

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

**Date:** 5 July 2022

**Public Authority:** Breckland District Council

**Address:** Elizabeth House  
Walpole Loke  
Dereham  
Norfolk  
NR19 1EE

**Decision (including any steps ordered)**

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1. The complainant requested information relating to the sale of Barnham Broom Golf and Country Club. Breckland District Council (the "council") withheld the information under the exemption for commercial interest – section 43(2) of the FOIA. At the Commissioner's direction the council reconsidered the request under the EIR and disclosed some information to the complainant. Other information was withheld under the exception for commercial interests – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 of the EIR and that it failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under regulation 12(5)(e).
4. 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 FOIA and may be dealt with as a contempt of court.

## Background

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5. The request relates to Barnham Broom Golf and Country Club, which Breckland District Council is reported to have bought in 2006 for £7m, reportedly spending a further £2m on the asset<sup>1</sup>.
6. It has been reported that the council is attempting to sell the asset at a loss for the taxpayer<sup>2</sup>.
7. It is within this context that the request was made.

## Request and response

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8. On 1 March 2021, the complainant wrote to Breckland District Council (the "council") and requested information in the following terms:

"(In relation to the minutes of both Cabinet (04-01-2021) and OSC (14-0202021) meetings) The minutes of both Cabinet (04-01-2021) and OSC (14-0202021) meetings on this matter have been kept entirely confidential; neither has the full text of the OSC call-in request been disclosed. I suggest this is not in keeping either with [redacted] comment nor our Council's duty of openness and transparency. The chairman of OSC has suggested that I test the situation with an FoI request.

I there wish to make a request that a copy of the minutes be released for both meeting with only those parts which genuinely pass a public interest test for confidentiality be redacted - with a clear justification as to which statute is used to withhold information for each redaction. I further request in relation to Barnham Broom Golf and Country Club that the annual (tax year) rental income from this complex be disclosed for the last 10 years, since we have not completed this tax year data be income from April-December 2020."

9. The council responded on 29 March 2021 and confirmed that it was withholding all the information under the exemption for commercial

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<sup>1</sup> <https://www.edp24.co.uk/news/local-council/breckland-councils-secret-decision-on-barnham-broom-golf-6891072>

<sup>2</sup> <https://www.edp24.co.uk/news/local-council/no-answer-barnham-broom-golf-breckland-millions-losses-8714138>

interests – section 43(2) of the FOIA.

10. Following an internal review the council wrote to the complainant on 2 June 2021. It confirmed that it was maintaining its position.

### **Scope of the case**

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11. On 29 June 2021 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 sale and potential development of land, it occurred to the Commissioner that the information was environmental in nature. He, therefore, directed the council to reconsider the request under the EIR.
13. The council issued a new response to the complainant under the EIR, disclosing some information and withholding other information under the exception for commercial confidentiality – regulation 12(5)(e).
14. The Commissioner confirmed with the complainant that his investigation would consider whether the council had applied the exception correctly.

### **Reasons for decision**

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#### **Is it Environmental Information?**

15. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR. The Commissioner has set down below his 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 sale of and potential development of land.
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 the 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. In this case the withheld information comprises redactions made to the following disclosed documents:
- Cabinet Meeting 4 January 2021
  - OSC Meeting 14 January 2021
  - Call-in Reason
27. The council also withheld the “Breakdown of Rent payments for the land asset April 2011-December 2020” in its entirety.
28. In its submissions regarding the application of the exception the council stated the following:

“The Council considers that the information contained within the restricted minutes, unredacted call-in reason and a breakdown of the rental income is not already in the public domain.

The information held is considered confidential commercial information for the purposes of the EIR, and we consider that the disclosure of that information would adversely affect the commercial interests of the Council and of the third party.

Accordingly, the information requested falls within Regulation 12(5)(e) as it is commercial information. The question arises as to whether in all

the circumstances of the information, the public interest in maintaining the exception outweighs the public interest in disclosure.”

29. On the basis of this element of the council's submission, the Commissioner considers that it has failed to demonstrate that the exception is engaged. In addition to failing to explain why the withheld information is subject to a duty of confidentiality, the council also fails to identify any specific harm to a legitimate economic interest which disclosure would cause.
30. The public interest arguments provided by the council are, technically, redundant because they relate to the application of an exception that has not been shown to be engaged. However, the Commissioner has also considered whether the arguments have any application to the engagement of regulation 12(5)(e).
31. The public interest arguments in favour of maintaining the exception cited by the council relate to the potential damage to the council/third party interests caused by disclosing rent values and potential damage to the council's reputation regarding its handling of commercial information and potential damage to its relationship with the third party to whom the asset is leased.
32. The Commissioner considers these to be generic arguments which contain no reference to the specific information being withheld or the specific context within which the information would be disclosed. The Commissioner is left with the impression that the council has applied the exception on a general basis. Whilst he is mindful that arguments could be made for withholding the information, the council has failed to make them and it is not the Commissioner's role to generate arguments on the council's behalf.
33. Having considered the council's submissions and the withheld information, the Commissioner has concluded that the council has failed to show that the exception is engaged. At paragraph 3 above the Council is required to disclose the information withheld under regulation 12(5)(e).

## Right of appeal

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34. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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 .....**

**Christopher Williams**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**