to be a blanket refusal to answer my legitimate enquiries'*.
18. On 16 May 2017 the council responded to the complainant advising that it had not declared a *'blanket ban'*. It stated that some of the complainant's requests referred to information that would be used as evidence at the licence appeal and as such information was now subject to *'sub judice'*, it could not be disclosed. The council went on to say that it had only refused one of the complainant's requests (which was not the request under consideration) under regulation 12(5)(d) of the EIR.
19. On 16 May 2017 the complainant contacted the council to raise concerns that it was not following proper process. He stated that it should have notified him separately about each request that he had submitted that had been put 'on hold', rather than issuing a generic refusal notice.
20. The complainant then contacted the council on several further occasions to request an update on his requests. In particular, he asked for a list of his requests that were now on hold, and the current position of the site licence appeal.
21. On 18 September 2017 the complainant contacted the council again, raising further concerns about the way in which his information requests were being handled. The council confirmed that this

correspondence was to be dealt with as a stage 1 complaint and it provided a response on 2 October 2017.

22. The council once again confirmed that a number of the complainant's requests had been put on hold pending the outcome of the site licence appeal. However, the council also went on to advise that, in addition, it now believed it was of some relevance that it was now in the process of appealing against decision notice FS50650700<sup>3</sup>, issued by the ICO on 28 March 2017. This decision notice related to a request submitted by a different party for a technical report (Coffey 2 Report) relating to the site and Ecclesbourne Glen.
23. The council stated that the requests which had been submitted by the complainant related to information which could be used in either of the two appeals it had referred to (the site licence and the decision notice) and that the release of such information could prejudice the position of either the council, or a third party.
24. On 3 October 2017 the complainant advised the council that he was not happy with the outcome of the stage 1 complaint.
25. On 15 November 2017 the council confirmed that the complainant's correspondence of 3 October 2017 had been dealt with as a stage 2 complaint. It advised that it was awaiting confirmation of a hearing date in relation to the site licence appeal and that it was still in the process of submitting an appeal against decision notice FS50650700. It went on to say the following:  
  
*'It is reasonable that the resources of the council in this area of its work, which are already stretched in dealing with 2 appeals, should not be placed under further strain by having to respond as well to requests in relation to the site licence appeal or investigation by the Information Commissioner conducted at the same time, or similar issues; and arising from the same or very similar factual circumstances.'*
26. The council went on to provide the complainant with details of how to progress his complaint further with the Local Government Ombudsman, should he remain dissatisfied with the way in which his complaint had been handled.
27. On 20 April 2018 the complainant contacted the council to raise concerns that it had failed to respond to his various communications which had asked for a list of his information requests that were on hold. He also advised that he understood that there had now been

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2013849/fs50650700.pdf>

agreement between parties about the site licence, and that the pending appeal had been withdrawn. The complainant asked that, given this, the council should now provide a response to the requests that remained outstanding.

28. On 20 July 2018 the council provided the complainant with a list of requests that it had previously put on hold (which included the request currently under consideration). It went on to confirm that it was now in the process of dealing with these requests.
29. On 22 July 2018 the complainant raised further concerns with the council about its most recent response. He also referred to a number of additional requests that he had made which had not been included within the list that had been provided by the council.
30. The complainant subsequently sent a number of additional emails to the council about all of his outstanding requests before contacting the ICO on 11 October 2018 to complain that he had still not received a response to his request of 1 December 2016. The ICO then wrote to the council requesting that it now consider this request and issue the complainant with a response.
31. On 19 November 2018 the council issued the complainant with the following response:

*'Negotiations in regards to the Caravan Site Licence is a private matter between Hastings Borough Council and the Licensee, there is no public consultation.*

*Hastings Borough Council has provided you with everything they are willing to disclose from the geotechnical advisors.'*
32. On 20 November 2018 the complainant advised the council that he was not satisfied with its decision. The council then provided its internal review response on 21 December 2018.
33. The council upheld the original decision stating that the information was 'exempt' as negotiations between the relevant parties were a private matter and there was no public consultation in relation to the conditions of the licence.
34. The council went on to confirm that the new caravan site licence had now been issued and that a copy of this had already been supplied to the complainant in response to a separate information request.

## Scope of the case

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35. As already stated in paragraph 30 of this decision notice, the complainant initially contacted the Commissioner on 11 October 2018 to complain about the council's failure to provide a full and formal response to his request.
36. Following receipt of the council's internal review response of 21 December 2018, the complainant contacted the Commissioner again on 4 March 2019 to express his continued dissatisfaction about the way in which his request for information had been handled.
37. Whilst the council's response to the complainant's request of 1 December 2016 did not cite the exception it was relying on to withhold information, at the initial stages of the Commissioner's investigation it confirmed that the exception '*used would have been 12(5)(e)*'.
38. As the council had referred to regulation 12(5)(d) in its correspondence to the complainant of 22 March 2017, and then to regulation 12(5)(e) in its response to the Commissioner's initial enquiries, this created some ambiguity on how it had actually dealt with the request. Therefore, the Commissioner asked the council to further clarify what exception(s) it had applied at the time of receipt of the original request, and at the internal review stage.
39. The council responded to advise that it '*did not state an exception when responding to the initial request or internal review but would have relied on 12(5)(d) or 12(5)(e).*'
40. Whilst the council's response remains ambiguous, given that it had originally informed the Commissioner that it believed regulation 12(5)(e) to be engaged in relation to this specific request, she intends to firstly consider whether the council is entitled to rely on this exception. If necessary, the Commissioner will then go on to consider whether regulation 12(5)(d) is engaged. In addition, she will consider the council's compliance with the procedural aspects of the EIR, as requested by the complainant.

## Reasons for decision

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### Information which falls within the scope of the request

41. The Commissioner has excluded some of the withheld information provided for her consideration by the council as she regards it to fall



outside the scope of her investigation. This is because it did not exist at the time that the request was received.

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

42. 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.
43. 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.
44. The request is for communications between geotechnical advisors and the council about '*proposed new conditions*' to be included in a new site licence. Geotechnics is defined as the branch of civil engineering concerned with the study and modification of soil and rocks. Given this, it is not unreasonable to assume that such communications are likely to involve discussion about the soil/land on, or around, the site.
45. Having considered the withheld information, the Commissioner is satisfied that it contains information on measures affecting, or likely to affect, the land and environment. She therefore finds that it is environmental information within the meaning of regulations 2(1)(a), 2(1)(b) and 2(1)(c) of the EIR.

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

46. 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.
47. 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?



48. 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.
49. The Commissioner has considered each point of the above test. When doing so, she has viewed it to be relevant to consider the First-tier (Information Rights) Tribunal case of *Hastings Borough Council v IC EA/2017/0084*<sup>4</sup> (the Tribunal case). That case directly relates to decision notice FS50650700, initially referred to within paragraph 22 of this notice.
50. The Coffey 2 Report (dated 23 January 2015), which was relevant to the Tribunal case, had been commissioned by the council and contained information about the site and Ecclesbourne Glen. It was confirmed that its content was based on a review of all the information that had been made available to Coffey, and this included a geotechnical report and a drainage report which had been commissioned by the site owners and supplied on a voluntary basis to the council.
51. There is therefore a distinct difference between the information that was considered in the Tribunal case and that which is currently under consideration; they are not requests for the same set of information. However, there are some close similarities in terms of the nature of the information, the circumstances which led the information to be created, and the timing of the requests. This has led the Commissioner to be satisfied that some of the comments of the Tribunal are relevant to her consideration of this case.

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

52. 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*

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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)

*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.'*

53. The focus of any geotechnical report or advice will be based on the study of the land to which it relates. Communications between the council and its geotechnical advisors about certain licence conditions are therefore going to 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.
54. Whilst accepting that the Tribunal's comments set out in paragraph 52 of this decision notice were in reference to a different set of information, the Commissioner is satisfied that the description of what is commercial information can be extended to the information that has been withheld in this instance, and that it can be considered to be commercial for the purposes of the EIR.

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

55. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
56. 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 obligation shared in circumstances importing an obligation of confidence? This can be explicit or implied.
57. The information relates to the formulation of conditions which are to be included within a site licence. The site owners will be obliged to adhere to such conditions, once the licence is formally issued. The Commissioner considers that the information, in the main, is not trivial.
58. Having considered the withheld information that falls within the scope of the request, the Commissioner is of the view that it contains details which is likely to be based on both historic and recent information that relates to the site, and also the surrounding area. In addition, it includes information provided by the site owners and their agents.

59. The council has argued that any issues relating to the formulation of the licence are a private matter between the site owners and the council. It goes on to say that the process is not subject to public consultation and, as such, is viewed to be confidential. It also states that it has written confirmation from the site owners, and their agents, that information about their business should not be made publicly available.
60. The Commissioner notes that the licence was issued in February 2017 but was then the subject of an appeal and further negotiations continued between the relevant parties before an agreement was finally reached in March 2018. Given this, she regards it to be a relevant factor that the withheld information forms communications between relevant parties about a process that was ongoing at the time of the request.
61. However, a small amount of the withheld information consists of extracts from the draft licence itself. It is pertinent to note that this particular information is almost identical in content to part of another set of information which the council withheld in response to another request submitted by the complainant on 1 December 2016. Details of that request are set out within decision notice FS50830896<sup>5</sup>, issued by the Commissioner on 29 January 2020. For the purpose of this decision notice that request will be referred to as 'Request 1'.
62. Following the Commissioner's intervention in respect of Request 1, and after taking into account information that was already in the public domain, the council released some information to the complainant, including a copy of the draft conditions of the licence that was relevant to the request.
63. The council confirmed to the Commissioner that whilst it had revised its position in respect of case FS50830896, it did not intend to do the same with regard to the specific request currently under consideration. It advised that the information that had been released into the public domain in 2016 (and which led to its revised position in relation to Request 1) was very limited '*in comparison*' to the information that it held that was relevant to this request.
64. However, the council has already released a copy of the draft conditions of the licence into the public domain. The Commissioner is satisfied that this information is, in content, almost identical to the

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<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617144/fs50830896.pdf>

draft conditions of the licence contained within the withheld bundle of information provided for her consideration in this case.

65. The Commissioner therefore does not accept that the second criteria is met in relation to the conditions contained within the draft licence that is relevant to this request. She would add that she is only referring explicitly to the conditions that were set out within the draft licence itself, and not any additional comments, annotations, discussions etc. that are recorded about such conditions which are not already in the public domain.
66. As a result, it is the Commissioner's decision that the council is not correct to apply regulation 12(5)(e) to the information which forms the conditions set out within the draft version of the licence which has been withheld.
67. The Commissioner has gone on to consider the remaining information that the council has withheld (which is not already in the public domain) in this case. It is her view that it is not unreasonable for all parties to expect that the remaining communications held relevant to this request would be treated in confidence.
68. In addition, given the nature of the request, at least some of the information is likely to form preliminary discussions about the council's possible options which it would not, at that early stage, want to disclose to the site owners. In paragraph 24 of the Tribunal decision reference is made to '*implicit duties of confidence*' being the '*norms of many situations*'. The Commissioner views the information that has been withheld to be directly relevant to such comments.
69. Having considered the withheld information, the Commissioner is satisfied that, with the exception of the extracts of the draft conditions of the licence, it is not trivial in nature and it has the necessary quality of confidence.
70. The Commissioner has gone on to consider whether the third criteria is met in relation to the withheld information, with the exception of the extracts of the conditions set out within the draft licence.

**Is the confidentiality required to protect a legitimate economic interest?**

71. 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.

72. 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.
73. The Commissioner again regards it to be pertinent to refer to the Tribunal case referred to 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.'*

74. Later in the same paragraph the Tribunal goes on to say the following:

*'We must have regard to the terms of regulation 12(5)(e) and assess whether the commercial confidentiality at issue is "provided by law to protect a legitimate economic interest." There is no legitimate economic interest in running an unsafe site or a site that causes and may continue to have an adverse environmental impact. There is a legitimate economic interest in trying to reach an agreement on site regulation which meets both legitimate environmental concerns and the fair treatment of an established business.'*

75. In the case currently under consideration, the requester was asking for communications that relate directly to the site licence which was still in draft at the time of the request. Negotiations were also already underway with the site owners about such conditions. Taking this into account, the Commissioner is satisfied that the Tribunal's comments are sufficiently relevant to her consideration of the information that has been withheld in this case and she has concluded that this part of the test is met.

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

76. Although this is a necessary element of the exception, should the first three tests set out in paragraph 47 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**

77. 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.
78. When carrying out the test the Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).
79. In this case, the council states that it considers the factors in favour of disclosure to be transparency and accountability. The complainant has argued that the information is of vital importance to a public understanding of the causes of the landslips which have occurred in Ecclesbourne Glen.
80. The Commissioner understands that the landslips have not only affected the landscape but led to the closure of a number of footpaths, some of which remain closed. The complainant states that there is a strong public interest in establishing the causes of the landslips and whether there is anything that can be done to prevent a reoccurrence.
81. The council states that it has concerns about placing information that relates to the commercial interests of the site owners into the public domain. It has advised that the Tribunal case demonstrated that the owners of the site had been subjected to harassment by members of the public.
82. The council also states that it places some importance on the request by the site owners not to put information into the public domain, particularly in light of the harm which they have claimed would occur as a result.
83. The Commissioner notes that there is reference to certain allegations of harassment, particularly in paragraph 32, of the Tribunal case decision. However, when setting out its decision, the Tribunal appears to make a distinction between the actions of others and that of the requester in that case, who did not seem to be linked to any campaign.
84. The complainant in this case has argued that the campaign group referred to in the Tribunal case had not been given the opportunity to defend the harassment allegations that were made by the site owners. He has provided the Commissioner with information, including police reports, to refute such allegations.

85. However, the Commissioner does not wish to get embroiled in a debate about whether the claims of harassment were substantiated as she does not regard it to have a substantive bearing on the decision to be made in this case.
86. The Commissioner accepts that the effects of the landslips have generated a lot of local interest and she understands that there may be residents within the local community that have concerns about what did, and what did not, cause or contribute to their occurrence. She also recognises that there has been some public concern about the operation and management of the site itself. She appreciates that certain members of the public may have strong views on the matters relating to the site, and the landslips, and notes that, rightly or wrongly, there appears to be a lack of trust between parties about how various issues has been dealt with. This has consequently led to a large number of information requests being submitted to the council.
87. However, when considering the important factors of transparency and accountability, the Commissioner has taken into account that some information about Ecclesbourne Glen, the landslips and the site have been placed in the public domain. In addition, she has had regard to the fact that the request under consideration related to conditions of a site licence that was still in a draft format, and negotiations were ongoing with the site owners to try to reach an agreement at the time that the request was made. She is also aware that once a licence is finalised, in many cases it will be made available to the public upon request (as was the case in this instance).
88. The Commissioner recognises the importance of parties being able to communicate in confidence whilst the licence process is ongoing. It is her 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. She is satisfied that the disclosure of the requested information whilst the licence was still under consideration would not have been in the public interest and on this basis, is satisfied that the council was correct to have withheld the information that is under consideration in this instance.
89. Given that the Commissioner concluded in paragraph 65 of this decision notice that certain information was not subject to the exception at regulation 12(5)(e), she has gone on to consider whether regulation 12(5)(d), which was also cited by the council, is engaged in relation to that information.



## **Regulation 12(5)(d)**

90. Regulation 12(5)(d) provides 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 public authority, or any other public authority, where such confidentiality is provided by law.
91. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore, although some information may have been revealed to one of the parties involved in the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.
92. The term 'proceedings' is not defined in the EIR, but the Commissioner interprets it to include situations where an authority is exercising its statutory decision making powers.
93. In this case, the council has advised the Commissioner that it regarded the relevant proceedings to be the site licence appeal hearing, stating that the release of the withheld information would be likely to prejudice that hearing. However, at the time of the request (December 2016), the relevant licence was still in draft and was yet to be finalised, or issued to the site owners. Given this, there was no appeal, nor had such proceedings been contemplated at that time. Therefore, this argument carries little weight in the Commissioner's consideration of the application of regulation 12(5)(d) in this particular case.
94. However, the Commissioner has given consideration to the council's correspondence to the complainant dated 22 March 2017 which stated that it was refusing a number of his requests at that time under regulation 12(4)(d). Whilst it had advised that this was until the licence appeal had been heard, it also stated that it had given consideration to the following:
  - *If disclosing the information would adversely affect the confidentiality of a public authority's proceedings where confidentiality arises from common law.*
  - *The information will form part of the business of proceedings to reach a decision.*
95. Whilst the Commissioner does not accept that the licence appeal proceedings were relevant to this case, she is of the view that the points of consideration referred to in paragraph 94 of this notice have some relevance to her consideration of regulation 12(5)(d) in this instance.

96. The Commissioner is aware that the licencing process is underpinned by regulations which, amongst other things, will set out the arrangements for making and determining licence applications. The procedure to be followed by the council leading to the issuing of a site licence is therefore a statutory process, the details of which are set out in various legislation.
97. The Commissioner accepts that the issuing of a licence relates to a situation where an authority is exercising its statutory decision-making powers and therefore relates to formal 'proceedings.' She is satisfied that the discussions with the council's geotechnical advisers about the provisions contained within the draft licence form part of the process to reach a decision on the licence, and that this information forms part of 'proceedings' described by regulation 12(5)(d). It is therefore the Commissioner's view that the first test required for the exception to be engaged is met.
98. The next condition to be satisfied is that the proceedings must be protected by confidentiality provided by law. The confidentiality may be provided in statute or derived from common law. It should be noted that the exception at regulation 12(5)(d) protects the confidentiality of proceedings, rather than the confidentiality of information.
99. The council has argued that as the information requested was to be used as part of the appeal proceedings against the licence, it was subject to a duty of confidence required by law. As already stated, the Commissioner does not regard the appeal to have been a relevant factor at the time that the request was received. However, she does regard it to be appropriate to consider whether the common law of confidence would apply, particularly given the arguments that have been presented by the council than the site owners would not have expected certain information relating to the licence to be in the public domain.
100. In order for the information to have the necessary quality of confidence the information must not be otherwise accessible, be of importance to the confider and not trivial.
101. The only information which the Commissioner is considering under regulation 12(5)(d) is the extract of the conditions set out in a particular version of the draft licence that is relevant to this request. These conditions were the subject of discussion between the council and its geotechnical advisors.
102. The version of the draft licence that forms part of the withheld bundle provided by the council for the Commissioner's consideration in this case differs very slightly to that which is already in the public domain,

and which has also recently been released by the council in response to Request 1. However, the Commissioner is satisfied that the content is so inherently similar that her approach should be consistent with the outcome of decision notice FS50830896. On this basis, the Commissioner must conclude that the extracts of the conditions set out in the draft licence which have been withheld in response to the request under consideration do not attract the necessary quality of confidence required in order for regulation 12(5)(d) to apply. This is for the same reason set out in decision notice FS50830896, that being primarily that the information was already in the public domain.

103. As result, the Commissioner is not persuaded that regulation 12(5)(d), or regulation 12(5)(e), can be applied to the extracts of the conditions set out within the draft licence which were withheld in response to this request. As a result, it is her decision that this particular information should now be released to the complainant.

### **Procedural matters.**

104. The complainant has requested that the Commissioner also consider the general handling of this request by the council.

105. 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 14(3) states that the refusal shall specify (a) any exception relied upon and (b) the public interest considerations.

106. The complainant made his request on 1 December 2016. On 22 March 2017 the council appears to have provided a generic response to a number of his requests. It advised that it had applied regulation 12(4)(d) because of the submission of the site licence appeal. It does not appear that the complainant was given information about the internal review process.

107. The council then subsequently advised the complainant that it had only applied regulation 12(4)(d) to one of his requests. It is still not clear whether, at that time, the council believed regulation 12(4)(d) to be engaged in respect of his request of 1 December 2016. What is clear is that the council did place this request, and a number of other requests, on hold, pending the outcome of the site licence appeal and then subsequent the Tribunal case appeal.

108. The council has provided the Commissioner with a number of reasons for the delay in the handling of this particular request. It has referred to the large number of requests that received about the site, the landslips and Ecclesbourne Glen. The council has also referred to the fact that negotiations and the appeal relating to the site licence were

ongoing until April 2018 and the appeal in relation to the Tribunal was only decided on 26 March 2018. It states that whilst these matters remained outstanding it could not respond to the complainant's requests that related to either subject as the relevant information was to be used within the appeals, and it would be *sub judice*.

109. The Commissioner appreciates that the council was receiving a high volume of requests about the matters of Ecclesbourne Glen and the landslip, and that this would have placed some burden on its resources. She also accepts that the negotiations and appeals referred to may have had some bearing on some of the requests that it had received.
110. However, the council did not respond to the complainant's original request within the required 20 working days. It should be noted that had it done so, the appeals which formed part of its argument for withholding the information would actually have had no relevance to its initial decision, as they would not yet have been submitted.
111. In addition, matters relating to both appeals were complete by April 2018. The council only provided the complainant with a direct response to his request of 1 December 2016 on 19 November 2018, over six months after the two appeal processes were complete.
112. The Commissioner is satisfied that the council has breached regulation 14(2) of the EIR as it failed to provide the complainant with a refusal notice within the prescribed 20 working day period.
113. The council also failed to specify what exception it was relying on in either its response of 19 November 2018, or its internal review response. It also failed to set out its consideration of the public interest test. As a result, the Commissioner is satisfied that the council has also breached regulation 14(3)(a) and 14(3)(b) of the EIR.

## Other matters

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114. The Commissioner regards it to be appropriate to make reference to the council's general approach of placing a number of information requests on hold whilst the two separate appeal processes were ongoing. She appreciates that this was a difficult situation for the council to deal with. However, the Commissioner does not regard it to have been reasonable to expect any requester to have to wait for so long for a formal decision in response to any information request. In some cases, the requests that were on hold date back to 2016/2017, with responses only being issued in 2018.

115. In those cases whether the information requested was relevant to the appeals, and the council was satisfied that it should be withheld, it should have notified the complainant accordingly, providing a refusal notice in respect of each request, citing the exception(s) engaged, together with its consideration of the public interest test and providing details of how to request an internal review. Had the council taken such action, it is likely that most of the requests that were put on hold would have been resolved within much more reasonable timescales.

## Right of appeal

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116. 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)

117. 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.

118. 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**