

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 27 February 2018

Public Authority: Mid Devon District Council

Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested copies of specific communications relating to noise emissions from a gun club. Mid Devon District Council ("the Council") initially withheld the requested information under the exception provided by regulation 12(4)(e), but subsequently confirmed during the Commissioner's investigation that the information should have been withheld under regulation 12(5)(b).
2. The Commissioner's decision is that Council has correctly applied regulation 12(5)(b), but breached regulation 5(2) by responding outside of the time for compliance.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 June 2017, the complainant wrote to the Council and requested information in the following terms:

Freedom of information request for all correspondence and communication between Mid Devon's Environmental Health Department and Mid Devon's Legal Department regarding shooting on Hemyock Common/Turbary by Culm Vale Gun Club, and Culm Vale Gun Club Limited including the legal reason for how and why MDDC consider the Culm Vale Gun Club Limited would be successful in claiming a prescriptive 20 year easement and clear legal reason how they have this right to cause a statutory noise nuisance at OUR property.

5. The Council responded on 5 July 2017. It stated that the requested information was withheld under section 42(1) of the Freedom of Information Act 2000 ("the FOIA").
6. Following an internal review the Council wrote to the complainant on 18 August 2017. It stated that the request should have been considered under the terms of the EIR and not the FOIA, and that the information was withheld under regulation 12(4)(e) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 24 August 2017 to complain about the way his request for information had been handled, and specifically that the Council had incorrectly applied regulation 12(4)(e).
8. During the course of the Commissioner's investigation, the Council advised that the incorrect exception had been applied, and that the Council now sought to withhold the information under regulation 12(5)(b).
9. The Commissioner therefore considers the scope of this case to be determination of whether the information has been correctly withheld under regulation 12(5)(b).

Reasons for decision

Is the information environmental?

10. Information is “*environmental*” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(b), any factors that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to the consideration of noise emissions. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

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

11. Regulation 12(5)(b) 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.
12. 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*”.
13. 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.
14. The Council has provided a copy of the withheld information to the Commissioner. The Commissioner has identified that it represents communications between specific council officers within the Council’s environmental health service, and a professional legal advisor within the Council’s legal service. The Council has confirmed that the purpose of these communications is to obtain legal advice, and that any associated confidence has not been lost through the information being disclosed to any third parties.

15. In the circumstances of this case the Commissioner understands that officers have sought the legal advice in relation to the Council's duty to conduct an inquiry into 'Noise Nuisance, monitoring and investigation' under section 79 of the Environmental Protection Act 1990 ("the EPA"), and that the legal advice discusses the Council's options in proceeding. The Council has clarified that it has sought this advice following concerns raised by the complainant about noise emissions from a gun club, and that the matter remains live and may be subject to further investigation. The Council has also advised that the matter may be referred to the courts.
16. Having considered the above, the Commissioner recognises that disclosure of the information would undermine legal professional privilege, and that the disclosure would also affect the Council's ability to defend itself in any related legal challenge. The Council should be able to defend its position from any claim made against it without having to reveal its position in advance, particularly so as challenges may be made by persons not bound by the legislation. This situation would be unfair.
17. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.

The public interest test

18. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

The public interest in disclosure

19. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
20. In the circumstances of this case, the complainant has explained to the Commissioner that he holds concerns about noise emissions deriving from the gun club, and that these emissions represent a nuisance that affect his home. He has referred this matter to the Council, but he believes that the Council has failed to take appropriate action. As such,

the complainant considers the Council has failed to fulfil its duties under the EPA, and wishes to gain a copy of the legal advice so as to assist him in submitting the matter to the courts.

The public interest in maintaining the exception

21. The Council has informed the Commissioner that the advice relates to an inquiry under the EPA that remains live and ongoing, and which may result in litigation.
22. As already indicated, the Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege.
23. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges, and may deter public authorities from seeking legal advice. The Commissioner's published guidance¹ on regulation 12(5)(b) states the following:

In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.

24. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without needing to disclose its legal advice in advance. This would provide an unfair advantage to opposing parties, who would not be likewise constrained by having their legal arguments known in advance.
25. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Tribunal recognised this in the *Bellamy* case when it stated that:

...there is a strong element of public interest inbuilt into privilege

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

itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...

26. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect, as described above.

Balance of the public interest

27. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the Council.
28. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions. However, having appraised the withheld information itself, and the wider circumstances of the matter, the Commissioner does not consider that the public interest in disclosure equals or outweighs the strong public interest that is inherent in maintaining the Council's right to obtain legal advice in confidence.
29. The Commissioner has observed that the public interest in maintaining this exception is a particularly strong one. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a substantial amount of people, or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
30. Having considered the context of the request, the Commissioner appreciates that the complainant is dissatisfied with the Council's actions, and that the noise emissions he is concerned about directly impact his home. However, and notwithstanding the complainant's own views, there is no clear evidence available to the Commissioner that suggests that the Council is failing to comply with its duties under the EPA, and it is further understood that the complainant may refer the matter to the courts should he dispute the Council's conclusions. In such a scenario it is not the purpose of the EIR to circumvent any due legal remedies.
31. Having considered the above Commissioner is satisfied that the public interest favours maintaining the exception, and that the Council has correctly applied regulation 12(5)(b).

Regulation 5(2) – Time for compliance

32. Regulation 5(2) states that an information request should be responded to no later than twenty working days after the date of receipt. In this case the Council did not respond to the request under the terms of the EIR until after this time.
33. On this basis the Commissioner must find a breach of regulation 5(2).

Other matters

34. In the circumstances of this request, the Council has, through the incorrect application of legislation and subsequent incorrect application of an exception, demonstrated a poor handling of the request.
35. The Commissioner reminds the Council that public guidance on the terms of the EIR is available at:

<https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

Right of appeal

36. 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

37. 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.
38. 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

Andrew White
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