

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

**Decision notice**

**Date:** 14 January 2013

**Public Authority:** Chelmsford City Council  
**Address:** Civic Centre  
Duke Street  
Chelmsford  
Essex  
CM1 1JE

**Decision (including any steps ordered)**

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1. The complainant requested information from Chelmsford City Council ("the council") regarding the rental of Hylands Park for the V Festival. The council provided some information regarding earlier years however it refused to provide more recent information using the exception under regulation 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR") relating to commercial confidences.
2. The Commissioner's decision is that the council correctly relied on regulation 12(5)(e) and correctly determined that the public interest in maintaining the exception outweighed the public interest in disclosing it in the circumstances of this case. For clarity, it has been necessary to set out some of the relevant arguments in a confidential annex associated with this notice that has only been provided to the council. The Commissioner also found a breach of regulation 5(2), 14(2) and 14(3) because of the late response and the council's failure to consider the request under the EIR.
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 19 July 2011, the complainant requested information from the council in the following terms:

*"1) Please could you advise how and where on Chelsford Borough Council's website I can locate the Audited Accounts of the Council?*

*2) Please could you tell me how much the council receives in monies for the rental of Hylands Park for the purpose of the V Festival? Could you please advise the rental fee received each year since the Festival first played at Hylands Park. Furthermore, please advise me how the council then spends this rental fee received from Maztec".*

5. The council responded on 25 October 2011 and provided some information. However, the council said that it was unable to provide the fees for the use of Hylands Park because that information is exempt under section 43(2) of the Freedom of Information Act 2000 ("the FOIA").
6. The complainant requested an internal review on 7 November 2011.
7. The council completed its internal review on 29 November 2011. It said that it wished to maintain its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled and following an initial decision notice, the council was ordered to reconsider the request under the EIR. It subsequently relied on regulation 12(5)(e). On 27 June 2012, the complainant asked the Commissioner to consider whether the council had correctly relied on the exception under regulation 12(5)(e).
9. During the Commissioner's investigation, the council agreed to the disclosure of the licence fees paid for the period 1996 to 2005, thereby informally resolving that part of the complaint. The Commissioner's investigation therefore only concerns the hire fees paid for the years 2006 to 2010. The council has confirmed that at the time of the request, it did not in fact hold the detail of the licence fee for 2011, since that is agreed following the event, taking into account factors such as attendance figures.

### **Reasons for decision**

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#### **Regulation 12(5)(e) – Commercial confidences**

10. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will

consider the following questions:

- 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? (This will obviously occur if the information is disclosed under the FOIA)

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

11. 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. The information in question is the licence fee paid for the hire of the park during the years 2006 to 2010. The Commissioner was satisfied that this is clearly a commercial arrangement and the information is therefore commercial in nature.

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

12. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
13. The Council presented an argument that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
  - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
14. Having considered the withheld information, the Commissioner was satisfied that it is not trivial. No evidence was presented to the Commissioner to demonstrate that the information is already in the public domain. Therefore, the Commissioner considers that the information has the necessary quality of confidence.
15. The council told the Commissioner that it considers that an obligation of confidence had arisen in the circumstances of this case. It said that on every occasion when a request for this information had been made, the company concerned, Maztec Ltd, had indicated that it considers

that the information was confidential and the council likewise has taken the same view. The council also highlighted that it had become an established arrangement that this information would not be disclosed to third parties and this had been followed consistently for many years, contributing to the expectation that the information would be treated as confidential. The council said that this had been explicitly acknowledged in the past during verbal discussion between the parties on a number of occasions, and the council was able to provide supporting evidence from Maztec that this had been the case.

16. In view of the above explanation and the nature of the withheld information, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence.

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

17. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not".
18. In support of the above approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:  
  
*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*
19. The council told the Commissioner that it wished to argue that the commercial interests of itself and Maztec would be prejudiced if the information was disclosed. The Commissioner was satisfied that if the information was disclosed, it would more probably than not prejudice the commercial interests of both the council and Maztec, except that he did not consider that all the arguments made about commercial harm to Maztec's interests were convincing.
20. In relation to its own interests, the council argued that the disclosure of the information would result in major event organisers, including

Maztec, being less inclined to deal with the council in the future if it was perceived that the council could not maintain confidentiality. The Commissioner accepts that this consequence would be more probable than not. Negotiation is part of the process of determining a mutually agreeable licence fee and the confidentiality of that process enables the third party to maintain a stronger negotiating position with other parties. The promoters may also negotiate with private venues rather than public venues if they choose.

21. The council also said that disclosure would reveal to other competing sites (both private and publicly owned) the price the company is currently paying for using Hylands Park, which would prejudice the council's ability to compete with others fairly in relation to the festival in the future and may ultimately result in the loss of the festival altogether if the council was undercut by a competitor. The Commissioner was satisfied that the council's ability to compete on an equitable basis with its competitors would be compromised if the information was disclosed. The disclosure would make it considerably easier for the council's competitors to undercut the council.
22. The council also said that as a consequence of the adverse effect caused to Maztec's own commercial interests (partly considered in the confidential annex to this notice and partly considered below) it considered that it was more probable than not that Maztec would seek to renegotiate its contract with the council for future use of the park, which would damage the legitimate economic interests of the council significantly. The Commissioner accepts that the risk of this was more probable than not based on the arguments presented in the confidential annex to this notice. For the reasons set out below, the Commissioner was only persuaded of the prejudice to the council's commercial interests so far as there was prejudice to Maztec's negotiations in circumstances that are comparable to the V Festival.
23. In relation to the interests of the third party, the council has already indicated in its response to the complainant dated 25 October 2011 that disclosure of the information would prejudice Maztec's position when negotiating contracts for the hire of venues elsewhere. More particular concerns have been set out in a confidential annex. In line with the decision by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* ([EA/2006/0014](#)), the council was able to present direct evidence from Maztec that the arguments it was presenting represented the genuine concerns of the company. It provided a detailed record of a telephone conversation and a copy of a letter from Maztec. The Commissioner was satisfied that the risk of prejudice to Maztec's negotiations with other venues in the future was more probable than not where the circumstances are comparable to the V Festival. The Commissioner was satisfied that if the fee agreed

with the council was disclosed, it would more probably than not impact on the price other venues would desire, putting the company in a weaker negotiating position than would otherwise be the case. Further rationale is included in the confidential annex.

24. The Commissioner was not satisfied that sufficient evidence had been provided to demonstrate that it was more probable than not that Maztec's commercial interests in relation to negotiations that are not comparable to the V Festival would be prejudiced. In evidence directly from Maztec, the company explained that hire fees for various events held at various locations differ depending on the nature of the event, the venue and the length of hire. The company did not explain why, given the variable nature of the events, prejudice would be more probable than not in relation to circumstances that were not comparable to the V Festival, which the Commissioner understands forms the most common aspect of the company's business.

### **Public interest in disclosing the information**

25. The scheme of the FOIA itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
26. In the specific circumstances of this case, the Commissioner considers that there is a strong public interest in the council being accountable and transparent about how it is making the best use of its assets, particularly against the background of the current economy. The V Festival is a large and popular event, with great potential to bring in a substantial income to the council over a long period of time, which in turn can be put to public use in other contexts. It is understandable that the public would wish to be reassured that the council is managing its asset in this context in the best possible way.

### **Public interest in maintaining the exception**

27. The council has been able to persuade the Commissioner that its own commercial interests and those of Maztec would be prejudiced if the information was disclosed for the reasons already discussed above and partly, in the confidential annex to this notice.
28. The legislation recognises that there is a public interest in ensuring that undue harm is not done to the legitimate economic interests of public authorities or third parties, through the disclosure of information. In the case of a local authority, trade with businesses is an important part of raising the funds that affect public services. There is a public interest

in protecting the relationship of trade between the council and businesses and ensuring that businesses are not discouraged from entering into arrangements with public authorities that contribute considerable sums to the authority's income and therefore public services.

29. The Commissioner accepts that the disclosure of this information would make it considerably easier for its competitors to undercut the council in future negotiations. Not only does this affect the council's ability to get the best possible deal, it also exposes the council to the risk of the V Festival being held elsewhere, in which case it would lose a substantial amount of income and public services would inevitably suffer as a result. The Commissioner understands that this would be the worst case scenario, but it is still a risk if the information was disclosed. The Commissioner also accepts the risk of Maztec seeking to renegotiate the level of fee paid to the council. It is clearly in the public interest for the council to ensure that it receives the best possible fee for its asset for the reasons already outlined.
30. Maztec has demonstrated that prejudice would be caused to its ability to negotiate successfully with venues when there are comparable circumstances to those of the V Festival as set out in the confidential annex to this notice. It is important that commercial enterprises are given an appropriate degree of protection to enable their businesses to be successful and contribute to the wider economy, which is in the public interest. As already indicated, there is also a wider public interest point at stake when there is a risk, as there is in this case, that any commercial harm caused to the company would more probably than not be passed on to the council either fully or in part.

### **Balance of the public interest**

31. When the Commissioner asked the complainant to highlight why he considered that the public interest favoured disclosure, he referred to a statement made by the council in its original response to him dated 25 October 2012 as follows:  
  
*"The Festival Promoter has a policy to nationally donate in the region of £100,000 each year to charities and good causes. As part of this sum Chelmsford Borough Council has most recently received £35,000 towards the construction of the Hylands Park Adventure Play Area and a further £20,000 for environmental improvements at Hylands Park towards tree and hedge planting. We understand that Writtle Parish Council also receives sums for good causes on a regular basis".*
32. The complainant argued that the company's willingness to contribute in this charitable manner suggests that the licence fee negotiated by the

council is too low. The Commissioner disagrees with the complainant in this respect. There is no evidence available to the Commissioner to indicate that this is indeed the case and the mere fact of the charitable donations does not necessarily mean that those payments are made possible because the company is not paying enough to hire the park for the V Festival. Even if these additional donations were taken into account when negotiating the contract, this would not mean, in the Commissioner's view, that the council was not achieving the best overall deal.

33. The complainant also said that he could think of no reason why it would be in the public interest to withhold the information and the council's reluctance to publish the figures was a further indication that the fee negotiated is too low. Again, the Commissioner disagrees with the complainant's point of view. On the contrary, there are strong reasons for the council to have concerns that disclosure of this information would not be in the public interest, as discussed in this decision notice, and the council's application of the exception cannot be taken as sign that the licence fee is too low.
34. However, the Commissioner appreciates that there is a strong public interest in the public being reassured that the council is getting the best possible deal in relation to its asset, and a deal that is appropriate in view of the scale of the V Festival. The council understands from the council that it considers that it is receiving an appropriate fee for the hire of the park. The council said that the possibility of a rival music promoter who is able to pay a greater fee to the council is remote to non-existent. The council highlighted the unique nature of the event and the amount of time it takes for a festival of this nature to become as well-established as the V Festival. There are also audit processes available offering some means of reassurance.
35. Turning now to the council's arguments about prejudice to its own commercial interests. The Commissioner has accepted that there would be a risk that major music promoters, including Maztec, would be less inclined to deal with the council in the future if it was perceived that it could not maintain confidentiality. In relation to Maztec in particular, the Commissioner was not persuaded that the risk of harm would be particularly severe. Both parties have stressed to the Commissioner that the music festival has become established in Chelmsford over many years and that the parties have built up a very good relationship. Moreover, the parties could take into account commercial concerns when negotiating a mutually agreeable fee in the future. This may result in the council receiving less than it would have done otherwise however that particular argument was not presented by the council.



36. The Commissioner considered that the remaining case presented by the council was stronger. It was clear to the Commissioner that if the council was disadvantaged in a competitive negotiation in the future for the V Festival, this could have a very severe impact. If the V Festival contract was not maintained and the festival was held somewhere else, the council and the wider local economy would suffer a significant loss. The impact would not only be limited to the council's finances either since the Commissioner considers that there would be wider implications for the local economy.
37. The council highlighted that the V Festival is one of the leading music festivals in the UK and it matches Glastonbury and Leeds-Reading in prominence and importance. The council said despite the financial difficulties faced by the economy, the V Festival has continued to grow and sell to capacity. The council stressed to the Commissioner that the V Festival represents a considerable income stream and it has been relied upon by the council over the years to fund general expenditure across the full range of council services. The council added that through the strong relationship it had built up with Maztec, it had also been able to secure improvements to the park and contributions are also made to local projects through an annual donation of £100,000.
38. The council also said if the festival was lost, the wider economy would be adversely affected. It explained that in 2006, the council commissioned research to be undertaken by East of England Tourism. The completed research was entitled "Economic Impact of the V Music Festival – 2006" and it showed that the V Festival's presence brought an estimated £8.2 million into the borough's economy, arising from expenditure by contractors and spending by visitors at the festival and elsewhere in Chelmsford. The council pointed out that the V Festival had grown considerably since then, with attendance increasing from 75,000 in capacity in 2006 to 90,000 capacity in 2010. The council also said that in addition to this, the 2006 V Festival resulted in significant additional net spending in the regions outside Chelmsford i.e. the rest of the county of Essex and the East of England. The council quoted the figures as £7.4 million and £6.6 million respectively. The council said that given the overall economic downturn, the festival arguably plays an even greater role now in terms of contributing to the wider economy.
39. However, although a possibility, the Commissioner considered that loss of the festival would be the worst case scenario. The Commissioner has taken into account the comments made by both Maztec and the council on the subject of the strong working relationship they have built up over the years and the fact that the V Festival has become a successful and established event in Chelmsford. He considers that it is more likely that the parties would renegotiate a lower fee than move the event to

another location. However, this in itself would still impact on the council's finances to a significant extent given the substantial contribution to public services derived from the licence fee.

40. The council said that, in common with other local authorities, it continues to be subject to severe budgetary constraints, coupled with pressure to make year on year savings. It follows that any significant reduction in the hire fee would have extremely serious ramifications for the council and the wider community. The council said that its Director of Finance had identified what a reduction could represent in real terms and it provided these details to the Commissioner to demonstrate the impact that a reduction in its income from the licence fee would have in varying degrees of severity depending on the scale of the reduction. The Commissioner was satisfied that the impact would be sufficiently severe.
41. As already indicated, comments relating to the impact on Maztec's commercial interests are made in the confidential annex to this notice. If the loss was passed on in full or in part to the council through a renegotiation of the contact for the V Festival, the Commissioner is satisfied that the impact would be severe for the reasons already outlined above.
42. The council also considered the age of the information when making a decision to withhold the most recent fees. It said that it was able to disclose the older fees because of the passage of time and the fact that the V Festival had grown in size significantly since then. Disclosure of the more recent fees would be much more prejudicial.
43. In light of the above considerations, the Commissioner was not persuaded on this occasion, that the public interest in disclosing this information equals or outweighs the risks to the council's and Maztec's commercial interests. Given the financial loss that the council would be likely to occur, which may be more or less severe depending on the choices made by Maztec, the Commissioner considered that it would not be proportionate to expose the council to this level of harm in order to achieve complete accountability and transparency about the licence fee that is paid. In view of the evidence presented, it was the Commissioner's view that the risk of harm outweighed the benefits and the public interest therefore favours maintenance of the exception.

### **Procedural issues**

44. Regulation 5(2) provides that public authorities should respond to requests within 20 working days. The council's response was significantly outside this time frame on this occasion and the Commissioner has therefore found a breach.

45. Regulation 14(2) provides that public authorities wishing to refuse information under the EIR should do so within 20 working days. Regulation 14(3) specifies that public authorities should cite an exception and set out relevant public interest arguments. As the council failed to comply with these provisions within 20 working days and by the date of the internal review, the Commissioner has found further breaches of the EIR.

## Right of appeal

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46. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

47. 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.
48. 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**  
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