

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

Decision notice

Date: 8 August 2016

Public Authority: Arun District Council
Address: Civic Centre
Maltravers Road
Littlehampton
BN17 5LF

Decision (including any steps ordered)

1. The complainant has requested the Event Management Plan for the Mutiny Festival which took place at Fontwell Racecourse in July 2015. Arun District Council refused the request under the exemption for prejudice to commercial interests, section 43(2) of the FOIA. During the Commissioner's investigation the public authority reconsidered the request under the EIR and revised its position to withhold the information under the exceptions for public safety (regulation 12(5)(a)) and adverse affect to the confidentiality of commercial information (regulation 12(5)(e)).
2. The Commissioner's decision is that Arun District Council failed to handle the request under the EIR and breached regulation 5(1) and regulation (14) and failed to demonstrate that regulation 12(5)(a) and regulation 12(5)(e) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information to the complainant.
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.

Request and response

5. On 23 January 2016, the complainant wrote to Arun District Council (the "council") and requested information in the following terms:

"A copy of the Event Management Plan Submitted by the Mutiny in the Park Event organisers and accepted by the Council at the time of Granting the Licence for the Mutiny Music Festival at Fontwell Park Racecourse in July 2015. The requested document is the amended version following the Environmental Services Department's requirements for improvements."
6. The council responded on 19 February 2016. It stated that it was withholding the information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 16 March 2016. It stated that it was maintaining its position.

Scope of the case

8. On 14 April 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information.
10. At the outset of her investigation the Commissioner invited the council to consider whether the request fell to be handled under the EIR as it occurred to her that the information was likely to be environmental in nature.
11. The council accepted the Commissioner's view and reconsidered the request under the EIR, withholding the information under regulation 12(5)(a) and regulation 12(5)(e).
12. The Commissioner has considered whether the council has correctly applied exceptions under the EIR to withhold the requested information.

Reasons for decision

Is it Environmental Information?

13. 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.
14. 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 as 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...'

15. 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.
16. In this case the focus of the withheld information is the hosting of a festival at a site at Fontwell Park, involving temporary built structures. The information, therefore, relates to land/landscape and advice which could determine or affect, directly or indirectly, policies or administrative decisions taken by the council.
17. 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”).

18. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

Regulation 14 – refusal to disclose information

19. 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
20. In these circumstances the Commissioner believes that it is appropriate for her to find that the council breached regulation 14(1) of EIR which requires that 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 because the council actually dealt with the request under FOIA.
21. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

22. The council has withheld the entirety of the information which makes up the Event Management Plan (“EMP”) under regulation 12(5)(e).
23. 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”.
24. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - 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?

Is the information commercial or industrial in nature?

25. The council has stated that the information was provided to it by Mutiny in the Park Limited ("MITPL") as part of a licence agreement for a commercial event. It confirmed that the information sets out the operational and safety plans required to facilitate the event.
26. Having considered the council's submissions and referred to the information, the Commissioner is satisfied that the information is commercial in nature and satisfies this element of the exception.

Is the information subject to confidentiality provided by law?

27. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
28. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
29. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
30. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. Furthermore, he notes that the EMP itself explicitly states that the information should not be disclosed more widely without MITPL's express permission. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it relates to the delivery of a substantial public event. In addition to this, the council has confirmed that the information is not in the public domain and the Commissioner is satisfied that this is the case.
31. The Commissioner considers that it is reasonable to assume that the information has been shared with the council in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of

the exception, he is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

32. 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 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.
33. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This 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".
34. The council has argued that disclosure of the information would adversely affect the legitimate economic interests of MITPL.
35. The Commissioner will not accept speculation about prejudice to the interests of third parties. He expects public authorities to provide evidence that the arguments being presented genuinely reflect the concerns of the relevant third parties. This is in line with the decision of the Information Tribunal in the case of Derry City Council v the Information Commissioner (EA/2006/0014). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air but as the arguments expressed only represented the council's own thoughts on the matter, the tribunal rejected the arguments.
36. The council confirmed that, in handling the request, it contacted MITPL and sought its view on whether the information could be disclosed.
37. The council advised the Commissioner that MITPL considers that the withheld information is still considered to be "live" and that it forms the basis of its current business plan and procedures. The council submitted that MITPL has suggested that, should the information be disclosed, competitors would be able to use the information to produce their own management plan at a fraction of the cost incurred by MITPL. The council has stated that an outcome of this would be that the business

operations of MITPL would be harmed, affecting its legitimate economic interests whilst assisting its competitors.

38. The council provided the Commissioner with an extract from MITPL's submissions which explained that the information contained within the EMP was produced for it by specialist consultants at significant cost. MITPL further explained that the information constitutes a blueprint of how it operates festivals to be used by anyone with statutory responsibility for an event. It has argued that a competitor would, therefore, be able to utilize the information to stage a similar event in direct competition with MITPL. MITPL has further stated that disclosure of the information would be "likely" to prejudice its commercial interests.
39. The Commissioner notes that the council has withheld the EMP in its entirety and on the basis of the general principle invoked by MITPL that disclosure would be of use to competitors. The Commissioner appreciates that rival event management companies would, no doubt, be interested in accessing the plans or blueprints for staging events of competitors. However, the Commissioner is mindful that threshold for the engagement of regulation 12(5)(e) is a high one and, in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate economic interests of one or more parties. In demonstrating harm, an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.
40. The Commissioner has been left with the impression that the council and the third party has adopted a "blanket" approach to the application of the exception and has not had sufficient regard to the nature of the actual information. Furthermore, the rationale presented in favour of the third party's argument is particularly limited and contain a striking lack of detail and absence of any reference to the information in itself.
41. The Commissioner notes that the council has had 2 opportunities to present a detailed rationale for withholding the information and a further chance during his investigation. In cases where an authority does not provide sufficient arguments to demonstrate that an exception is engaged the Commissioner does not consider it his role to demonstrate arguments on its behalf.
42. Having considered the available evidence the Commissioner does not find that she is able to support the council's application of the exception based on such limited rationale. The arguments provided do not attempt to refer to any specific parts of the information in question or explain why the complete circumstances of the case warrant the conclusion

reached that prejudice to MITPL's commercial interests would be more probable than not.

43. For the reasons described above, the Commissioner has concluded that the council has not demonstrated to the Commissioner to the required standard that it had correctly engaged the exception under regulation 12(5)(e). The Commissioner has, therefore, not considered the application of the public interest in this case. However, he notes that, in view of the disquiet which the event caused in the local community, voiced by the complainant and by local MP, Nick Herbert¹, and concerns about the adequacy of the planning and operational arrangements, the Commissioner considers it is likely that there would, in any event, have been compelling public interest arguments for transparency in this case.
44. In reaching the above conclusion the Commissioner has referred to a previous decision notice which was issued to Isle of Wight Council in respect of the Isle of Wight Festival². The Commissioner considers that the requests and circumstances of both cases are sufficiently similar for the same conclusion to be reached in the matter of this request.

Regulation 12(5)(a) – public safety

45. The council has applied regulation 12(5)(a) to information falling within specific sections of the EMP which fall within the 'Event Safety Management Plan' ("ESMP").
46. Regulation 12(5)(a) states:

"For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

(a) international relations, defence, national security or public safety."
47. To engage regulation 12(5)(a), disclosing the requested information must have an adverse effect on at least one of the following interests; international relations, defence, national security or public safety. For the exception to be engaged it has to be more probable than not that the alleged harm would occur if the information were released.

¹ <http://www.nickherbert.com/news.php/654/mp-demands-review-and-apology-after-mutiny-festival-disruption>

² https://ico.org.uk/media/action-weve-taken/decision-notices/2013/825260/fs_50460423.pdf

48. The council has argued that disclosure of the information would have an adverse effect on public safety. It has stated that any future events held by MITPL or other organisers at the Fontwell Park site would be "jeopardised". The council has submitted that the information sets out how it and MITPL deal with major incidents or how event organisers are asked to handle drug or alcohol problems and the disclosure of this information would "cause concern" to the council and the Police in respect of their "...abilities to deal effectively with criminal activities that are likely to occur at events of this size and nature."
49. In defining harm to public safety within the context of the exception, the Commissioner's guidance states:
- "The term public safety is not defined in the EIR. But in broad terms this limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public. It can be used to protect the public as a whole, a specific group, or one individual who would be exposed to some danger as a result of the disclosure."*³
50. The Commissioner notes that the council's arguments about the putative effects of disclosure do not make reference to public safety, nor do they make explicit the link between the effects of disclosure and the specific elements of the information that has been withheld. The council's assertion that the information sets out how event organisers would deal with major incidents is not developed in any detail, nor is it shown how this impacts on public safety, nor is any reference made to specific sections of the withheld information (which relates to a broad range of activities).
51. The Commissioner is also mindful that the request was made some time after the event was held so, the information was not 'live' in the sense that its disclosure could have an effect on the passage of events at the festival or the effectiveness of any procedures contained within the ESMP. In relation to the possible effects of disclosure on future events, the council has not provided any details of the likelihood of such events taking place. In short, the Commissioner considers that the council's

³ Guidance published on the ICO website here: https://ico.org.uk/media/for-organisations/documents/1633/eir_international_relations_defence_national_security_public_safety.pdf

submissions are highly speculative and raise concerns that the matter has not been given due consideration.

52. In any event, the Commissioner considers that it is not sufficient for the council to assume, as it appears to have done in this case, that it is self-evident that disclosure of the information would result in adverse effects to public safety. The Commissioner is not satisfied that the arguments presented by the council either succeed in demonstrating that adverse effects would be more likely than not to result from disclosure or even demonstrate that the supposed harm meets the definition of the exemption, namely, that it would take the form of hurt or injury.
53. In cases where an authority does not provide adequate arguments in support of the application of an exception the Commissioner considers that she is not obliged to generate such arguments on its behalf. She has, therefore, concluded that, on the basis of the information provided, the council has failed to demonstrate that the exception in relation 12(5)(a) is engaged. She has, therefore, not gone on to consider the public interest test.

Right of appeal

54. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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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