

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 19 January 2021

**Public Authority:** Stratford-on-Avon District Council  
**Address:** Elizabeth House, Church Street  
Stratford-on-Avon  
CV37 6HX

#### **Decision (including any steps ordered)**

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1. The complainant requested from Stratford-on-Avon District Council a copy of the terms of reference document relating to a report on the possible development of a local airfield. The Commissioner determined the matter with reference to the EIRs. She decided that the regulation 12(5)(e) (Commercial confidentiality) and 12(5)(f) (Interests of the information provider) EIR exceptions were not engaged.
2. The Commissioner requires Stratford-on-Avon District Council to disclose to the complainant the full text of the terms of reference document "Brief for Aviation Consultant".
3. Stratford-on-Avon District 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**

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4. The request for information was made in the context of a planned development within the local area administered by Stratford-on-Avon District Council (SDC). SDC told the Information Commissioner, by way of background, that Wellesbourne Airfield was a privately-owned strategically important secondary airfield located in Warwickshire and

had been subject to contentious proposals for redevelopment. It was part of SDC's core strategy for aviation that the airfield be retained and supported.

5. SDC said it had entered negotiations with the owners of the airfield regarding potential redevelopment and, crucially, the retention of aviation activity. SDC said that its policy was to pursue a compulsory purchase order in respect of the airfield if necessary in order to retain its aviation functions. SDC added that the proposed redevelopment was a major and high-value project requiring both political and commercial sensitivity.
6. SDC appointed a named firm of aviation consultants ("the consultants") to advise it on aviation matters. In providing advice, the consultants were guided by a SDC document "Brief for Aviation Consultant" dated 15 October 2019 ("the brief"). In preparing their report, "Wellesbourne Airfield Review" dated December 2019 ("the consultant's report"), the consultants had regard for a memorandum of understanding ("the MoU") between SDC and the airfield owners dated 30 August 2019 which made plain (at paragraph 12.2) that:  
*"Nothing in this MoU shall fetter the powers and/or duties (including those under statute) of the Council."*
7. In response to an earlier information request, SDC had provided the complainant with a redacted copy of the brief. However, on 6 May 2020, he wrote to SDC and requested information in the following terms:  
*"Referring to [the consultants' report] we may have a concern in that the terms of reference for [the consultants' report] are also not in the public domain and therefore, and noting the public interest I am hereby requesting a copy of those Terms of Reference.  
For clarity we are not concerned with the commercial arrangement between SDC and [the consultants]; only the terms under which [the consultants] have completed and compiled the Report on Wellesbourne Airfield for SDC."*
8. The parties subsequently confirmed to the Commissioner in correspondence that the complainant's reference to 'terms of reference' related to the brief. The Commissioner therefore treated the request as being for a complete copy of the brief.
9. Following an internal review dated 22 June 2020, SDC refused to provide the complete brief ("the withheld information") in full relying on the sections 21(1) (Information accessible by other means), 41(1) (Information provided in confidence) and 43(2) (Commercial interests) FOIA exemptions. SDC made no reference to the EIRs in its responses.

## Scope of the case

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10. The complainant contacted the Commissioner on 26 June 2020 to complain about the way his request for information had been handled. He said that, following an earlier intervention by the Commissioner, SDC had provided him with an unredacted copy of the consultant's report. He added that:

*"Ultimately there is no commercial confidentiality within the [brief], and it remains an instructional document from SDC to [the consultants]."*

11. He was concerned that, while SDC had disclosed the consultants' report to him in full, it had not done so until required to by a decision of the Information Commissioner in a previous connected matter, ICO reference FER0918154. In spite of this precedent, SDC refused to disclose the withheld information from the brief that had provided the basis for the consultants' report.
12. In conducting her investigation the Commissioner considered whether the more appropriate legislation was FOIA or the EIRs.
13. Having determined that the EIRs applied, the Commissioner considered the application of the regulation 12(5)(e) (Commercial confidentiality) and 12(5)(f) (Interests of the information provider) EIR exceptions.
14. The Commissioner has considered some of the background information and noted the debate about the future of the airfield. She has had regard for the content of the consultants' brief, both the withheld information and the unredacted sections, the MoU between SDC and the site owners, and representations she has received from the parties.
15. During the Commissioner's investigation, SDC continued to maintain its reliance on the section 41(1) and 43(2) FOIA exemptions to continue to withhold the withheld information. SDC said that if, in the alternative, the EIRs applied it relied on the regulation 12(5)(e) and 12(5)(f) EIR exceptions.

## Reasons for decision

### Is the disputed information environmental?

16. The starting point for the Commissioner when investigating any information rights complaint is establishing whether the appropriate legislation has been applied by the public authority. In this case, the Commissioner began by looking at whether SDC should have used the EIR or FOIA as the basis for its decision. She asked SDC to reconsider its handling of the request and to review whether the requested information fell to be considered under FOIA or the EIR.
17. The complainant referred the Information Commissioner to her determination in his favour in the earlier connected matter. This followed the then refusal by SDC to disclose the consultant's report to him; this had been determined as an EIR matter. As a result of the Commissioner's determination, the full text of the consultants' report had been disclosed. He added that SDC was now refusing to correspond further with him.
18. SDC, in representations to the Commissioner dated 6 November 2020, maintained its reliance on the section 41(1) and 43(2) FOIA exemptions (but not the section 21(1) FOIA exemption). SDC said:

*"The Council has considered whether the Freedom of Information Act 2000 (as opposed to the Environmental Information Regulations 2004) is the relevant legislation relating to [the complainant's] request – the view has been reached that the 2000 Act is the correct legislation. In reaching this conclusion, it is noted in particular that the terms of reference refer principally to the technical aspects of aviation operations at the site rather than the environment per se."*
19. SDC said that it had been proactive in publishing information relating to airfield matters so far as practicable. In particular, it had disclosed the MoU and also the consultants' report prepared in response to the brief. SDC added that it had disclosed the bulk of the information requested – subject only to one small (but important) redaction.
20. In additional representations to the Commissioner on 20 November 2020, SDC added that, in determining whether information is *environmental information*, an holistic approach should be taken as to whether information is 'on' environmental matters, and that regard should not be had to issues with which the information was not concerned or issues with which the information was merely connected.
21. SDC said that the withheld information was limited to the terms of reference for the consultants to report principally on regulatory compliance of existing operations at the airfield. SDC said the report

itself clarified that this was a reference to eg whether concerns had been raised by the Civil Aviation Authority at inspections, whether the airfield was within controlled airspace, etc. Their report did not include statistics about the number of aircraft using the airfield (but did repeat an estimate provided by the airfield manager). SDC's view was that the withheld information was not *environmental information* (rather, it was merely connected with environmental matters).

22. However, SDC accepted that there might be a reasonable argument that the EIR applied. In the EIR alternative, SDC said that the information would still be withheld under the provisions of the regulation 12(5)(e) and (f) EIR exceptions for the same reasons that it had been withheld under the sections 41 and 43 FOIA exemptions.
23. 'Environmental information' is defined at EIR regulation 2(1). In accordance with the European Council Directive 2003/4/EC, from which the EIR derive, the Commissioner's view is that the definition should be interpreted widely. It is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.
24. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*  
*and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or,*

*through those elements, by any of the matters referred to in (b) and (c);"*

25. In considering this matter the Commissioner had regard for her own guidance.<sup>1</sup> This says that it is often clear that a project itself constitutes a measure that will affect the environment: eg building a bridge. In this case, developing the physical infrastructure of an airfield is a measure that will affect the environment. She therefore decided that the requested information fell within the definition of information about environmental measures as set out in EIR regulation 2(1)(c).
26. The Commissioner's guidance for EIR regulation 2(1)(f) provides further detail and indicates that cultural sites, which include places that have an historical, literary, educational, or artistic value, and religious, ethnic, or social significance and which cover: modern as well as historical; and urban as well as rural locations, are environmental. Likewise, built structures including buildings and built infrastructure, such as roads, railway lines, pylons, aerials, bridges, canals and tunnels.
27. Having considered SDC's representations and the content of the information within the brief, the Commissioner decided that the airfield's physical infrastructure, its buildings, runways and taxiways are built structures within the meaning of EIR regulation 2(1)(f). Information 'on' any measures comprising additions to those, or adaptations of them, would therefore be environmental and need to be considered with reference to the EIR.

### **Application of EIR Regulation 12(5)**

28. EIR regulation 12(5) says:

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

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;*

*(f) the interests of the person who provided the information where that person –*

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

*(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; ... ”.*

29. The Commissioner considered the application of these EIR exceptions as they were relied on by SDC to withhold the requested information.

**Regulation 12(5)(e)**

30. The Commissioner's published guidance<sup>2</sup> on the regulation 12(5)(e) EIR exception explains that, in order for this exception to be applicable, there are a number of conditions that must be met. These are:

- 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?

31. On 14 December 2020, the complainant told the Commissioner:

*“By withholding the full Terms of Reference clearly SDC are attempting to ‘cover up’ either deliberate misinformation within their own organization or misinformation within that provided by their contractors/ consultants.*

*The work of the Council and that of their contractors/ consultants was clearly funded from public funds.*

*On that basis it is not appropriate or acceptable that the information that we requested should be withheld.*

*It is also of note that we are now considering legal action but are not in a position to do so until the full facts of the matter are disclosed; and hence our request for clarification.”*

32. When considering application of the EIR exceptions, SDC did not provide supporting evidence beyond simply reiterating that it relied on the case it had previously made to support its reliance on the section 41 and 43 FOIA exemptions. While these exemptions are similar to the EIR

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<sup>2</sup>[https://ico.org.uk/media/fororganisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)



12(5)(e) and 12(5)(f) exceptions, they are not identical with them. However, SDC declined to offer the Commissioner any further evidence to support its alternative EIR position.

33. SDC told the Commissioner that:

*"... The Council's stated policy is to pursue a compulsory purchase order in respect of the airfield if necessary in order to secure the retention of the aviation functions.*

*This is a major and high-value project for the Council requiring both political and commercial sensitivity."*

34. With regard to the section 41(1) FOIA exemption, SDC said that:

*"Disclosure of the information would constitute an actionable breach of confidence (section 41): this information was provided to the Council by the owners of the airfield, [name redacted]. The information has the necessary quality of confidence in that it relates to future commercial arrangements for a privately owned airfield, and it was communicated in circumstances importing an obligation of confidence – namely, pursuant to a confidentiality agreement between the owners and the Council ["the confidentiality agreement"]. In the Council's view, the disclosure of the information would likely cause detriment to the owners in that it would prejudice their commercial interests (see below)."*

35. For the section 43(2) FOIA exemption, SDC said:

*"Disclosure of the information would likely prejudice the commercial interests of a third party (section 43): The Council considers that disclosure of the information would prejudice the owners' commercial interests in that it would affect their commercial relationship with their existing tenants ([reference to the content of the withheld information redacted]) and their negotiating position with potential future partners ([reference to the content of the withheld information redacted])."*

36. The Commissioner considered whether the regulation 12(5)(e) EIR exception was engaged with reference to the conditions which must be met that: the information is commercial or industrial in nature, the information is subject to a duty of confidence under either the common law duty of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.



37. The Commissioner decided from her inspection of the brief as a whole, both the information already disclosed and the withheld information, that the information was commercial and industrial in nature.
38. With regard to the issue of the information being subject to confidentiality provided by law, the Commissioner has considered the content of the withheld information and also the confidentiality agreement. She noted that the confidentiality agreement specifically excluded instances where publication of information was required to meet SDC's statutory duties. The Commissioner regarded this as being applicable to EIR and any FOIA matters.
39. The Commissioner accepted that there had, for a time, been a need for confidentiality and a safe space within which discussions between SDC and the airfield owners could take place in order to protect their respective legitimate economic interests. She also considered whether or not their confidentiality, as evidenced by the confidentiality agreement, would be adversely affected by disclosure of the withheld information at the date of the request (6 May 2020) and decided that it would not. The consultants' report had by then been disclosed in full so that withholding a small part of the brief on which it was based would not adversely affect the parties' confidentiality. The Commissioner therefore decided that the regulation 12(5)(e) exception was not engaged.

***Regulation 12(5)(f)***

40. As regards application of the regulation 12(5)(f) EIR exception, the criteria which must be met for this exception to be engaged, are:
  - (i) the person was not under any legal obligation to supply that information to any public authority;
  - (ii) the person supplying the information did not supply it in circumstances in which the public authority is entitled, apart from under the EIR, to disclose it; and
  - (iii) the person supplying the information has not consented to its disclosure.
41. If a landowner wishes to pursue a development that requires planning consent then the landowner has no option but to submit a formal planning application to the public authority as the local planning authority. However, if the landowner wishes to receive informal advice through a pre-application process then this is done on a purely voluntary basis.

42. By including the withheld information in the brief to the consultants, a third party, SDC was breaking out beyond the confines of its previous confidential informal discussions with the owners. SDC was then sharing with a third party the withheld information concerning development of the infrastructure of the airfield. From that point on, if not before, SDC could not reasonably maintain that it was not entitled to disclose the withheld information or that the owners had still only given it to SDC on a purely voluntary basis but had an obligation to provide it to others who reasonably required to see it.
43. For a public authority to apply an EIR exception, it must show that disclosure is more likely than not to adversely affect the relevant interest (ie there is more than a 50% chance of the prospective adverse effect arising). It is not enough to show that disclosure could, might, or even would be likely to, have an adverse effect.
44. The Commissioner's interpretation of "would adversely affect" is supported by the decision of the then Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030, 17 October 2006)* ("*Hogan*"), at paragraphs 28–34. The Tribunal in *Hogan* was considering a prejudice-based exemption in FOIA; "prejudice" in FOIA is considered to be equivalent to "adversely affect" in the EIR. The *Hogan* Tribunal said, at paragraph 33, that the term "would prejudice" means: "the occurrence of prejudice to the specified interest is more probable than not".
45. The prejudice-based exemptions in FOIA use the phrase "would or would be likely" to prejudice. The *Hogan* Tribunal went on to say that "would be likely" meant "a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not". Unlike the FOIA exemptions, however, the EIR regulation 12(5) exceptions do not contain the phrase "would be likely", so they can be applied only where it is more probable than not that the relevant adverse effect would happen.
46. It is not possible to prove beyond reasonable doubt that an adverse effect would happen, but a public authority must still show that:
  - the causal link between disclosure and effect is so convincing that the adverse effect is more likely than not to happen. This could be the case even if the adverse effect would happen only once or affect only one person or situation; or,
  - disclosure is more likely than not to have an adverse effect, given the potential for the adverse effect to arise in certain circumstances, and how frequently these circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).

47. The fact that the regulation 12(5) EIR exception uses only “would”, but not “would be likely to” means that the test for engaging these EIR exceptions is more stringent than that for the FOIA prejudice-based exemptions. An EIR exception is not engaged if there is less than a 50% chance of the adverse effect happening.
48. For this exception to apply, the arguments need to be strong with regard to the adverse effect that disclosure would have on that party. SDC did not demonstrate this to the Commissioner. SDC specified the owners and itself as the parties whose commercial interests it considered were at risk of adverse effect.
49. SDC did not evidence its arguments about contractual clauses of confidentiality and decided not to consult with the owners. Therefore, SDC has not demonstrated that an adverse effect with a more than 50% chance of happening would arise from disclosure of the withheld information. The Commissioner decided therefore that the regulation 12(5)(f) EIR exception was not engaged.
50. Following her investigation, the Commissioner decided that the regulation 12(5)(e) and 12(5)(f) EIR exceptions are not engaged. Accordingly she required SDC to disclose the withheld information.

## **Other matters**

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51. For the avoidance of doubt, the Commissioner makes clear that neither the complainant nor SDC referred to emissions as an environmental information issue in their representations to her. The Commissioner saw no reasons of her own to consider whether the EIR regulation 12(9) exception might be engaged.
52. Since she found no EIR exception to be engaged, the Commissioner did not conduct a public interest balancing test. She recalled however that EIR regulation 12(2) requires SDC to apply a presumption in favour of disclosure when EIR exceptions do apply.
53. The Commissioner also recalled, from her own past investigations, that the EIR regulation 12(5)(e) exception often arises as a concern in planning matters. She has generally found that, where the issue arises, the particular public interest in public participation in planning matters generally carries a significant amount of weight in favour of disclosure.

## Right of appeal

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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@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)

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** .....

**Dr Roy Wernham**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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