

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

Date: 14 March 2025

Public Authority: Kent County Council
Address: Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant requested a consultant's report about Thanet Parkway Station. Kent County Council ("the council") refused the request, applying Regulation 12(5)(e) (commercial confidentiality).
2. The Commissioner's decision is that the council was correct to withhold the information under Regulation 12(5)(e). He has, however, decided that the council's response did not comply with the requirements of Regulation 14(2) in that it did not provide its response within 20 working days of receiving the request.
3. The Commissioner does not require the council to take any further steps.

Request and response

4. On 2 April 2024, the complainant wrote to the council and requested information in the following terms:

“Further to your reply to my previous EIR request (ref 45121065 - see below) dated 11 March, which confirms that the Council is in possession of the final version of the Sable Leigh Consultancy report on the cost of Thanet Parkway Station, please provide me with a full version of that report.”
5. The council responded on 2 August 2024, issuing a refusal notice outside of the time required by Regulation 14(2) of the EIR. It refused to provide the requested information on the basis that Regulations 12(5)(e) and 12(4)(d) of the EIR applied.
6. Following further correspondence, on 24 October 2024, the council wrote to the complainant with the outcome of its internal review. It amended its position and confirmed it was now solely relying upon Regulation 12(5)(e) to withhold the information.

Scope of the case

7. The complainant contacted the Commissioner on 25 September 2024 to complain about the way their request for information had been handled.
8. The complainant argues that the council was not correct to apply Regulation 12(5)(e) to withhold the information from disclosure.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

9. Regulation 12(5)(e) of the EIR provides 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.
10. The exception in Regulation 12(5)(e) can be broken down into the four-stage test which was adopted by the [Information Rights Tribunal in Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association \(EA/2010/0012\), 24 May 2010](#).

11. All four elements are required in order for the exception to be engaged and are as follows:
 - 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?
12. If the first three questions can all be confirmed, the fourth question will also automatically be confirmed. This is because the information would cease to be confidential if it was disclosed under the EIR.

Is the information commercial in nature?

13. The complainant submitted an argument to the Commissioner that the information was about emissions and therefore Regulation 12(5)(e) cannot be applied to withhold it due to the application of Regulation 12(5)(9) of the EIR. Having viewed the withheld information, however, the Commissioner has decided that this argument is incorrect.
14. The withheld information is a report produced by Sable Leigh Consultancy (SLC) about the final cost of constructing Thanet Parkway Station and other related matters. The council argues that it is commercial in nature because it relates to the procurement and costs of goods, works, and services for a significant project.
15. Having viewed the withheld information, the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

16. The council argues that the information is subject to a common law duty of confidence. It argues that SLC were contracted to carry out the review under a duty of confidence, with confidentiality terms around the use of data and the report produced forming part of the terms of procurement.
17. It also argues that its own staff are subject to contractual terms of confidentiality, and that they would be aware that an unauthorised disclosure of the information could lead to disciplinary action being taken against them by the council.
18. It also argues that a reasonable person would naturally conclude that information of the nature contained within the report should be treated with a duty of confidentiality.

19. The Commissioner is persuaded by the council's arguments in this respect, and he is therefore satisfied that the information is subject to the necessary obligation of confidence.
20. The Commissioner notes that the information is not trivial. It contains sensitive information relating to ongoing negotiations. It is also not otherwise in the public domain. The Commissioner has therefore decided that the information also has the necessary quality of confidence.
21. The Commissioner is therefore satisfied that the withheld report is subject to a duty of confidence which has been provided by law.

Is the confidentiality required to protect a legitimate economic interest?

22. 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.
23. 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.

The complainant's position

24. The complainant argues that there can be little commercial prejudice to the council given that the station was completed over a year ago, and passenger services to and from it have been operating since 31 July 2023. The complainant argues that:

"It is hard to see how the disclosure of information about the costs of a project which was completed and, I assume, largely paid for over a year ago, would damage the commercial position of the council."

The council's position

25. The council has submitted detailed arguments in support of its position that the exception applies as a disclosure of the information would have an adverse affect upon its legitimate economic interests.
26. It argues that the information is commercially sensitive because it is still in negotiations with its contractor, Network Rail, about final costs. A disclosure of the council's assessment of costs would obviously affect its bargaining position during these negotiations. This would therefore have a detrimental impact upon its legitimate economic interests.

27. The Commissioner has also taken into account further arguments submitted by the council in respect of its position as regards the affect a disclosure would have on its economic interests. The Commissioner has taken these points into consideration in reaching a decision on the application of this test.
28. The Commissioner has published [guidance](#) on the application of Regulation 12(5)(e). This notes that the timing of the request and whether the commercial information is still current are likely to be key factors in the decision as to whether the exception is applicable.
29. The Commissioner has previously issued decision notices¹²³ on similar information where negotiations were still live and ongoing. His decision in each of those cases was to uphold the application of Regulation 12(5)(e) because the information was still live, its disclosure would cause an adverse effect on the ongoing negotiations, and thereby the legitimate interests of the parties concerned.
30. Having considered the detailed arguments submitted by the council, the Commissioner is satisfied that a disclosure of the information would cause an adverse affect upon the council's economic interests.
31. The Commissioner's decision is therefore that this part of the test has also been met.

Would the confidentiality be adversely affected by disclosure?

32. Although this is a necessary element of the exception, as the first three tests set out above have been met, the Commissioner considers it inevitable that this element will also be satisfied.
33. The Commissioner therefore considers that the exception in Regulation 12(5)(e) is engaged by the requested information.
34. As the exception under Regulation 12(5)(e) is engaged, the Commissioner has gone on to consider the public interest test required by Regulation 12(1)(b) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. If it does not, then the information should be disclosed.

¹ [FER0711508](#)

² [FER0580869](#)

³ [ic-182717-j2q7.pdf](#)

35. When carrying out the test the Commissioner must take into account the presumption towards disclosure provided in Regulation 12(2) of the EIR.

Public interest in the information bring disclosed

36. The complainant argues that the council has spent a significant amount of money on the development at a time when it is reducing its funding to other important aspects of its functions.
37. The complainant argues that the project is already millions over what was initially stated to be the cost, and final costs figures have not been disclosed by the council. The complainant therefore argues that there is a very strong public interest in the council providing greater clarity over its decisions and actions as regards the project:

"There is a strong public interest in the disclosure of this report as it relates to the transparency and accountability of the council in overseeing as the accountable body the spending of what is likely to be over £50million of public money on the construction of a railway station.

There is also a strong public interest in knowing why since its inception in 2013, the cost of this project, and its call upon public funds, has escalated dramatically.

Furthermore, this project has always been, and remains, controversial not only because of its spiralling cost, but also whether it represents value for money for the tax payer."

38. The Commissioner accepts, and has taken these arguments into account in his decision.
39. The council said that its decision had taken into account that the withheld report relates to the procurement and ultimate cost of goods, works and services for a significant infrastructure project.
40. It said that it recognises that the principle of open government and good decision-making is important and that the public should have a right to know how public bodies function and how decisions are made.
41. In particular, it said that it recognises that there is public interest in disclosing information to present a full picture, and promote the public interest in development works and creating a sustainable environment.

42. Further, it said that its decision took into account that there is a public interest in disclosing details of how it conducts its business, including its scrutiny of costs incurred by strategic contractors.

Public interest in the exception being maintained

43. The council confirmed that the issue remains a live matter and that the report retains its commercial sensitivity for the reasons explained above.
44. A disclosure of information which would undermine the council's negotiating position risks creating a loss to the public purse, which would in turn affect the resources which the council could put to other public use.
45. There is a very strong public interest in protecting the ability of the council to complete its negotiations without its bargaining position being undermined by a disclosure of the report prior to the negotiations being completed. Disclosing the information during this period may also cause delays in the parties reaching a final agreement.
46. As negotiations are ongoing, a disclosure of the report would not provide the public with a true picture of the costs of the project. This can only be provided once the negotiations have been completed.

The Commissioner's conclusions

47. On the evidence and arguments presented to him by both parties, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in the information being disclosed in this instance.
48. There is a public interest in protecting information relating to ongoing negotiations from disclosure. A disclosure of the information during negotiations would ultimately make it harder for the council to obtain best value for tax payers. It would also potentially lengthen the time it would take for negotiations to conclude, which is not in the public interest.
49. Whilst there may be circumstances where the public interest in disclosure justifies the disclosure of information, even with the risks outlined, the Commissioner does not consider that this is such a case. His decision is therefore that the public interest rests in the exception in being maintained outweighs that in the information being disclosed in this case.

50. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has borne this in mind when reaching his decision. However, the above demonstrates that the Commissioner's view is that the public interest in the exception being maintained clearly outweighed that in the information being disclosed at the time that the request was initially responded to.
51. Therefore, the Commissioner's decision is that the presumption in favour of disclosure required by Regulation 12(2) does not change the outcome of his decision that the exception was correctly applied by the council in this case.

Regulation 14(2) – Refusal to disclose information

52. Regulation 14 of the EIR states that:
- “(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.”
53. The complainant submitted their request on 2 April 2024. The council did not provide its EIR refusal notice until 2 August 2024.
54. As it failed to provide its response within the statutory time limit, the Commissioner's decision is that the council breached Regulation 14(2) of the EIR.

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.

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