

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

**Decision notice**

**Date:** 5 May 2016

**Public Authority:** Thanet District Council  
**Address:** PO Box 9  
Cecil Street  
Margate  
Kent  
CT9 1XZ

**Decision (including any steps ordered)**

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1. The complainant submitted a request to Thanet District Council (the Council) for information from its files regarding planning issues concerning a particular piece of land. The Council provided the complainant with some information but withheld the remainder on the basis of section 31 of FOIA. The Council subsequently accepted that this request should have been considered under the EIR and therefore sought to rely instead on the exception contained at regulation 12(5)(b). The Commissioner is satisfied that the Council is entitled to rely on this exception. However, in handling this request it did breach the procedural requirements of the EIR contained at regulations 14(2) and 14(3) by failing to respond to the request within 20 working days and failing to initially deal with the request under the EIR.

**Request and response**

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2. The complainant submitted a number of requests to the Council on 3 August 2015 concerning the land at 'Portland, Flete Road'. She specifically sought:

*'1. Copy minutes (formal or informal) produced in respect of any council committee or officer meeting held in respect of the Land since 1 January 2014*

- 2. Copy contemporaneous (or other) note or record, etc. produced by any officer attendee at any meeting (falling within the above) and that relates to the Land since 1 January 2014.*
  - 3. The names and full job titles of all officers attendant for any part of any meeting (falling within the above) that relates to the Land*
  - 4. Copy emails, other correspondence, notes or instructions from or on behalf of officers or Members relating to the Land and planning enforcement since 1 January 2014.'*
3. The Council responded on 2 October 2015. It argued that the information sought by request 1 was available on the Council's website and was therefore exempt from disclosure on the basis of section 21 (information reasonably accessible to the applicant) of FOIA. The Council sought to withhold the information falling within the remaining three exemptions on the basis of section 31 (law enforcement) of FOIA.
  4. The complainant contacted the Council on 12 October 2015 in order to ask for an internal review of its decision to refuse the information sought by requests 2 to 4 on the basis of section 31 of FOIA.
  5. The Council informed her of the outcome of the internal review on 2 November 2015. The Council provided her with the information sought by request 3. However, the review concluded that the information sought by requests 2 and 4 was exempt from disclosure on the basis of section 31 of FOIA.

## Scope of the case

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6. The complainant contacted the Commissioner on 30 September 2015 to complain about the Council's handling of her requests. More specifically, she argued that:
  - The Council was incorrect to withhold the information sought by requests 2 and 4 on the basis of section 31 of FOIA. In particular she argued that the requested information did not relate to a live investigation.
  - She was dissatisfied with the time it took the Council to respond to her requests.
  - She was also dissatisfied with the Council's apparent failure to consider the applicability EIR to her requests.

7. During the course of his investigation the Commissioner informed the Council that in his view it should have considered this request under the EIR rather than FOIA.<sup>1</sup> The Council accepted this point and sought to argue that the withheld information was exempt from disclosure on the basis of regulation 12(5)(b) of the EIR.
8. The Commissioner has therefore considered whether this exception provides a basis to withhold the information falling within the scope of requests 2 and 4. The only exception to this is a certain amount of documentation falling within the scope of request 4 which the Commissioner has established is already in the possession of the complainant (or in the possession of the individuals who she represents). With the agreement of the complainant, the Commissioner has not considered such information as part of his investigation.

## Reasons for decision

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### Regulation 12(5)(b)

9. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
10. The Commissioner's guidance on regulation 12(5)(b) sets out that there is no definitive list which covers circumstances when a public authority may wish to consider applying the exception but it also cites examples of types of information requests where a public authority may wish to invoke the exception.<sup>2</sup> One of these examples is information about investigations such as those carried out in relation to planning legislation.
11. In its submissions to the Commissioner, the Council explained that the land which was the subject of the request had been subject to

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<sup>1</sup> The EIR provide a right of access to information held by public authorities which is defined as 'environmental information'. Therefore if a public authority receives a request for information which is environmental information the request should be considered under the EIR rather than FOIA.

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

enforcement action since 2006, including the occupants being issued with an enforcement notice. The Council noted that until such times as an enforcement notice is formally withdrawn from land, it remains binding and further proceedings, including a prosecution, may be taken. More specifically, it strongly refuted the complainant's assertion that this was not a live enforcement matter at the time of her request. Rather, the Council explained that the complainant, who represents the owners of the land, has initiated proceedings in the High Court by way of judicial review to prevent the Council exercising its powers under the Town and Country Act 1990 to carry out default works under the enforcement notice. It explained that the decision by the Council to halt the works was made for specific reasons and the complainant was informed that the matter would be the subject of a new decision with regard to the aspect of default action. The Council specifically stated that at no time whatsoever was the complainant informed that it would not be investigating this matter further.

12. With regards to the consequences of disclosing the withheld information, the Council argued that disclosure of an ongoing enforcement file would adversely affect its ability to carry out its enforcement functions and thus would adversely affect the course of justice. In this case, this involved carrying out an investigation regarding the failure to comply with enforcement notices and a consideration as to the options which the Council could take. The Council also argued that disclosure of the file would adversely affect its ability to defend itself at any further Judicial Review hearing should the owners of the land bring such an action in the future. The Council noted that the information included internal emails and documents regarding the history of the matter as well as actions and decisions taken by officers.
13. As noted above, in the complainant's opinion at the point she submitted her request on 3 August 2015 the matter was not live. This is because in June 2015 the Council had already taken the decision to take direct action, namely the removal of the building and demolition of the caravan on the land in question, to ensure compliance with the enforcement notice. Moreover, she argued that the withheld information could be disclosed without undermining the Council's ability to take effective enforcement action.
14. Having considered the submissions of both parties, and having had the opportunity to review the withheld information, the Commissioner is satisfied that at the time of the complainant's request, the Council's enforcement case in respect of the land which is the subject of the request was ongoing. Although the Council had taken the decision in June 2015 to enforce the notice by taking the direct action described above, such action had not been taken by the point the complainant submitted her request. Moreover, it is clear that the Council was still

actively considering what further action and steps it could take. Furthermore, the Commissioner is persuaded by the Council's argument that disclosure of a planning enforcement file, whilst the enforcement in question remains ongoing, would adversely affect its ability to undertake such action. Disclosure of the withheld information would reveal the options and issues considered by the Council and the Commissioner accepts that disclosure of such discussions could undermine the Council's enforcement activities at a later date. The exception is therefore engaged.

### **Public interest test**

15. Under regulation 12(1)(b) an exception can only be sustained if, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
16. The Council argued that there was a clear public interest in it being able to enforce effectively cases in which there had been a breach of planning legislation. The Council argued that it would also be against the public interest if it was not able to defend itself against any legal proceedings, ie a Judicial Review, in respect of this case.
17. The complainant argued that it was vital that the requested information was disclosed in the unequivocal interests of transparency and accountability. She emphasised that this was not a case based purely on planning issues; there were exceptional circumstances (of the owners of the land) which, in her view, outweighed the interests in the Council in enforcing planning law. She argued that the Council had failed to take sufficient account of these circumstances as part of its decision making. The complainant argued that it was essential that the Council was dealing with this case in a fair and equitable way, not least to ensure that it was complying with relevant legislation such as the Human Rights Act 1998 and Equality Act 1990. Meeting such aims, in the complainant's view, necessitated the disclosure of the withheld information rather than the Council making decisions about alleged breaches of planning legislation behind some cloak of secrecy.
18. The Commissioner agrees that there is public interest in the Council being open and transparent about decisions it takes in respect of enforcement action. Disclosure of this information would certainly help to serve these aims and indeed shed light on the extent to which the Council's decision making process took into account the specific circumstances of the owners of the land. However, in the Commissioner's opinion there is a very clear public interest in ensuring that the Council is able to take effective enforcement action in order to ensure compliance with planning legislation. In the circumstances of this case, given that the case remains live and ongoing, the Commissioner

believes that this significantly strengthens the public interest in maintaining the exception in order to ensure that the Council has the private thinking space it needs to take decisions in respect of this enforcement case. In the Commissioner's opinion, this outweighs the interest in disclosing the information and therefore he has concluded that the public interest favours maintaining the exception.

### **Procedural issues**

19. As the Council acknowledged during the course of the Commissioner's investigation, it should have dealt with this request under the EIR rather than under FOIA. Its failure to deal with the request under the correct piece of legislation means that it breached some of the procedural requirements of the EIR.
20. Firstly, the Council breached regulation 14(3) which requires a public authority to provide the requester with a refusal notice specifying the exceptions within the EIR upon which it is relying. It did not provide the complainant with a refusal notice citing regulation 12(5)(b) and thus breached regulation 14(3).
21. Secondly, the Council failed to issue this refusal notice within 20 working days which is a requirement of regulation 14(2). Primarily, this was on the basis of course that it initially considered the request under FOIA but also because it did not actually respond to the request (even under FOIA) until 43 working days after it was submitted. This delay therefore means that the Council breached regulation 14(2).

## Right of appeal

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22. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

23. 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.
24. 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** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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