

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 April 2022

Public Authority: Mid Sussex District Council
Address: Oaklands Road
Haywards Heath
RH16 1SS

Decision (including any steps ordered)

1. The complainant requested plans and technical specifications relating to a golf clubhouse, submitted as part of the building control process, from Mid Sussex District Council ("the Council"). The Council withheld some of the information under regulation 12(5)(e) of the EIR – Adverse effect on the confidentiality of commercial information – and the remainder of the information under regulation 12(5)(f) – Adverse effect on the information provider.
2. The Commissioner's decision is that regulation 12(5)(e) is engaged, but that the balance of the public interests favours disclosure of the information withheld under that exception. He finds that regulation 12(5)(f) is not engaged in respect of the remainder of the information.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Disclose all of the withheld information to the complainant.
4. The Council must take this step 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 25 November 2020, the complainant wrote to the Council and requested information in the following terms:

"Please could you provide copies of all information in relation to the matters listed below that is currently held by Mid Sussex District Council ("MSDC"). The request is made with respect to the following references for land situated at Cuckfield Golf Centre, RH17 5HY.

CD/05/00322

In relation to the above planning consent, information relating to or in connection with all building control matters

DM/19/0964

In relation to the above planning consent, information relating to or in connection with all building control matters

DM/20/0487

In relation to the above planning consent, information relating to or in connection with all building control matters

DM/20/4123

In relation to the above consent, information relating to or in connection with all building control matters

For the purpose of this request, information shall include, but not be limited to:

- Type of information: includes all media, such as paper, electronic and micro-fiche;
 - Source of information: includes all that generated by MSDC or received from or generated by all third parties;
 - Form of information: includes all records such as letters, memos, briefs, file notes (of meetings, telephone conversations or otherwise), emails, scanned documents, recommendations, forms (compliance, application or like), plans and photos.
 - For the avoidance of doubt, information shall include, but not be limited to internal correspondence and meetings with other MSDC officials and their agents."
6. On 18 December 2020, the Council provided an initial response. It commented that some of the information was copyrighted. The complainant replied on the same day, and said that he wished to be able

to inspect the information at the Council's offices, and that (at least) the non-copyrighted information should be sent to him forthwith and/or in line with EIR time-scales.

7. After a further exchange of correspondence, the Council provided its substantive response on 23 December 2020. It informed the complainant that there were three Building Control cases in connection with the planning reference numbers he had quoted, with the following reference numbers: 05/01964/OTHFP5 (New Clubhouse), BC/20/0185 (alterations and additions) and BC/20/0185/1 (alterations and additions).
8. The Council explained it had sought consent from relevant parties to disclose the information under the EIR. It provided the information which related to 05/01964/OTHFP5 (New Clubhouse). It also provided some of the information which related to BC/20/0185 (alterations and additions).
9. However the Council continued to withhold the remainder of the information relating to BC/20/0185 (alterations and additions), and all of the information relating to BC/20/0185/1 (alterations and additions).
10. Its position was that this information was exempt from disclosure under regulation 12(5)(f) of the EIR: adversely affect the interests of the person providing the information.
11. The complainant requested an internal review on 8 January 2021. He queried whether the Council may have sought to rely on regulation 12(5)(c) – intellectual property rights – and disagreed that regulation 12(5)(f) applied. He provided some supporting arguments in relation to the public interest in the disclosure of the withheld information, which, he stated, related to an apparently unauthorised development.
12. The Council sent him the outcome of its internal review on 19 January 2021. It confirmed that it had not relied on regulation 12(5)(c). Having obtained consent from the information provider, it provided some of the information which related to BC/20/0185.
13. However, it continued to withhold some of the information relating to BC/20/0185 and BC/20/0185/1, under regulation 12(5)(f).

Scope of the case

14. The complainant contacted the Commissioner on 6 February 2021 to complain about the way his request for information had been handled.

15. As stated above, the Council was relying on the exception at regulation 12(5)(f), which may be engaged where disclosure would adversely affect the interests of the information provider. This is known as the “voluntary supply of information” exception, since it requires the information to have been provided voluntarily to the public authority, and does not apply where the information provider could have been put under a legal obligation to provide it.
16. During the course of the investigation, the Commissioner asked the Council for more details of the circumstances in which the information had been provided to the Council. The Council revised its position in respect of some of the withheld information and stated that it was relying on regulation 12(5)(e) – adverse effect on the confidentiality of commercial information – to withhold it.
17. This notice covers whether the Council is entitled to rely on regulations 12(5)(e) and 12(5)(f) respectively, as a basis for refusing to disclose the withheld information.

Reasons for decision

Regulation 12(5)(e) – adverse effect on the confidentiality of commercial or industrial information

18. Regulation 12(5)(e) of the EIR states 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. If engaged, it is then necessary to consider the balance of the public interests.
19. In this case, information which was provided to the Council by an architect (also the planning applicants’ planning agent) was withheld under this exception. Other information, provided by a firm of structural and civil engineers, was withheld under regulation 12(5)(f) and will be considered separately, later on in this notice.
20. The Commissioner has published guidance¹ on the application of regulation 12(5)(e). As the guidance explains, the exception can be broken down into a four-stage test.

¹ <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

21. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:

- The information is commercial or industrial in nature;
- It is subject to confidentiality is provided by law;
- The confidentiality is protecting a legitimate economic interest; and
- The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

22. The Commissioner has considered the withheld information, and notes that it comprises drawn structural plans, elevations and site plans relating to the project. Most are marked as being preliminary drawings.
23. The architect who created the drawings is also the planning agent who provided the information to the Council. He was engaged to work on the project, in both capacities, by the planning applicants.
24. The Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

25. The phrase "confidentiality provided by law" in this circumstance can include the common law duty of confidentiality, which is what the Council considers to exist in respect of the information in this case.
26. For a common law duty of confidentiality to exist, it is required that the information has the necessary quality of confidence, and was imparted in circumstances which gave rise to an obligation of confidence.
27. Regarding whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public.
28. The Commissioner is satisfied that the withheld plans and drawings are not trivial and have not otherwise been made public. The information therefore has the necessary quality of confidence.
29. The Commissioner has next considered the circumstances in which the information was provided to the Council, and whether these gave rise to an obligation of confidence. As previously explained, the withheld information comprises preliminary architect's plans and drawings which were provided to the Council by a planning agent (also the architect).

30. The Council has explained that the building control process is not subject to public scrutiny in the same way as the planning process. It publishes the following statement on its website: "Building Control records are not public records and generally there is no public right to view or obtain information submitted under the Building Regulations. With the owner's authorisation, others may be able to view certain records."
31. The Council's position is, therefore, that the information was provided to it with the expectation that it would be viewed only by its building control team, and not made available for public scrutiny.
32. The Commissioner has considered the decision of the First-tier Tribunal (Information Rights) ("the Tribunal") in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), which is referred to in his published guidance, referenced previously.
33. In that case, the Tribunal accepted evidence that it was "usual practice" for certain types of document to be provided to a planning authority in confidence. Indeed it found that, even where it was obligatory for the information to be provided to the authority as part of the public planning process, it was possible for an expectation of confidentiality to exist.
34. In that case, the Tribunal concluded that the developer had "reasonable grounds for providing the information to the council in confidence", adding that "any reasonable man standing in the shoes of the council would have realised that that was what the developer was doing". The Tribunal found that the council in that case had accepted the withheld information "in confidence". In reaching this conclusion, the Tribunal also applied the "reasonable person test" established by Megarry J. in *Coco v AN Clark Engineers Ltd* [1968] FSR 415.
35. The Commissioner considers that this is relevant here. It establishes that, although there is a common perception that all information relating to planning applications should be available for public scrutiny, this is not the case; a duty of confidence may arise, at different stages of the process, depending on the circumstances and on the nature of the information.
36. In this case, furthermore, the architect was approached to ask for his consent to release the information. He refused, which may be said to indicate that he had an expectation of confidence when he provided the information.
37. The Commissioner is satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

38. As the Tribunal confirmed in the case of *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) ("Elmbridge")², to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
39. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.
40. In this case, the confidentiality was designed to protect the interests of the architect. The Commissioner has considered whether his interests were "legitimate economic interests".
41. The Commissioner's guidance on the application of the exception, referenced previously, explains that, whilst the information itself must be "commercial or industrial" in nature, the interests being protected by the confidentiality should be "economic", which is a broader term, and can include a broader range of professional interests.
42. The Commissioner has considered the withheld information. He accepts that the plans and drawings are the intellectual property of the architect and, whilst this in itself is not necessarily a bar to disclosure under the EIR, he considers that intellectual property rights do comprise a legitimate economic interest.
43. Considering whether the architect's interests would be harmed by disclosure, the Commissioner is aware of the architect's views in this case: he considered that, since the information comprises preliminary drawings, members of the public may seek to engage with him to discuss the designs (his name is in the public domain), which he considers would affect him adversely.
44. The Council has confirmed that "the plans sent in were preliminary drawings... [The architect] in his refusal to release these plans stated

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_\(GRC\)_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_(GRC)_20110104.pdf)

that the designs were not the designs that received planning approval and that the plans were titled preliminary and were no longer relevant.”

45. To engage the exception it is not necessary that the adverse effect is severe, only that there would be some adverse effect on the relevant economic interests.
46. The Commissioner is satisfied in this case that the confidentiality is required to protect a legitimate economic interest.

Would the confidentiality be adversely affected by disclosure?

47. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
48. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have been identified.
49. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
50. The Commissioner is satisfied that the exception is engaged.

Regulation 12(5)(e): the balance of the public interests

51. Regulation 12(5)(e) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
52. Under regulation 12(2) of the EIR, public authorities are also required to apply a presumption in favour of disclosure.

Factors in favour of disclosure

53. There will always be some public interest in disclosure to promote the transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making, all of which ultimately contribute to a better environment.
54. In this case, the complainant explained that the local community became aware that works taking place on the site were diverging from the approved plans, and notified the Council. He questions whether the Council acted appropriately. Subsequently, a retrospective planning application was made, evidently to incorporate the changes to the design.
55. The complainant considers that being able to scrutinise the plans which were submitted for building regulation approval at different stages, would shed light on when the Council became aware of the changes and potential breaches, and on its approach to planning enforcement. The information would also shed light on the developer's claims relating to the reasoning behind making structural changes.
56. The complainant has stressed that the development is taking place in a designated area of outstanding natural beauty and is of "significant public amenity value".

Factors in favour of maintaining the exception

57. By finding the exception at regulation 12(5)(e) to be engaged, the Commissioner has already accepted that releasing the withheld information would, to some extent, negatively affect the legitimate economic interests of the architect in this case. It is not, generally, in the public interest to allow harm to legitimate economic interests. However, the extent and severity of the harm needs to be considered, and the harm needs to be weighed against any countervailing considerations, as considered below in the Commissioner's decision.
58. The Commissioner also considers that there will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected. It is important to preserve trust in public authorities' ability to keep third party information confidential.
59. The Council has argued in this case that the preliminary drawings are not the plans which received planning permission, and that disclosure of

them could cause confusion, by placing what it termed "incomplete material" into the public domain.

60. It has also continued to assert that it did not consider that it should disclose the information in this case without the architect's consent, since all documents provided to building control are not, routinely, published. It has argued that the integrity of the building control process would be damaged if the information were disclosed.
61. Specifically, it asserted: "[There is a] a greater interest in protecting the integrity of the building consent process and disclosure could damage the public trust in the Building Regulations process. We also state on our application page: 'Please note: Our records are only retained for 15 years. Building Control records are not public records and generally there is no public right to view or obtain information submitted under the Building Regulations. With the owner's authorisation, others may be able to view certain records'."
62. The Council stated that: "Whilst planning applicants are aware that their applications are subject to a statutory consultation process and certain details of their applications will be in the public domain, applicants for Building Regulations consent are not subject to the same public transparency under the Building Act 1984. As a result, applicants will have a reasonable expectation that their applications are not subject to public disclosure."
63. The Council's conclusion was that, in this case, the public interest in maintaining the exception, designed to protect the confidentiality of commercial information, outweighed the public interest in disclosure of the information.

The Commissioner's decision: regulation 12(5)(e)

64. The Commissioner considers that, in this case, there are some specific public interests in favour of the information being disclosed.
65. He is aware that the progress of the development caused concern locally. As building works on the site progressed, it appeared that the developer was not adhering to the agreed specifications, but rather, was building along the lines of a previous planning application, which had been refused. The complainant understands that a planning enforcement procedure followed. Subsequently, it became necessary for the developer to apply for retrospective consent.
66. The Commissioner agrees that there is public interest in understanding how the Council made decisions about the actions it would take, particularly since the clubhouse is in a designated area of outstanding natural beauty.

67. With regard to the public interest in the exception being maintained (that is, the information being withheld), the Commissioner has considered the extent and severity of the harm that would be caused to the architect's interests by the disclosure of the withheld information. It would not, generally, be in the public interest to cause severe harm to legitimate economic interests.
68. However, with regard to the Council's assertion that disclosure of the information would confuse or mislead the public, the Commissioner is not persuaded that this would cause harm to those interests. Most of the plans and drawings are clearly marked "preliminary" and could, in any case, be disclosed with an accompanying explanatory narrative, if necessary. He considers that this aspect would have only a negligible effect on the architect's interests.
69. The architect has also indicated that having to, potentially, discuss these preliminary and "irrelevant" drawings with the public would affect him adversely. With regard to that particular factor, the Commissioner accepts that this may cause some inconvenience.
70. The Commissioner has also considered the Council's broader concerns regarding the adverse effect to confidentiality: the harm which, it suggests, would be caused to the integrity of the building control process. However, he is not persuaded from the Council's arguments that this would be significant. It is widely understood that, as a public authority, the Council is obliged to consider any request for environmental information on its own merits, and in light of all relevant circumstances at the time of the request. He therefore considers that professional bodies which lodge information with the Council are likely to be already aware that disclosure may be requested. In any event, there is no loss of integrity where a legitimate request for information is appropriately weighed up in accordance with the EIR in all the circumstances of the case.
71. The Commissioner is aware that a great deal of information about the development is already in the public domain, and that the Council has, in general, been transparent about the progress of this matter.
72. However, in view of the arguments on both sides and in all the circumstances of the case, including the requirement for the Council to apply a presumption in favour of disclosure, the Commissioner finds in this case that the balance of the public interests favours the disclosure of the information.
73. He has therefore decided that the exception provided by regulation 12(5)(e) should be overturned, and orders disclosure of the information withheld under this exception.

Regulation 12(5)(f) – adversely affect the interests of the person who provided the information

74. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information, where that person—
- i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - iii) has not consented to its disclosure
75. In this case, the Council is relying on this exception in respect of information provided to its building control team by a firm of civil and structural engineers. It comprises over 100 pages of technical drawings and specifications, and, as with the withheld information already considered above, relates to an application to extend and alter a clubhouse at a golf course.
76. The Commissioner's guidance³ explains that the purpose of the exception is to protect the voluntary supply to public authorities of information which might not otherwise be made available to them.
77. The guidance also explains that it is helpful to consider a four-stage test, as broken down by the First-tier Information Rights Tribunal in the case of *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273)⁴:
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

³ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

⁴ https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it other than under the EIR?
- Has the person supplying the information consented to its disclosure?
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?

78. To engage the exception, it is necessary that all four elements of the test are met.

Could the information provider have been put under any legal obligation to provide the information to the Council?

79. Regarding the first element, the Council's position is that the engineering firm in this case was not under "a legal obligation" to provide the information to Building Control.

80. The Commissioner is aware that it is necessary for building works to comply with the government's building regulations, and that the standard of work is normally checked by the relevant local authority's building control team. Whilst it is necessary to obtain building regulations approval, this is separate to the process by which planning approval is sought.

81. The Commissioner asked the Council to explain the circumstances in which it had obtained the information. The Council explained that the planning agent (whose own drawings have been considered in the earlier section of this notice) "would have commissioned [the engineering firm] to produce the structural calculations".

82. The Council commented:

"There is no obligation to provide plans and drawings, though at any stage in the process, the [planning] applicant may be asked to submit plans and calculations to show that the proposals comply with Building Regulations. If Building Control are not satisfied with the documentation provided they may ask for further items such as plans."

83. However, from this explanation, the Commissioner considers that there will likely be situations in which persons can be legally obliged to provide information to the relevant authority, as part of the process by which building regulations approval is obtained. Since, as the Council noted, plans and documentation can be asked for during the building regulation process "to show that the proposals comply with building regulations", the Commissioner considers that the relevant persons in this case could

have been placed under a legal obligation to provide information, including the withheld specifications.

84. The Building Regulations 2010 also make it clear that plans and specifications are required in certain circumstances.
85. In this case, the Commissioner is aware that the engineering firm provided the information directly to the Council. However, this firm had been commissioned by the planning agent, who, in turn, was in the employ of the planning applicants (the developers). In the Commissioner's view, there could have been a legal obligation for the information to have been provided, as part of the building control process.
86. The Commissioner has not been persuaded, in this case, that the information provider could not have been placed under a legal obligation to provide the withheld information.
87. For this reason, he finds that the exception is not engaged.

The Commissioner's decision: regulation 12(5)(f)

88. The Commissioner's decision is that the information withheld under this exception should be disclosed.

Right of appeal

89. 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

90. 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.
91. 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
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