

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 March 2018

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

Decision (including any steps ordered)

1. The complainant has requested information relating to his address between Stratford-on-Avon District Council (the council) and Dorsington Parish Council and its residents. The Council refused the request, withholding the information under the exceptions for the adverse effect to the course of justice and personal data – regulations 12(5)(b) and 13 of the EIR.
2. The Commissioner's decision is that the council has correctly applied regulation 12(5)(b) of the EIR to withhold the requested information. However she also finds the council in breach of regulation 11(4) in providing an internal review outside the time specified.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 8 August 2017 the complainant wrote to the council and requested information in the following terms:

"I would like to make a formal Freedom of Information request to see all correspondence and notes of telephone calls and meetings between

SDC's Enforcement and Planning Officers and any Dorsington resident or Dorsington Parish Council in respect of functions at The Moat House for the period of 1st January to 31st July 2017."

5. On 25 August 2017 the council responded and refused to provide the requested information citing regulations 12(5)(b) and 13 of the EIR as its basis for doing so.
6. On 29 August 2017 the complainant made a request to the council for an internal review of its handling of his information request. On 10 and 14 September 2017 the council responded stating that as the complainant had made a complaint about its reviewing officer it would be inappropriate for the review to be completed by him. The council further stated that although there remained the possibility for the reviewing officer to delegate his responsibility to another officer [to complete a review] it believed that there was a 'real danger' that that officer would also face a complaint being raised about them if the review decision was unfavourable to the complainant.
7. On 16 October 2017 the complainant contacted the Commissioner to complain about the council's refusal to conduct an internal review. On 14 November 2017 the Commissioner wrote to the council reminding it of its obligations under regulation 11 of the EIR to carry out an internal review.
8. On 6 December 2017 the council provided the complainant with an internal review in which it maintained its original position.

Scope of the case

9. On 16 January 2017 the complainant contacted the Commissioner again to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to consider whether the council was correct to refuse the request under regulations 12(5)(b) and/or 13 of the EIR.

Reasons for decision

Regulation 12(5)(b) – Adverse effect to the course of justice

11. Under this exception a public authority can refuse to disclose information on the basis that “... *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 inquiry of a criminal or disciplinary nature*”.
12. The Commissioner’s guidance explains that ‘an inquiry of a criminal or disciplinary nature’ is likely to include information about investigations into potential breaches of legislation, for example, planning law or environmental law¹. The exception also encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege (LPP). As such, the Commissioner accepts that ‘an inquiry of a criminal or disciplinary nature’ is likely to include information about investigations into potential breaches of legislation, for example planning law or environmental law.
13. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an “adverse” effect resulting from disclosure of the information as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word “would” is “more probable than not”.

Is the exception engaged?

14. The council has explained that it is the local planning authority for the Stratford-on-Avon district and has authority to investigate alleged breaches of planning control and to initiate enforcement action. Breach of a planning enforcement notice is an offence pursuant to section 179 Town and Country Planning Act 1990. The council has explained that there is an extant enforcement notice and a stop notice prohibiting the use of the complainant’s address commercially as a wedding venue, and that the withheld information relates to a live enforcement case

¹ https://ico.org.uk/media/fororganisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

concerning non-compliance with the notices and that disclosure would prejudice its ability to conduct an inquiry of a criminal nature.

15. The council confirmed that it is therefore satisfied that the requested information falls within the definition of this exception, as it relates to an inquiry undertaken by the council in accordance with relevant planning legislation.
16. In terms of the adverse effect that disclosure would cause, the council has stated that the information was provided as part of a live investigation and that disclosure would inhibit the council's ability to effectively investigate possible breaches of planning control. Specifically, that it would affect its ability to conduct effective inquiries as individuals would be dissuaded from providing information that may inform council planning activity if they thought it would be disclosed and so affect public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of the individuals providing information. The council has explained that in relation to enforcement of planning control, the public are given assurances in its Local Enforcement Plan and its form for reporting suspected breaches of planning control that their identity will be kept confidential, except where disclosure maybe necessary for legal reasons. The council has confirmed that there are no such legal reasons at this time.
17. In particular, the council argues that disclosure would dissuade the public from providing information in any investigation. The council explained that this would have a detrimental impact on its ability to obtain responses, and investigate planning control breaches effectively; to the detriment of the proper planning of the district. Disclosure would adversely affect the integrity of the process and the ability of the council to carry out future investigations effectively and comprehensively.
18. The council has confirmed that its investigation process relies on public reporting. If information that has been provided by the public were routinely released into the public domain this would result in a loss of trust between the confider and confidante and in the willingness of individuals to co-operate honestly, free and frankly in the future. This would in turn adversely affect the ability of the council to carry out future inquiries of this nature, investigate fully and comprehensively and act on any breaches of legislation that are identified.
19. The Commissioner has reviewed the requested information and she is satisfied that regulation 12(5)(b) of the EIR is engaged in this case. She will now explain why.

20. The council has confirmed that the requested information relates to a live investigation concerning non-compliance with notices, which, is an offence under the Town and Country Planning Act 1990. The Commissioner is therefore satisfied that the requested information falls within the definition of this exception as it relates to an enquiry of a criminal nature.
21. The council has explained that disclosure of the information may be necessary for legal reasons but that there are no such reasons at present. The Commissioner is therefore satisfied that the requested information also falls within the definition of the general course of justice element of this exception.
22. In terms of adverse effect, the Commissioner accepts that disclosure would reveal information volunteered by the public to the council which it relies on to investigate potential breach of law to the detriment of the council. It would affect whether individuals decide to volunteer information and co-operate with the council. This would in turn damage the effectiveness of the council's investigation process and the ability of the council to investigate and take action where necessary of any breaches of legislation.
23. The council has explained that individuals co-operate in such investigations with the expectation that the information will remain confidential and will not be disclosed to the world at large. If the information was disclosed under the EIR, this would damage the trust and co-operation of individuals on which the process and the ability of the council to exercise its powers heavily relies.
24. The council has stated that disclosure of the information may be necessary for legal reasons, although there are no such reasons at this time. The Commissioner considers disclosure of the information at a time when this is still possible would adversely affect the course of justice and, if required, the ability of effected parties to receive a fair trial.

Public Interest test

25. This exception is also subject to the public interest test. So in addition to demonstrating that the exception is engaged the public authority must also consider the public interest arguments for and against disclosure and demonstrate that, in this case, the public interest rests in maintaining the exception.
26. The council stated that it accepted that there is a public interest in the outcome of the investigation and in the transparency of the process.

However, the council is of the view that as the information relates to a live investigation process into breach of non-compliance with legal notices there is therefore a stronger public interest in maintaining the exception because disclosure would prejudice the council's live planning enforcement investigations and wider enforcement work, to the detriment of planning control and the protection of the environment of the district. The council stated that such consequences would not be in the wider interests of the public. Rather it is in the public interest to withhold information that has been provided in relation to a live investigation to enable the council to fully investigate potential breaches of the legislation.

27. The Commissioner has considered the arguments for and against disclosure. She understands that there is a public interest in openness and transparency and in providing information to the public which enables them to understand more clearly how such matters are investigated and why a particular outcome has been reached. In this particular case, it is noted that the information relates to a breach of legal notices. The Commissioner accepts that there will be a public interest in knowing how this matter is being dealt with and why a particular approach is being taken.
28. However, the Commissioner accepts that disclosure would reveal information in relation to a live investigation to the world at large and prejudice the outcome of the investigation and damage the integrity of the current process and the willingness of individuals involved to co-operate fully. It is not in the wider interests of the public for this to happen. The council relies on the co-operation of the public and information provided by them to fairly and comprehensively investigate potential breaches of the law. If the council's ability to investigate such matters was damaged it would hinder its ability to investigate future cases and take appropriate enforcement action where necessary.
29. Although there are public interest arguments in favour of disclosure in this case, the Commissioner has concluded that these are outweighed by the weightier arguments in favour of maintaining the exception. As a result she requires no further action to be taken.

Regulation 13 – personal data

30. The council also applied regulation 13 of the EIR to withhold the requested information. The Commissioner has not found it necessary to go on to consider the application of this exemption further within this decision notice given she has decided that the council was correct to apply regulation 12(5)(b) of the EIR to the entirety of the information which was withheld.

31. The Commissioner consider however that the withheld information is a combination of the complainant's personal data and other information and therefore the request should also have been treated as a Subject Access Request under the Data Protection Act 1998 (DPA). The Commissioner recommends that the council now revisits the request and considers releasing any information that is the complainant's personal data, which he may be entitled to under the subject access provisions of the DPA.

Regulation 11 – representations and reconsiderations

32. Regulation 11(4) of the EIR states that a public authority shall carry out an internal review and notify the applicant of its findings within 40 working days of receipt.

33. The complainant requested an internal review of its decision on 29 August 2017 and a response was eventually issued on 6 December 2017 following the Commissioner's intervention. The council therefore breached regulation 11 (4).

Right of appeal

34. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

**Pamela Clements
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