

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 March 2019

Public Authority: Antrim & Newtownabbey Borough Council

Address: foi@antrimandnewtownabbey.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from Antrim & Newtownabbey Borough Council ('the Council') in relation to a pig farm construction site within the Council's area. The Council disclosed some of the requested information, stated that it did not hold some of the information, and refused to disclose the remainder, citing regulation 12(5)(b) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the information withheld under that regulation and that it holds no further information within the scope of the complainant's request apart from that which it has already disclosed to the complainant. Therefore, the Commissioner requires no steps to be taken.

Request and response

3. The complainant requested information in relation to a pig farm construction site on the Reahill Road. The Council responded to him on 21 August 2017, providing him with some information in response to the request (namely that information requested in parts 1, 2, 7, 8, 9, 14,16,17,20 and 21 of his request), stating that it did not hold some of the information, and refusing to disclose the remainder, citing regulation 12(5)(b) of the EIR as a basis for non-disclosure. The exact wording of the request is contained in an Annex to this notice.

4. The complainant sought an internal review of the Council's response on 21 August 2017. On 22 August 2017, the Council wrote to the complainant seeking clarification of what aspects of its response the complainant was dissatisfied with. The complainant responded stating that he was dissatisfied with all aspects of the response.
5. On 1 September 2017, the Council provided its response to the complainant's request for internal review, stating that it did not hold some of the requested information (namely that in parts 10, 12, 13 and 19 of the request) and upholding the original decision to withhold some of it under regulation 12(5)(b) of the EIR. The complainant wrote to the Council again on 4 September 2017 expressing his dissatisfaction with the Council's response.
6. Since that date, the Council has informed the Commissioner that some of the proceedings the information relates to have now concluded. The Council has now provided the complainant with some more of the requested information, namely that requested in parts 3, 6, 15 and 18 of the complainant's request (see Annex for full wording). The remaining information continues to be withheld under regulation 12(5)(b) of the EIR or is not held by the Council.

Scope of the case

7. The complainant contacted the Commissioner on 13 December 2017 to complain about the way his request for information had been handled.
8. The Commissioner wrote to the Council seeking its detailed submissions on 26 July 2018. The Council responded to the Commissioner on 20 August 2018, providing its submissions as to its application of the above exception and its overall handling of the complainant's request.
9. The Commissioner has considered the Council's handling of the complainant's request.

Reasons for decision

Regulation 12(5)(b) EIR – The course of justice

10. Regulation 12(5)(b) EIR provides an exception from the duty to disclose information where the 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'. The Commissioner accepts that the exception is designed to encompass information that would be covered by legal professional privilege.
11. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the 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'.
12. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts that disclosure of legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
13. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

Is the exception engaged?

14. The Council considers that each of the elements of regulation 12(5)(b), as set out in paragraph 10 above apply to the information withheld under that regulation. The Council's enforcement process, for which its powers lie in the Planning (Northern Ireland) Order 2011, involves the gathering of evidence, obtaining legal advice and deciding what, if any, enforcement action to take. Therefore it is important that there should be no disruption to the administration of justice, including the operation of the courts, and no prejudice to the rights of individuals or organisations to a fair trial. If a matter is before the courts, information is subject to the rules of disclosure. It is also important to ensure that disclosure of information does not prevent public bodies such as the Council from conducting investigations relating to its statutory duties.
15. The Council has also informed the Commissioner that it considers that it is important not to put perpetrators on notice that the Council is taking certain actions, as this could lead to them destroying vital evidence or taking some action which would prevent the Council from taking enforcement action.
16. The Council states that it obtained legal advice in respect of the enforcement action related to this matter. The Council states that the legal advice obtained was for the purposes of proposed and contemplated litigation, and that therefore litigation privilege applies.
17. The Commissioner, having perused the information withheld under regulation 12(5)(b), agrees that litigation privilege applies in respect of the legal advice. She also accepts that, in the enforcement process, it is important that the Council is able to carry out its statutory duties without interference. Disclosure of the information, when the enforcement case is live, as in this case, would have an adverse effect on the course of justice by potentially alerting perpetrators to the Council's actions and allowing them to interfere with these, which would not be conducive to justice being achieved. Therefore, the Commissioner considers that the exception as set out in regulation 12(5)(b) is engaged in relation to the information withheld under that exception. She has now gone on to consider the public interest in both disclosure of the withheld information and in maintaining the exception.

The public interest test

18. The Council states that it has carried out a balancing exercise of all the public interest factors in favour of both disclosing the information and maintaining the exception.
19. The Council accepts that there is a strong public interest in public authorities being transparent, accountable and informing the public of the processes and rationale behind their decision-making. This would be very important in the enforcement process, to demonstrate that the Council is fulfilling its statutory obligations in relation to enforcement action.
20. However, the Council is of the opinion that the premature release of the evidence gathered for the purpose of potential proceedings would subsequently prejudice future proceedings. The Council considers that there is a strong public interest in the Council being able to fulfil its enforcement obligations and obtain legal advice in a free and frank manner, without the concern that the information could be prematurely released into the public domain.
21. The Council considers that the public has a strong interest in allowing the preparation of evidence to be completed without the potential to inhibit and prejudice the outcome of future legal proceedings. There is a strong public interest in allowing the Council to fulfil its statutory duties, to ensure that a fair and lawful planning system is being operated, and to ensure that unlawful action can be fully investigated and prosecuted where appropriate.
22. The Commissioner recognises that there is significant public interest in the Council being open and transparent about decisions it takes and in demonstrating to the public that it is correctly fulfilling its statutory duties in relation to enforcement action. Disclosure of the information withheld under regulation 12(5)(b) could reassure the public about the thoroughness of the enforcement process.

23. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring that the course of justice runs smoothly. In her view, it would be firmly against the public interest if premature disclosure of information were to 'tip off' perpetrators about enforcement action and cause them to do anything which might obstruct that action. The Commissioner also considers that it would be strongly against the public interest to prejudice future legal proceedings by curtailing the Council's ability to freely seek legal advice without the concern that such advice may end up prematurely in the public domain.
24. The Commissioner has therefore concluded, in all the circumstances of the case, that the public interest favours maintaining the exception contained in regulation 12(5)(b) and withholding the information to which that exception applies on that basis.

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

25. Regulation 12(4)(a) of the EIR states 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.
26. The Commissioner wrote to the Council on 26 July 2018, seeking its detailed submissions regarding, among other things, its assertion that it did not hold some of the requested information. The Council responded with separate paragraphs regarding each part of the complainant's request in respect of which it did not hold information, as the Commissioner has detailed below:-

Q10 Please provide copies of environmental audits carried out since January 2017 as required by the Construction Environmental Management Plan (CEMP).

The Council states that Section 1.4 of the CEMP states that the principal contractor's performance in implementing the requirements of the CEMP should be monitored through the completion of regular environmental audits during the construction period. During a meeting with the developer, a Council officer inspected various records, however the Council did not retain any copies as environmental audits are the responsibility of the developer.

Q12 Please provide drawings and photographs of the silt fencing and the cut-off trenches as per the CEMP.

The Council states that it does not hold this information. The CEMP states that where required, the use of bunds, silt fencing and cut-off trenches will prevent silty water from entering adjacent watercourses. This was addressed during a meeting with the developer when it was advised that an alternative had been agreed with DAERA.

Q13 Please provide copies of noise and vibration monitoring carried out since work commenced onsite.

The Council states that it does not hold this information. The CEMP states that the results of any noise and vibration monitoring will be made available, as required, to the local authority. The Planning section liaised with the Council's Environmental Health Section in relation to this matter and was advised that no noise and vibration monitoring has been carried out by Environmental Health and that they are satisfied that none is required.

Q19 Please provide copies of the pre-commencement inspection report carried out on the area to be occupied by the attenuation pond before any work took place as set out in the Reservoir Act 2015.

The Council states that it does not hold this information as compliance with other statutory bodies is a matter for the relevant body. In this case, the Department for Infrastructure's Rivers Agency is the body responsible for adhering to the provisions of the Reservoir Act 2015 and the complainant has been advised of this.

Q20 What action has been taken by council to have schedule 6 completed. At the planning meeting councillors were told "this is at an advanced stage and requires minor details to be submitted in order to be approved". That was November 2016!

The Council states that a Schedule 6 Consent under the Drainage (Northern Ireland) Order 1973 is a matter for the Rivers Agency of the Department for Infrastructure.

27. The Commissioner is satisfied that the Council has carried out all necessary searches and enquiries to establish that it does not hold any recorded information falling within the scope of the relevant parts of the complainant's request. It has explained exactly which bodies would be responsible for holding the relevant requested information and therefore why it holds no recorded information within the scope of the specified parts of the complainant's request.

28. For these reasons the Commissioner is satisfied that on the balance of probabilities the Council does not hold the information requested in these parts of the complainant's request. It was therefore entitled to rely on regulation 12(4)(a) of the EIR at the time of the request (although this was not officially cited by the Council).

Right of appeal

29. 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

30. 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.
31. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

ANNEX

1. What steps have ANB Council taken to ensure that the numerous incidents of water pollution from the site will cease? Please specify dates.
2. What has the council done to have the unapproved lean-to and the generator removed from the site? What conclusions did the council come to when they checked that the shed is built as in the plans approved?
3. What steps has the council taken to remove the lighting at the large shed which is disruptive to bat activity? Please specify dates and the success of these steps.
4. What steps has the council taken to prevent the developer working outside the site limits as denoted by the red line? This work is so extensive that it requires planning permission.
5. The conclusions of the bat survey at the time of application were based on the developer only working inside the red line. What has the council done to prevent the illegal activity on the east side of the site which has disrupted bat activity? Has the council informed PSNI of this activity?
6. What action have been taken by the council as a result of the failure of the developer to follow the CEMP? Please specify dates and the results of the action. Condition 4 requires the developer to adhere to the CEMP throughout the construction period.
7. What action has been taken by the council as a result of work going on outside normal hours? Please specify dates.
8. What has the council done to ensure that hedges cut were not buried before being checked for nests?
9. Please provide copies of the changes to the CEMP agreed to by NIEA and council planners.
10. Please provide copies of environmental audits carried out since January 2017 as required by the CEMP.
11. What action has been taken by council to ensure soil bunds are as per the CEMP? Please specify dates and the outcome of the action.

12. Please provide drawings and photographs of the silt fencing and the cut-off trenches as per the CEMP.
13. Please provide copies of noise and vibration monitoring carried out since work commenced on site.
14. What action has been taken by council to have the wheel wash operational and being used?
15. What action has been taken by council to have the concrete wash operational and in use?
16. Please provide details of a contact number for local residents to ring for undue disturbance as per the CEMP.
17. What action has been taken by council to have the road widening scheme completed before work began on site?
18. What action has been taken by council to the unapproved culverting along the side of the Reahill Road?
19. Please provide copies of the pre-commencement inspection report carried out on the area to be occupied by the attenuation pond before any work took place as set out in the Reservoir Act 2015.
20. What action has been taken by council to have schedule 6 completed. At the planning meeting councillors were told "this is at an advanced stage and requires minor details to be submitted in order to be approved". That was November 2016!
21. What action has been taken by council to ensure that all those living downstream of the attenuation pond will be safe from inundation? Levels on drawings submitted at the time of application show that all of this body of water will be above the natural level of the surrounding land.

