ico. Information Commissioner's Office

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

Date: **20 July 2021**

Public Authority: **Maidstone Borough Council**
Address: **Maidstone House**
King St
Maidstone ME15 6JQ

Decision (including any steps ordered)

---

1. The complainant has requested information relating to Mote Park Adventure Zone. Maidstone Borough Council initially withheld some information under the exemption for commercial interests – section 43(2) of the FOIA. During the Commissioner's investigation the council reconsidered the request under the EIR, disclosing some information and withholding other information under the exception for commercial confidentiality – regulation 12(5)(e).

2. The Commissioner's decision is that Maidstone Borough Council (the "council") breached regulation 5(1) and regulation 14 and that it failed to demonstrate that the exception in regulation 12(5)(e) is engaged.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Disclose the information in parts 2-5 of the request.

4. The public authority 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

5. Mote Park Adventure Zone in Maidstone is owned by Maidstone Borough Council. The park opened in May 2019, later than anticipated because of problems with a burst sewerage pipe during construction[1].

6. There have been reports that the construction problems have resulted in significant additional costs to the council and the council has publicly stated that legal action has been considered.

7. The requester has sought information relating to these matters.

Request and response

8. On 19 July 2020, the complainant wrote to Maidstone Borough Council (the "council") and requested information in the following terms:

   "The June 2020 "policy and resources committee agenda contained a small paragraph on page 73 relating to the Mote Park Adventure Zone, particularly the writing off of £400,000 caused by the collapse of a sewer during the construction phase. The reason for the writing off was not adequately explained.

   Despite repeated requests to have the following questions answered by the press office, I have not received a reply.

   For clarity, these are:

   1 Who was the contractor?
   2 Was the contractor given plans of the site - detailing the presence of sewers etc - prior to work starting or was it their responsibility to carry out these surveys?
   3 Against whom did MBC consider legal action?
   4 Who did MBC believe to be responsible?
   5. Why was legal action dropped?
   6 Who acted for the council in a legal capacity?
   7 If it was an officer, who?
   8 If it was an outside law firm, who was it?

[1] See: https://www.kentonline.co.uk/weald/news/adventure-zone-proves-costly-investment-235021/

9 Who was the senior officer in charge of the AZ works?
10 Which officer, named, was responsible for recommending writing off the loss?
11 Which democratically elected members, named, were consulted about the writing off of the loss before it went to P&R?"

9. The council responded on 10 August 2020 and confirmed that it was withholding all the requested information under the exemption for commercial interests – section 43(2).

10. Following an internal review the council wrote to the complainant on 3 August 2020. It stated that it was maintaining its position.

Scope of the case

11. On 23 September 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

12. In view of the nature of the request, which relates to the collapse of a sewer pipe during a construction exercise, it occurred to the Commissioner that the information was environmental in nature and that the request fell to be considered under the EIR rather than the FOIA. The Commissioner, therefore, invited the council to reconsider the request under the EIR and provide the complainant with a new response.

13. The council revisited the matter under the EIR and disclosed the information in parts 1 and 6-11 of the request. In relation to parts 2-5 of the request, the council confirmed that it was relying on the exception for commercial confidentiality (regulation 12(5)(e)) to withhold the information.

14. The Commissioner confirmed with the complainant that her investigation would consider whether the council correctly withheld the information in parts 2-5 of the request.

Reasons for decision

Is it Environmental Information?

15. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.

16. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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) and (b) as well as measures or activities designed to protect those elements…"

17. The Commissioner considers that the phrase 'any information…on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question.

18. In this case the requested information relates to the collapse of a sewer pipe during a construction exercise.

19. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

20. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

21. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.

22. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

23. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

24. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

25. The Commissioner considers that in order for this exception to be applicable, the following conditions must be met:

    • Is the information commercial or industrial in nature?

    • Is the information subject to confidentiality provided by law?

    • Is the confidentiality provided to protect a legitimate economic interest?

    • Would the confidentiality be adversely affected by disclosure?

26. Given the nature of this case the Commissioner considers that a more holistic approach to considering how the above conditions apply is appropriate.

Is the information subject to confidentiality provided by law?

27. In this context this will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.

28. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from a third party. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute.

29. The council has argued that the matters to which the request relates are subject to potential legal proceedings. It has provided no further submissions in relation to this element of the exception.

30. The Commissioner acknowledges that the information may relate to potential legal action, however, she does not consider that it is self-evident that the information is subject to an obligation of confidence.

31. Whilst she recognises that the information is not trivial the Commissioner is not convinced that all the withheld information is not in the public domain. She has not been provided with submissions by the council to contradict this view.

32. Setting any conclusions in this regard to one side at this point in this notice, the Commissioner has considered whether the council has provided adequate arguments in relation to the other conditions.

Is the confidentiality provided to protect a legitimate economic interest?

33. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view is 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.

34. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

35. The Commissioner recognises that arguments that disclosure would adversely affect the ability of a public authority to legally recoup costs may be relevant to this element of the exception, even if she would not accept that this constituted a commercial interest.

36. Following the above, the council has argued that the economic costs ultimately incurred by the council in this matter depend on the outcome of any legal action. Disclosure of the information, it has argued, could affect the *"….outcome of the legal action….For example, the Council's financial interests could be prejudiced by the disclosure of certain information".*

37. The Commissioner suggested to the council that its focus on the potential outcome of possible legal proceedings and the speculative nature of the financial harm which it might incur did not appear to satisfy the conditions of the exception.

38. The council provided further submissions in which it revised the language used to provide more certainty in respect of the likelihood of the ascribed harm occurring. The council argued that it considered that disclosure would result in harm to its position in any potential legal proceedings and this would in turn result in it suffering financial costs.

39. The Commissioner notes that the focus of the council's concerns is on the impact of disclosure on any putative legal action and on the potential loss of revenue which might result.

40. The Commissioner considers that these factors are removed from the commercial activity which the council has identified, namely, its operation of Mote Park Adventure Zone ("Mote Park"). She also considers that the council has not explained how disclosing the information in parts 2-5 of the request would impact on the specific legitimate economic interests it has identified.

41. Moreover, whilst the Commissioner accepts that legitimate economic interests can include financial costs that are not in themselves commercial information, the withheld information itself must be commercial in nature. Before reaching her conclusions in relation to this condition, therefore, the Commissioner has turned to this question.

Is the information commercial or industrial in nature?

42. The exception only protects the confidentiality of "commercial or industrial" information.

43. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The

44. essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about a public authority's revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services.

45. In this case the council has withheld the information in parts 2-5 of the request, namely:

    "2 Was the contractor given plans of the site - detailing the presence of sewers etc - prior to work starting or was it their responsibility to carry out these surveys?
    3 Against whom did MBC consider legal action?
    4 Who did MBC believe to be responsible?
    5. Why was legal action dropped?"

46. The council has stated that the information falls within the scope of "commercial information" because *"…We have commercial relationships with Southern Water and with the Adventure Zone contractor."*

47. The council has further argued that the sewage collapse which is the focus of the request relates to a commercial activity of the council, namely its operation of Mote Park. The council considers that, having embarked on a commercial enterprise, it is allowed to mitigate any losses it may incur (in respect of the sewer collapse) in the same way that a commercial organisation would be able to.

48. The Commissioner considers that it is not clear that information relating to any potential legal action or costs is directly related to the council's commercial activity in this case. Whilst such activities may have an impact on the council's finances the Commissioner does not consider that the effects of any legal action undertaken by the council in itself necessarily constitutes a commercial activity. In short, any potential legal action taken by the council or outcome of such action does not in itself constitute a commercial activity.

49. The Commissioner considers that the withheld information is too removed from the commercial activity identified by the council to constitute commercial information in itself. She does not, therefore, consider that the terms of this condition have been met.

Conclusions

50. When considered together, the Commissioner considers that the arguments provided by the council fail to convince that the applicability of the exception has been properly considered.

51. The council's submissions fail to properly address the conditions required to engage the exception and fail to make clear the causal link between disclosure of the specific information requested and the adverse effects described. The Commissioner also considers that the council's submissions elide two distinct activities (legal action and the commercial operation of Mote Park) in a way that confuses and obscures the relevant facts.

52. The overall impression the Commissioner has is that the council has decided that it does not want the information to be made public and sought to apply the exception on a general basis in order to facilitate this.

53. The Commissioner acknowledges that a case might be made for the information to be withheld. However, she considers that the council has been given sufficient opportunity to make such a case and has failed to do so.

54. The Commissioner has concluded that it has not been shown that the withheld information is commercial in nature and that the council has failed to show that disclosure would result in harm to a legitimate economic interest. As these conditions have not been met, she has determined that the exception is not engaged. She has, therefore, not gone on to consider the public interest. At paragraph 3 above the council is now required to disclose the withheld information.

Right of appeal

55. 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

56. 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.

57. 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 ……

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF