

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 December 2020

Public Authority: Bolton Council

Address: Town Hall
Bolton
BL1 1RU

Decision (including any steps ordered)

1. The complainant requested information from Bolton Council ("the Council") relating to investigations carried out by the Council concerning noise complaints made by residents at a specific address. The Council withheld the information under regulations 12(5)(b) (course of justice), 12(5)(f) (interests of information provider) and 13 (personal data) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 2 August 2019 the complainant wrote to the Council and requested information in the following terms:

"Under the freedom of information act, could I please request to see the information held on the noise complaints investigation carried out by Bolton Council and the Environmental Health department into the nuisance noise complained of by residents at [address redacted] and the subsequent tests apparently carried out. I would also like to know how many complaints have been made to date."

4. On 2 September 2019 the complainant repeated her request to the Council and also stated the following:

"We have been informed that the procedures required to make complaints have not been followed – the residents at [address redacted] say they have not completed diaries and have not made individual complaints. We are currently complaining to the Ombudsman and need the further information."

5. On 27 September 2019 the Council responded. It withheld the information under regulation 12(5)(b) (course of justice) of the EIR.

6. On the same day the complainant asked the Council for an internal review.

7. On 3 October 2019 the Council provided its internal review response. It maintained its position to refuse the request under regulation 12(5)(b) and also applied regulations 12(5)(f) (interests of information provider) and 13 (personal data) of the EIR to the requested information.

8. On the same day the complainant clarified her request to the Council and stated the following:

"Apologies – I should have clarified. The second FOI Request related to all complaints not just those made this year. There are closed cases from 2017 and there is no reason why I should not have been forwarded this information. I would expect to receive this in due course."

9. The Council informed the complainant that this correspondence would be treated as a new request.

10. The complainant expressed her dissatisfaction with this approach by the Council. She considered that her request of 2 August and 2 September 2019 indicated that she had requested information on all complaints and not just any complaints that were still live. The complainant stated the following to the Council:

"I did not ask for those dating from 2019, therefore, I am still expecting to receive any that were lodged prior to this year and that are now closed."

11. On 6 January 2020 the complainant contacted the Information Commissioner's Office (the ICO) about the Council's handling of her request for information.

12. Following the Commissioner's intervention on 6 February 2020, the Council subsequently issued a refusal notice to the complainant in response to her email of 3 October 2019. The Council relied on regulations 12(5)(b), 12(5)(f) and 13 for refusing to comply with the request for information.

Scope of the case

13. The complainant contacted the Commissioner on 25 February 2020 to complain about the way her request for information had been handled. Specifically, the complainant disagreed with the Council's refusal to provide the information. She also considered that there had been maladministration in the Council's actions with dealing with a particular investigation into noise complaints.
14. The following analysis focuses on whether the Council correctly withheld information under regulations 12(5)(b), 12(5)(f) and 13.

Reasons for decision

Regulation 2(1) – is the information environmental?

15. Regulation 2(1) of the EIR defines what "environmental information" consists of. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is information in any material form 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) and (b) as well as measures or activities designed to protect those elements..."

16. The Commissioner considers that the phrase "any information...on" should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
17. In this case the withheld information relates to noise. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(b) as the information can be considered to be on a measure affecting or likely to affect environmental elements and factors listed in regulations 2(1)(a) and (b). This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council (EA/2006/001)*¹.
18. Having found that the requested information is environmental, the Commissioner has gone on to examine whether the Council was correct to rely upon the exceptions cited.

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

19. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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."
20. As explained in the Commissioner's publicised guidance², the exception 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, environmental law.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i94/Kirkaldie.pdf>

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

21. 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*".

Is the exception engaged?

22. The Commissioner understands that the information sought relates to noise nuisance complaints investigated by the Council regarding a particular property.
23. The Council stated that it is relying on the limbs relating to the course of justice and the ability to receive a fair trial. It considers disclosure would adversely affect an inquiry, the nature of which concerns noise nuisance complaints. The Council has a duty to conduct such an inquiry and to undertake effective investigations in order to protect the local environment, should a noise nuisance exist.
24. The Council provided a copy of the withheld information to the Commissioner. She has identified that it represents communications between Housing Standards, Environmental Health, Regulatory Services, and Enforcement and Technical teams concerning details related to an open noise nuisance investigation.
25. It is the Council's view that to release information about an investigation into the public domain whilst the investigation is still ongoing would not be appropriate. The Council explained that this would hamper the Council's ability to thoroughly investigate such complaints and establish whether a statutory noise nuisance exists. The Council said that it would adversely affect the ability of any individual that was subject to such an investigation, to be investigated fairly. For example, the release of such information into the public domain may pre-empt the outcome of the investigation, leading to people making the assumption that a statutory noise nuisance exists and that the individual is responsible for it.
26. The Council considers that details of any complaints received from the public in respect of noise nuisance, planning enforcement etc. are provided in confidence and would not generally be disclosed.

27. In the circumstances of this case, the Commissioner accepts that the Council applied the exception to "*a range of information*", this included details about investigations relating to a potential breach of the legislation under the Environmental Protection Act 1990. The Commissioner notes that the exception was applied to all complaints about the noise nuisance in question prior to 2019, and not just for the complaints made during that year.
28. Having considered the Council's arguments, and reviewed the withheld information, the Commissioner recognises that the information represents evidence that, at the time of the request, related to a live and ongoing inquiry undertaken by the Council. It is clear that the public disclosure of such information would not only inhibit the Council's ability to effectively conduct an inquiry, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
29. 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 engaged. Therefore, she has gone on to consider the public interest test.

Public interest test

30. 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.

Public interest arguments in favour of disclosing the information

31. 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.
32. The Council acknowledged that there is always a general public interest in the disclosure of environmental information, because it supports the right of everyone to live in an adequate environment and ultimately, contributes to a better environment.

33. The Council said that there is a public interest in the Council being transparent about its processes and the manner in which it carries out investigations, placing such information into the public domain may increase the public's understanding and reassures them that such matters are taken seriously and investigated thoroughly.
34. The complainant stated to the Commissioner that the Council upload objections made by members of the public onto its Planning Portal. She believes that it is this that caused the original dispute between herself and individuals at [address redacted], as they were allowed to download the complainant's objection in full.
35. The complainant argued that she should "*be entitled to see accusations made that have triggered investigations.*" She does not believe that the reasons within the correspondence are legitimate, and indicated that procedures were not followed by the Council and therefore, the complainant considers that the documentation (accusations regarding noise nuisance) does not exist.
36. The complainant clarified to the Commissioner that her request was for details of any complaints that had been received (regarding noise nuisance investigations) and she stated "*not specifically open ones*".

Public interest arguments in favour of maintaining the exception

37. The Council argued that it is in the public interest for the Council to have the ability to investigate complaints, and to protect the local environment through taking enforcement action in cases where a statutory nuisance is found. It further argued that it is in the public interest that the Council undertakes such investigations fairly, and that those people who wish to make complaints can do so in confidence and in the expectation that their personal information will not be disclosed without their consent. The Council believes that this outweighs the public interest in the details of specific complaints made to the Council.

Balance of the public interest test

38. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, she has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless '*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*'. The threshold to justify non-disclosure is consequently high.

39. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role, and enhances transparency in its decision-making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

Conclusion

40. Having considered the context of the request, the Commissioner appreciates that the complainant is dissatisfied with the Council's actions regarding noise complaints investigations. However, and notwithstanding the complainant's own views, there is no clear evidence available to the Commissioner that suggests that the Council did not follow procedures in handling the complaints, or evidence suggesting that the Council failed to comply with its duties under the Environmental Protection Act 1990.
41. The Commissioner understands that the request took place whilst the inquiry was live and ongoing. She also notes that the inquiry relates to a private individual at their property, and it is reasonable to consider that this individual will expect the inquiry to proceed fairly and with the opportunity to appeal against any outcome and the evidence on which it is based. There is no indication to the Commissioner that the withheld information is already publicly known, or that the inquiry has been conducted improperly by the Council.
42. The Commissioner also recognises that the complainant's arguments for disclosure are based on a private interest, rather than wider public concern. Whilst the complainant argues that she is already aware of some of the context to the inquiry due to its relation to her own property, the Commissioner must consider the sought disclosure as being to the public, rather than to the complainant in isolation.
43. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.
44. 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)*, *"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..."* and *"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).

45. As covered above, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. 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)(b) was applied correctly to the withheld information.
46. On the basis that the withheld information has been correctly withheld under regulation 12(5)(b) of the EIR, the Commissioner has not gone on to consider the Council's application of regulations 12(5)(f) and 13.

Right of appeal

47. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

48. 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.
49. 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

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