

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

Decision notice

Date: 30 April 2013

Public Authority: Isle of Wight Council

Address: County Hall
High Street
Newport
Isle of Wight
PO30 1UD

Decision (including any steps ordered)

1. The complainant requested operational and safety information from the Isle of Wight Council ("the council") relating to the Isle of Wight Festival. The council provided some information, said that some was not held and withheld other information using the exemptions under section 38, 40 and 41 of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner asked the council to reconsider the request under the terms of the Environmental Information Regulations 2004 ("the EIR"). The council then sought to rely on regulations 12(5)(a), 12(5)(e) and 13(1). These exceptions relate to public safety, the confidentiality of commercial information and third party personal data. During the Commissioner's investigation, the complainant decided to pursue a complaint about the use of regulation 12(5)(e) only.
2. The Commissioner's decision is that the council did not demonstrate that regulation 12(5)(e) was engaged. The Commissioner therefore considers that the council breached regulation 5(1) and 5(2) of the EIR for failing to make this information available upon request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - The council should disclose all the information that was withheld solely on the basis of regulation 12(5)(e). The council may redact the information that it sought to withhold using regulation 13(1) and 12(5)(a).

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 24 June 2012, the complainant requested information from the council in the following terms:

"In respect of the 2012 Isle of Wight Festival, would you please let me have copies of both the draft and final ESOPs [event safety and operational plan] submitted; and a copy of the Licensing Authority's written approval of the final draft, if given".

6. The council responded on 19 July 2012 and it confirmed that it held information falling within the scope of the request. The council said that it needed more time to respond to the request fully because it was consulting third parties.
7. The complainant replied on 21 July 2012 and expressed dissatisfaction with the time taken to respond.
8. The council provided a full response on 10 August 2012. In respect of the written approval of the ESOP, the council said that it did not hold this information. It provided a draft document entitled "Isle of Wight Festival 2012 Conditions and Requirements Imposed by Premises Licence and Isle of Wight County Council Act 1971 (as amended) Public Document" which it said was relevant to the request. In relation to the request for the draft and final ESOP, the council said that having considered the content of all the versions identified, it wished to withhold all of the information using the exemptions under sections 38, 40, and 41 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had correctly refused to provide the information using the exemptions cited.
10. For clarity, during the investigation, the complainant agreed to pursue only the information being withheld using regulation 12(5)(e) from the

ESOP and draft documents, and he withdrew his complaint about the other exceptions since the information being withheld did not concern his particular areas of interest in this matter.

Reasons for decision

Is the information environmental?

11. The Commissioner considers that the request should have been handled under the terms of the EIR. Environmental Information is defined by regulation 2 of the EIR. Regulation 2(1)(c) provides that any information on plans, activities, measures etc. affecting or likely to affect the elements and factors listed in regulation 2 will be environmental. The information in question relates to the Isle of Wight Festival, an activity that at the very least affects the land. In the Commissioner's view, the withheld information should be considered under the EIR for this reason. No dispute arose between the council, the Commissioner and the complainant about the appropriateness of handling the request under the EIR.

Exceptions

Regulation 12(5)(e) – Confidential commercial information

12. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law in order to protect a legitimate economic interest. 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?
13. The Commissioner also considered that it was relevant in this case to consider the application of regulation 12(9) of the EIR. This provides the following:

"To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g)."

Does any of the information relate to information on emissions?

14. Regulation 12(9) will be relevant where the information is on emissions. For example, information will be covered where it details the level of existing or potential emissions. "Information on emissions" will also cover assumptions and formulas used to calculate the emissions in question. Details of the consequences or effect of the emissions will also be information on or about them. This ensures that the public can properly and fully understand the information and that it facilitates effective participation by the public in environmental decision-making.
15. Neither the EIR, nor the European Directive from which they were implemented, provided a definition of the term "emissions". However, the Aarhus Implementation Guide describes emissions as "the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land".
16. The Commissioner notes that some parts of the withheld information cover the issue of noise specifically, which the Commissioner accepts is an emission under the EIR. Having considered the information in those sections, the Commissioner formed the view that regulation 12(9) would be relevant to the information about noise. This means that this information cannot be withheld using regulation 12(5)(e). The Commissioner has not found it necessary to conduct a more detailed analysis in that regard however because he does not consider that the council had demonstrated that regulation 12(5)(e) was engaged with respect to any of the information in any event for the reasons described below.

Is the information commercial or industrial in nature?

17. 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 and a commercial activity will generally involve the sale or purchase of goods or services for profit. The Commissioner accepts that the withheld information is commercial in nature because it was provided to the council as part of a licence agreement for a commercial event. It sets out the plans of a commercial company, Solo Promoters Limited ("Solo"), in relation to operations and safety at the festival.

Is the information subject to confidentiality provided by law?

18. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

19. The Commissioner understood that the council wished to argue 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.
20. Having considered the withheld information and the circumstances of this case, the Commissioner is satisfied that the information is not trivial and is not generally in the public domain. He does note that some of the same details in the withheld information were disclosed as part of a separate document made available to the complainant at the time of the initial response to the request (as referred to in paragraph 8 of this notice). That information is no longer confidential and cannot therefore be covered by the scope of this exception. However, there was no evidence made available to the Commissioner suggesting that any of the other information had been put into the public domain.
21. In relation to the question of whether the information was shared in circumstances importing an obligation of confidence, the council explained that there was a committee meeting on 17 May 2011 at which a conversation took place between all parties regarding whether the ESOP should be made public. At that time it was agreed that the ESOP would not be published. The council also said the understanding that the document should be kept confidential was part of wider understanding between the parties and Solo had been given reassurances in this regard on a number of other occasions.
22. The complainant has specifically challenged the council's assertion that the information was confidential. He said that there is no reference to any undertaking of confidentiality in the minutes of the meeting of 17 May 2011 referred to by the council. He said that if such an undertaking was given it would be *ultra vires* (outside of the authority's powers) if it failed to make that undertaking a conditional one since all recorded information held by public authorities is subject to the FOIA (or where relevant the EIR).
23. It is true to say that the council has not been able to provide any specific evidence to prove that a duty of confidence arose in respect of the information in question however there is by the same token no

specific evidence to disprove the council's and the third party's assertions that an expectation of confidence arose. No obvious evidence is available to the Commissioner, either circumstantial or more specific, that would indicate that the parties operated on a clear understanding that all the information would be disclosed to the public or that an expectation of confidence was manifestly unreasonable in the circumstances. The council said that it acknowledges that the information was provided to support a licensing application however it was not the case that all information provided in relation to the council's regulatory decisions is automatically made available to the public.

24. The Commissioner would also like to explain that while it is also true that all recorded information held by public authorities will need to be considered in accordance with the provisions of the FOIA or EIR should a valid request be received, a duty of confidence that may otherwise exist is not made redundant by the failure to specifically highlight this point as part of that understanding although as a matter of good practice, it would be a sensible approach to do so.
25. In view of the above, the Commissioner decided that he was prepared to accept that on this occasion, a duty of confidence arose between the parties although, as indicated, the Commissioner would encourage the council to ensure that there is a clear record kept regarding agreements about how information may be used in appropriate cases where information has been provided to the council, particularly where the information has been provided as part of a formal arrangement as in this case. This would help to avoid any ambiguity in the future.

Is the confidentiality required to protect a legitimate economic interest?

26. 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". In support of this 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".

27. 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.
28. When the council reconsidered the request under the terms of the EIR at the Commissioner's direction, it initially said that further to additional consultation with Solo it had decided that it would be appropriate to disclose the withheld information apart from that it wished to redact some information using the exceptions under regulation 12(5)(a) and 13(1). It said that this decision had been based on a number of factors including the passage of time and the fact that there had been a licensing review which resulted in an agreement to produce a new public version of the ESOP for future events. Before the council disclosed the information however it undertook more consultation with Solo because the company had previously indicated that it may pursue legal action if the council disclosed the information. Solo confirmed to the council that this remained its position and the council subsequently wrote to the Commissioner to advise that it had reconsidered the withheld information and was no longer willing to make the disclosure previously indicated. It said that its decision had not been based on any improper factors such as the threat of legal action from Solo.
29. The council told the Commissioner that it wished to argue that the commercial interests of Solo would be prejudiced. It said the following in a letter to the Commissioner:

"The basis for applying the exception is that the document contains a blueprint to the organisation, running, licensing requirements, and legal obligations of staging an event of this scale. The council recognise that the document captures the experience and 'know how' of Solo in staging the event, such experience having been built up over a number of years. As such, that experience and 'know how' has a commercial value to Solo and to other market participants. It is my view that it is more probable than not that this adverse effect of public access to the ESOP 2012 would give Solo's competitors the benefit of its experience and

commercial 'know how' and this would harm Solo's commercial interests".

30. The Commissioner understands that consultation took place between the council and the third party both before the council issued its initial refusal to the complainant under the FOIA, and subsequently when the Commissioner asked the parties to reconsider the matter under the terms of the EIR. The Commissioner understands that there was some written correspondence about the matter between the council and Solo but that information was not provided to the Commissioner to assist with his investigation. However, the council did provide (with the consent of Solo) a copy of legal advice commissioned by Solo relating to this request. The legal advice does not focus on the arguments supporting regulation 12(5)(e) however it refers briefly to a letter from Solo to the council dated 20 July 2012 and refers to the basic outline argument that disclosure of the information would give Solo's competitors the benefit of its experience and commercial 'know how'. Based on this evidence, the Commissioner was prepared to accept that the argument made genuinely reflected concerns expressed by the third party.
31. In correspondence to the Commissioner, the complainant said that he had indicated to the council that he would be willing to accept the information in a redacted form however the council had withheld all of the information. He said that he found it implausible to suggest that all of the information would prejudice the commercial interests of Solo. He commented that he thought it was likely that the information would contain a great deal of mundane detail and information that was not commercially sensitive.
32. The Commissioner shared the complainant's initial reservations expressed above and these concerns were confirmed upon receipt of the withheld information. The Commissioner was left with the impression that the council and the third party had adopted a "blanket" approach to the application of the exception and had not had sufficient regard to the nature of the actual information. Furthermore, the rationale presented in favour of the third party's argument was particularly limited and contained an unexpected lack of detail in view of the length of time spent by the authority consulting Solo on a number of occasions. The Commissioner explained to the council during his investigation that by the time a complaint reaches the Commissioner public authorities have already had at least two opportunities to consider the request (i.e. the initial response and internal review). In this case, the council and Solo were also provided with further opportunities by the Commissioner to justify and elaborate upon the position taken however the council told the Commissioner that it considered that it had adequately justified its

reliance on the exception. The Commissioner disagrees with that view and does not find that he is able to support the authority's application of the exception based on such limited rationale. The rationale does 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 Solo's commercial interests would be "more probable than not".

33. The council also argued that its own interests would be prejudiced in the following terms:

"I have taken into account the fact that the revised licensing condition of the Isle of Wight Festival requires Solo to produce a public facing document in 2013. However, although Solo is required by the conditions of its licence to circulate the document to the Council in the preparation for the event, there is no condition as to the content of the document. It follows that there would be an adverse affect [sic] more generally in full disclosure of such plans, because parties submitting documents to the Council (which is performing an important public function through the licensing regime) would draft their submissions in order to protect against loss of commercial confidentiality, and therefore the Council's important public functions would be impaired as it may be lacking information that would otherwise have been supplied. It is essential that the licence holders have trust and confidence in the licensing regime and that they are able to provide full voluntary disclosure to the licensing authority to enable it to properly discharge its licensing functions. In managing large scale festivals such as the Isle of Wight Festival, it is essential that applicants and licence holders have confidence in submitting commercially sensitive information for the licensing authority, and other responsible authorities to understand and agree how the festival will operate, and that they can do so in confidence without the fear of wider publication"

34. Having considered the above, the Commissioner was not satisfied that the council had demonstrated how its *commercial* interests would be prejudiced by the disclosure as required by this exception. While it may be the case that disclosure would cause prejudice to the council's licensing functions that particular argument is not relevant to this exception and therefore has to be disregarded. It has become a long-established principle in cases considered by the Commissioner and the Information Tribunal that the arguments being made in support of a particular exception must relate clearly to the specific prejudice that the exception is designed to protect against. In this case, that is prejudice to commercial interests.

35. For the reasons described above, the council did not demonstrate to the Commissioner to the required standard that it had correctly engaged the exception under regulation 12(5)(e). The Commissioner therefore has not considered the application of the public interest in detail although he would add that it is very unlikely that he would have considered the withholding of all the information justified when conducting the public interest test even if the council had been able to demonstrate that regulation 12(5)(e) was engaged. The information relates to the operation and safety of a major annual event on the Isle of Wight which is growing in size. There is therefore a particularly strong public interest in disclosure and withholding all of the information is not a reasonable position. Touching upon more specific circumstances, the complainant also highlighted to the Commissioner that there were serious problems with the operation of the event in 2012 resulting from the adverse weather conditions that year. This increases the public interest in transparency surrounding the adequacy of the planning for the event.

Procedural issues

36. Regulation 5(1) and 5(2) provide that public authorities should make environmental information available upon request. As the Commissioner was not satisfied that regulation 12(5)(e) had been correctly applied in this case, he has found the council in breach of these obligations.

Other Matters

37. The Commissioner considers that the delays encountered during his investigation were excessive in the circumstances. On 26 November 2012, the Commissioner asked for the withheld information and arguments for withholding it to be provided to him, however, he was not presented with full rationale for withholding the information until 15 February 2013 and he was not provided with a full copy of all of the withheld information until 25 March 2013. The council initially sent some withheld information to the Commissioner earlier in March however upon inspection the Commissioner had cause to query whether he had been provided with all of the withheld information. The council subsequently confirmed that it did hold other information falling within the scope of the request that it had not made available to the Commissioner. Having asked for the withheld information to be provided to him on more than one occasion, the Commissioner assumes that he was provided with all the withheld information held by the end of his investigation. Furthermore, as explained already in this notice, the quality of the

arguments presented did not reflect the time taken to respond to the Commissioner.

Right of appeal

38. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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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