

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

**Date:** 3 November 2022

**Public Authority:** Thanet District Council  
**Address:** Cecil St  
Margate  
Kent  
CT9 1XZ

**Decision (including any steps ordered)**

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1. The complainant has requested copies of agreements between Thanet District Council ('TDC') and Brett Aggregates ('BA'), and other information, relating to BA's operations at the council-owned Port of Ramsgate. TDC disclosed a facilities agreement and accompanying deeds of variation, with redactions made under regulation 12(5)(e) (Confidentiality of commercial or industrial information) of the EIR. It said that at the time of the request it did not hold the other information specified in the request.
2. During the Commissioner's investigation TDC reconsidered the withheld information and it identified information in the facilities agreement which had previously been withheld under regulation 12(5)(e), which it agreed could be disclosed.
3. The Commissioner's decision is that regulation 12(5)(e) of the EIR was applied correctly to withhold commercially confidential information in the deeds of variation and in the facilities agreement. The Commissioner is also satisfied that at the time of the request, TDC did not hold the other information specified in the request and that it was entitled to rely on regulation 12(4)(a) (Information not held) of the EIR to refuse that part of the request. However, by failing to conduct an internal review of its decision within the required timescale, TDC breached regulation 11(4) of the EIR.

4. The Commissioner requires TDC to take the following steps to ensure compliance with the legislation.
  - Disclose the information in the facilities agreement which it has identified to the Commissioner as not being covered by the exception at regulation 12(5)(e) of the EIR.
5. TDC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## **Request and response**

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6. In September 2020, while inspecting TDC's accounts the complainant requested, under the Local Audit and Accountability Act 2014 ('LAAA'), a copy of the facilities agreement between TDC and BA.
7. Then, on 28 October 2020, the complainant wrote to TDC and requested information in the following terms:

“Subject: EIR request Brett Aggregates Ramsgate Port

Please provide me with a copy of the Facilities Agreement between Thanet Council and Brett Aggregates relating to Brett Aggregates operations at Ramsgate Port. Please send me copies of any deeds of variation relating to the Facilities Agreement and any other information held by the council related to the Facilities Agreement.

Please provide me with all planning decision notices and planning officer reports relating to the operation of Brett Aggregates at the Port of Ramsgate. Please also provide me with copies of any documents held by the Council relating to Environmental Impact Assessments and the Brett Aggregates operations at Ramsgate Port.”
8. TDC wrote to the complainant on 6 November 2020. It disclosed redacted copies of the facilities agreement and three deeds of variation to the facilities agreement, which were made in 2009. It said redactions to the information had been made in accordance with sections 26(4) and (5) of the LAAA, due to commercial confidentiality.
9. TDC wrote to the complainant again on 25 November 2020, explaining that his correspondence of 28 October 2020 would be closed as an FOIA request, as it had already been responded to under the LAAA.
10. The complainant wrote to TDC on 27 November 2020, pointing out that the LAAA did not provide a right of appeal against the redactions made to the disclosed information. He asked TDC to reconsider the request

under FOIA, and to provide an internal review of its decision to withhold information. He also said that the second part of the request had not been responded to. However, he asked to be allowed to refine its wording, as follows:

“Please provide me with copies of all information held by the Council relating to the construction of the Brett Aggregates concrete batching plant located at Ramsgate Port, including all planning information, communications between Brett Aggregates and the council, legal advice etc. Although the plant was constructed in 2010 some of the requested documents will have been produced during the period 2005 up until 2015.”

11. TDC responded on 26 January 2021. It stated that it would not be reviewing the first part of the request as it was satisfied that the redacted response that had already been provided was the same as the response that would have been given had the request been considered under FOIA or the EIR.
12. It refused the complainant's request to be allowed to refine the second part of the request, considering it manifestly unreasonable under regulation 12(4)(b) of the EIR on the grounds it was vexatious. It cited the complainant's previous correspondence on related matters which it said had been used to make public, unfounded allegations against TDC, in pursuit of a 'campaign' against it. It also said that his continued requests were placing an unreasonable burden on the resources of the council.
13. Following the Commissioner's intervention, TDC provided the complainant with an internal review on 28 June 2021. For the first part of the request, it said that the redacted information was exempt from disclosure under regulation 12(5)(e) (Confidentiality of commercial or industrial information) of the EIR. It said that the public interest favoured maintaining the exception.
14. As regards the second part of the request, it maintained that the request was manifestly unreasonable under regulation 12(4)(b) of the EIR.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 7 November 2021 to complain about the way his request for information had been handled. He disagreed with TDC's decision to refuse each part of the request under regulations 12(5)(e) and 12(4)(b) of the EIR.
16. During the Commissioner's investigation, TDC revised its position with regard to the request. For the first part of the request, it identified non-

exempt information in the facilities agreement which it had previously withheld under regulation 12(5)(e). It said this information could be disclosed, but as of the date of this decision notice it has not done so.

17. For the second part of the request, TDC said it was not obliged to accept the complainant's revised wording as it substantially expanded the scope and focus of what had originally been requested. It said it was effectively a new request for information. As regards the original wording of the request, TDC said that it did not hold the requested information at the time the request was received. However, it noted that information falling within its scope had since been placed in the public domain via its planning portal.
18. The analysis below considers TDC's revised position, as set out to the Commissioner during the investigation.

## **Reasons for decision**

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### **Regulation 12(5)(e) – Confidentiality of commercial or industrial information**

19. When initially responding to the request in November 2020, TDC disclosed redacted copies of the facilities agreement and the accompanying deeds of variation.
20. During the Commissioner's investigation TDC agreed that some information in the facilities agreement which had previously been withheld under regulation 12(5)(e), could be disclosed. At the time of this decision notice, it has not disclosed this information. It must therefore now take the action in paragraph 4.
21. As regards the remaining redactions to the facilities agreement, and the redactions made to the deeds of variation, TDC maintained these were correct. In each case, information was withheld under regulation 12(5)(e) of the EIR.
22. Regulation 12(5)(e) states that a public authority can refuse to disclose information if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
23. The exception imposes a four-stage test and each condition set out below must be satisfied for the exception to be engaged:
  - 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?

Is the information commercial or industrial?

24. The Port of Ramsgate is owned and operated by TDC. BA is a major commercial customer at the Port and its plant at the Port supplies ready mixed concrete for commercial and small load, domestic projects.
25. The withheld information is contained within a 56 page agreement between TDC and BA (and accompanying deeds of variation) which sets out the terms and conditions under which BA uses the Port for its commercial purposes. It includes financial information and details of improvements to be made by BA, to the berth it uses.
26. It is the Commissioner's opinion that the withheld information relates to a commercial activity, that being the use of council-owned facilities by BA, for profit. He is therefore satisfied that it is commercial in nature.

Is the information subject to confidentiality provided by law?

27. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
28. TDC said that the withheld information is subject to confidentiality provided by law under a common law duty of confidence. It said the information is not trivial and not in the public domain. The information was created in circumstances creating an obligation of confidence between TDC and BA in their commercial endeavours at the Port of Ramsgate.
29. The agreement requires that neither party to the agreement may disclose any information in it without the written consent of the other Party. It also states that the agreement is confidential and sharing it more widely within either party's organisations must only be done under limited conditions. The agreement does not contain a clause in relation to freedom of information and it was written with the expectation that the agreement was commercially sensitive and would not be disclosed without compelling reasons. The confidentiality clause is a contractual obligation on both parties and damages may be payable in the event of a breach.
30. TDC said:  
  
"The Complainant noted that Paragraph 20 of the Local Government Transparency Code 2015 states that,

'local authorities should expect to publish details of contracts newly entered into – commercial confidentiality should not, in itself, be a reason for local authorities to not follow the provisions of this Code'.

However, we will call attention to the fact that the Agreement was drawn up in 2006 and the guidance above was published in 2015. Given the Agreement predates this by nine years and eight years before the Local Audit and Accountability Act 2014, we would not at the time have considered inserting any clauses in this Agreement to allow for disclosing data under freedom of information."

31. It added that BA had been asked to give consent to the disclosure of an unredacted version of the information and declined, expressing concerns that disclosure would significantly undermine its commercial activities at both the Port and elsewhere.
32. To the Commissioner's knowledge, the remaining withheld information is not in the public domain; furthermore, he is of the view that it is not trivial in nature, and that such information has the necessary quality of confidence.
33. The Commissioner therefore considers that the second stage of the test is met with regard to the remaining withheld information.

Is the confidentiality provided to protect a legitimate economic interest?

34. The Commissioner considers that, in order for the third condition of the exception to be satisfied, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
35. In a detailed submission, TDC explained that disclosure of the financial details of the agreement would have a significant impact on BA's financial health and would undermine its market position. Having looked at the withheld information, the Commissioner notes that it comprises financial information and it reveals information about how BA structures particular parts of its business with regard to use of the Port. It also sets out the rights and obligations of both parties with regard to its use of the Port.
36. TDC also said that BA does not have exclusive use of the berth that it uses, and that TDC's own ability to negotiate competitively with other potential users would be damaged if information about BA's agreement with TDC (including information on fees and charges levied) was disclosed. It said this would reduce the income TDC would receive from commercial activities at the Port and decrease the positive impact of the commercial ventures supported by the Levelling Up Fund, from which

TDC had recently secured £19m for investment in improvements at the Port<sup>1</sup>.

“We are transparent that the Port has suffered significant losses in the past, as the Complainant has highlighted, and this additional significant funding is a major turning point for the Port to make it into a viable and profitable commercial entity for the Council and the residents of Thanet. It is vital that we are able to attract additional operators to the Port to create financial stability. The Department for Levelling Up, Housing and Communities recognises through our winning bid, we have the capacity to make the Port a success”.

37. TDC said that the withheld information should not be placed in the public domain, as, for the reasons described, it would undermine the success of this investment.
38. It is the Commissioner’s view that despite the passage of time since the original terms of the contract were agreed, disclosure of the withheld information would still undermine the position of both BA and TDC in a competitive marketplace. It would impact on BA’s ability to compete fairly with competitors and on TDC’s strategy for obtaining best price for use of an asset, as its commercial bargaining position in respect of the Port would no longer be protected.
39. The Commissioner is therefore satisfied that disclosure of the withheld information would adversely affect the legitimate economic interests of both BA and TDC, and that this stage of the test is met.

Would the confidentiality be adversely affected by disclosure?

40. Although this is a necessary element of the exception, should the first three tests set out in paragraph 24 be met, the Commissioner considers it inevitable that this element will also be satisfied. In his view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

### **Public interest test**

41. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider whether the public interest in the

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<sup>1</sup> <https://www.thanet.gov.uk/campaigns/ramsgate-future-levelling-up-fund-programme/>

disclosure of the requested information is outweighed by the public interest in maintaining the exception. When carrying out the test, the Commissioner must take into account the presumption in favour of disclosure, provided for in regulation 12(2).

Arguments in favour of disclosure

42. TDC made the following arguments in favour of disclosure:

"We refer to arguments in favour of disclosure that include the presumption under the EIR to openness of information and the duty on all public authorities to be open and transparent.

In this case there is a strong public interest in the release of information that would inform and engage public debate on issues pertinent to the use of Berth 4 and 5 by Brett Aggregates at the Port of Ramsgate.

The release of the information covered by this exception would also therefore help reassure the public that we are considering the most appropriate options when creating commercial agreements that are appropriate and create value for money for the residents of Thanet."

43. The complainant also cited the public interest in local authorities being transparent and accountable, and the need for them to be open about their decision-making, particularly decisions involving contractual agreements and financial matters. He referred the Commissioner to the Local Government Transparency Code 2015 and its emphasis on the importance of openness and transparency in local government.
44. The complainant said that the Port had been running at a substantial loss over a number of years. He saw a correlation between these losses and "the depletion of reserves and cuts to council services".
45. He suggested that the lease arrangements between TDC and BA may be in contravention of the Local Government Act 1972, in that TDC was not obtaining best value for BA's use of the Port. He argued that disclosure of the agreement between TDC and BA would allow the public to assess whether the income generated by the lease with BA was securing value for money for TDC and helping to promote financial stability for the council.
46. He also argued that some similar information was in the public domain, as under the LAAA he had obtained details of rent paid by BA to TDC in the financial year 2019-20 for the lease of the business site at the Port, and the amount paid to TDC for the aggregate levy in the same period. He argued that this called into question TDC's claims that disclosure of this type of information would be harmful.



Arguments in favour of maintaining the exception

47. TDC made the following arguments in favour of maintaining the exception:

“However, weighing against the public interest in disclosure are the arguments which preserve the principle of confidentiality:

- The disclosure would undermine TDC's relationship with Brett Aggregates, particularly as they determined what information should be redacted in 2019, and subsequently, the Council has needed to revisit the disclosures to improve transparency.
- As maintaining the confidentiality of commercial agreements between port operators and their tenants / occupiers is an industry standard practice, disclosure would also affect TDC's ability to do business with others in the future, in and outside of the aggregates sector, thus adversely impacting our ability to operate as a port and generate revenue for the Council that would in turn fund public services. This is more pressing with the expansion and development of the Port, supported by the Levelling Up Fund.
- There is a strong public interest in ensuring that the commercial and economic interests of external businesses, including public bodies, are not damaged or undermined by disclosure of information which is not common knowledge and which would adversely impact on future business and Council revenue.
- The greater majority of ports in the UK are now private entities; either trust ports or private limited companies. As a public authority, the Council must not be disadvantaged against our private sector competitors on the basis of oversharing of commercial confidential information.

We recognise previous ICO Decision Notices have determined that public authorities should ensure that contractors are aware that information can be released into the public domain. This was addressed in a case relating to Yorkshire Council (2008) where the ICO ordered that they disclose their waste management contract with an independent contractor. We believe the distinction between that case and ours is stark: the former is related to a contract concerning a contractor carrying out a core function of the local authority. In the case of Thanet District Council, there is no capacity for the contract to affect all of the community to a very great degree in the way that emptying wheelie bins across the district could. Indeed, the Port service is of a niche and commercial concern and therefore we believe confidentiality should be upheld.”

The Commissioner's decision

48. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public's confidence in the decisions made by a public authority.
49. The Commissioner appreciates that it is reasonable for the public to expect a greater degree of transparency and openness about contracts and agreements which involve the use, by private companies, of publicly-owned assets. Disclosure would permit the public to ascertain if TDC is obtaining a competitive price for BA's use of the Port. On this point, the complainant has argued that the losses made by TDC in the management of the Port merit a greater degree of scrutiny.
50. However, in the Commissioner's opinion, it would be firmly against the public interest if TDC's commercial interests are harmed. TDC has secured a significant investment from the Levelling Up fund to try to attract more commercial users to the Port. Any undermining of its competitive position such that it could not charge competitive rates, particularly when competing for business against privately owned ports, would be of detriment to the public purse.
51. In the Commissioner's opinion, the harm which would be caused to the economic interests of TDC, and to BA, should this information be released at a time when the agreement was still live, and when TDC may be negotiating with other Port users to provide similar services, carries considerable weight in favour of withholding the information. If TDC was unable to achieve a competitive price in terms of the Port fees paid by other users of the berth, this would have a direct, and detrimental, impact on the public purse. It would also not be in the public interest if the competitive position of BA in the marketplace was eroded.
52. It is the Commissioner's opinion that there is a strong public interest in protecting TDC's commercial interests. Given this, the Commissioner is satisfied that the balance of the public interests lies in the exception being maintained. In reaching this decision he has borne in mind that the information relates to TDC's ability to achieve the best price for use of a publicly-owned asset, and not the use of public money to deliver core services to the public.
53. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the

regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*<sup>2</sup>:

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

54. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
55. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

### **Refined wording of second part of request**

56. When requesting an internal review, the complainant asked TDC to consider a refined version of the second part of the request, which he argued was more concise. TDC declined to do this, arguing that, rather than reducing it, the refined version extended the scope of the original request.
57. The original wording asked for planning decision notices, planning officer reports and Environmental Impact Assessments relating to BA’s operations at the Port. The refined request specifies that it is for “all information held by the Council relating to the construction of the Brett Aggregates concrete batching plant” as well as the information referred to in the original wording. The Commissioner agrees with TDC that the focus of the refined request has significantly changed and that it has potentially extended its scope.
58. The Commissioner’s guidance on request handling states that a refined request is a new request for information<sup>3</sup>. The Commissioner is therefore

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<sup>2</sup> <https://www.gov.uk/administrative-appeals-tribunal-decisions/vesco-v-1-information-commissioner-and-2-government-legal-department-2019-ukut-247-aac>

<sup>3</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/>

satisfied that TDC was not obliged to consider the refined request when carrying out an internal review of its handling of the request of 28 October 2020.

59. The Commissioner has therefore considered the wording of the second part of the request, as it was originally submitted to TDC.

**Regulation 12(4)(a) – information not held**

60. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.

61. The second part of the request asked for planning decision notices, planning officer reports and information on Environmental Impact Assessments regarding the operation of BA at the Port.

62. As stated above, during the Commissioner's investigation, TDC reviewed this part of the request, and concluded that it did not hold relevant information at the time the request was received.

63. In scenarios where there is some dispute between whether the public authority holds relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

64. In order to determine such complaints, the Commissioner must decide whether it is more likely than not that a public authority holds information which falls within the scope of the request (or held it at the time the request was received).

65. In its submission to the Commissioner on this point, TDC said:

"...Thanet District Council did not have any Environmental Impact Assessments for the Port of Ramsgate or Brett Aggregates in the Planning department therefore we did not hold any planning decision notices or planning officer reports at the time of the request.

...From 2002 onwards, any decision notices would be accessible on our website that Thanet District Council would have responsibility for in their capacity as a local planning authority. However, please note that as Brett Aggregates is a mineral operator, they would need permission through Kent County Council as the county authority, so in this case, we would not hold the information requested and it would be held with Kent County Council instead."

66. However, it said that at a later point, and after the request was received, TDC had come to hold information falling within scope of the request:

“Nonetheless, all the documents on the Environmental Impact Assessments can be found online here, <https://planning.thanet.gov.uk/online-applications/> using planning application reference PA/TH/22/0132 but they were not available at the time of the EIR 4224 request.”

67. Having considered TDC’s submissions, which have given a reasoned and detailed account of why TDC has determined that it did not hold the information at the time the request was received, the Commissioner is satisfied that, on the balance of probabilities, TDC did not hold information falling within the second part of the request at the time it received it, and that regulation 12(4)(a) was therefore engaged.
68. The complainant may access such information as TDC now holds via the web address and reference number in paragraph 68.

### **Regulation 11 - Representations and reconsideration**

69. Regulation 11(4) of the EIR provides that where a request for review is received:

“A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.”

70. The complainant requested an internal review of TDC’s decision on 27 November 2020. TDC did not provide the outcome of the review until 28 June 2021, 144 working days after the complainant requested it, and only following the Commissioner’s intervention.
71. The Commissioner has therefore decided that the Council did not comply with the requirements of regulation 11(4) of the EIR.
72. The Commissioner has made a note of the delay, for monitoring purposes.

### **Other matters**

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73. The complainant is free to submit the revised wording of the second part of the request as a new request for information to TDC, under the EIR.
74. However, he may wish to bear in mind that TDC has indicated that it considers the revised wording of the request to be manifestly unreasonable, for the reasons it has previously provided to him.

## Right of appeal

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75. 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)

76. 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.

77. 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 .....**

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