

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 September 2022

Public Authority: Hinckley & Bosworth Borough Council

Address: Hinckley Hub
Rugby Road
Hinckley
Leicestershire
LE10 OFR

Decision (including any steps ordered)

1. The complainant requested, from Hinckley and Bosworth Borough Council ('the council'), legal advice and correspondence relating to a Noise Abatement Notice. The council refused the request on the basis that Regulation 12(5)(b) applied (course of justice).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to withhold the information in this case.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 28 March 2021, the complainant wrote to the council and requested information in the following terms:

"Could we please have a copy of all discussion documents, emails, reports, and correspondence relating to the writing of both the draft and final version of the 2014 Noise Abatement Notice 14/00058/EPA between

1. HBBC and the company's (RML's) solicitor, and
2. HBBC and its Barrister who guided the writing of the NAN 12/00058/EPA....

...3. Please provide all the legal advice provided by the Barrister, regarding 'Public interest', including the justification in 5.3 e) referred to in Report the Executive 16/04/14...

4. Please provide confirmation, together with any proof, that HBBC's Barrister reviewed and approved the final version of the 2014 Noise Abatement Notice 12/00058/EPA – in particular with reference to paragraph 21."

5. The council responded on 21 May 2021. It refused the request on the basis that the information was exempt under Regulation 12(5)(b) (course of justice). It also said that some information is no longer held by the council, but it did not specify what information is held, and what is not.
6. Following an internal review, the council wrote to the complainant on 20 July 2021. It maintained its initial position that Regulation 12(5)(b) applies.

Scope of the case

7. The complainant contacted the Commissioner on 14 October 2021 to complain about the way his request for information had been handled.
8. The complainant argues that the council was not correct to apply Regulation 12(5)(b) to withhold the information from disclosure. He did not complain about the council stating that some information is no longer held by it.

9. The Commissioner clarified with the complainant that the scope of the case is whether the council applied Regulation 12(5)(b) correctly.

Reasons for decision

The background to the request

10. The complainant's request relates to a Noise Abatement Notice issued against the owners of Mallory Park racing circuit in 2014. This followed a decision by the Local Government and Social Care Ombudsman requiring the council to take action to abate a statutory nuisance; noise, emanating from the circuit on regular occasions.
11. The complainant argues that the council was wrong to include within the notice the ability for the owners of the circuit to apply for a variation of the conditions set on the circuit. He also argues that it was not correct to allow a public interest element in considering the abatement conditions set on the circuit. He argues that neither is legally correct in cases of statutory nuisance. He provided the Commissioner with an expert's opinion which supports his arguments.
12. The council counter argues that the NAN is legally correct and appropriate in law.
13. The complainant wishes to see the legal advice to ensure that the council has acted appropriately.

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

14. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its 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.
15. The threshold for establishing an adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not; that is, a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

16. The 'course of justice' element of this exception is very wide in coverage, and, as set out in the Commissioner's guidance¹ on regulation 12(5)(b), encompasses, amongst other types of information, material covered by LPP. This approach was supported by the Upper Tribunal in *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC) in which the Tribunal, as set out in the Commissioner's guidance, stated that, in the absence of special or unusual factors, an adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege.
17. The council argues that it holds two different types of information, both of which fall within the scope of the complainant's request.
 - a) It argues that it holds legal advice and other information which is subject to legal professional privilege. Therefore, it argues, the exception is applicable to it.
 - b) It said that it also holds 'without prejudice' correspondence between itself and representatives of the owners of Mallory Park. It argues that this information also falls within the scope of the exception.

a) information subject to LPP.

18. The council explained that it considers that the information is covered by 'advice privilege'. Its view is that the information comprises confidential communications between the client - council officers - and its professional legal advisors for the purpose of obtaining legal advice.
19. Having considered the withheld information the Commissioner is satisfied that the correspondence comprises confidential communications between client and professional legal advisors, made for the dominant purpose of seeking and/or giving legal advice, and is therefore covered by LPP on the basis of advice privilege.
20. The Commissioner has considered whether the confidence attached to the information has subsequently been lost or waived through a disclosure of the advice to the world at large. Having considered the council's arguments, the Commissioner is satisfied that the legal advice remains subject to LPP.

¹<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

21. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
22. The council argues that the information relates to a 'live' matter. The site is still the subject of ongoing noise monitoring, and complaints, and there remains the possibility of enforcement should the situation require it. Additionally, the circuit owners may apply to vary the NAN, and the legal advice would feed into the decision on any variations which are requested.
23. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at Regulation 12(5)(b) is engaged.

b) other information

24. The council argues that the other information which it holds is 'without prejudice' correspondence with the circuit owner's legal representatives relating to the NAN. This falls within the scope of part 1 of the complainant's request for information.
25. The council argues that a disclosure of this correspondence would have an adverse effect on the course of justice as it would undermine the principle of 'Without Prejudice' discussions. The NAN stipulates restrictions and is appealable. The council argues that a disclosure of such correspondence would hinder the ability of the council and the circuit owners to talk freely and to openly negotiate solutions. It argues that this would impact the council's ability to address allegations of statutory nuisance.
26. It argues that "Statutory Nuisance is determined by a professional officer and not a member of the public, and disclosing discussions in relation to agreeing a notice would materially affect the council's duty to respond to the Statutory Nuisance".
27. The Commissioner has considered the council's arguments. There is a clear benefit on the parties being able to have "without prejudice" discussions. The Commissioner accepts that the purpose of such communications would be, at least in part, undermined, by the disclosure of that correspondence to the wider public, and that this could damage the ability of the council to agree certain actions with the circuit owners informally. Informal agreements of this nature might negate the need for litigation or enforcement to take place, or narrow the grounds and scope of any dispute.

28. The ability to negotiate agreed actions and solutions, to clarify any remaining areas of dispute, and to establish the legal grounds of that dispute forms part of the course of justice.
29. The Commissioner therefore accepts that the exception is engaged by this information.

The balance of the public interest

30. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exception being maintained.

Arguments in favour of disclosure

31. Regulation 12(2) of the EIR provides a presumption in favour of disclosure, which adds weight in favour of environmental information being disclosed in response to an EIR request.
32. There is always a public interest in a public authority conducting its business in a transparent manner.
33. The LGSCO ordered the council to address the statutory nuisance. However, in issuing the NAN, the complainant argues that the council left open the ability of the circuit owners to seek to vary the conditions which the NAN place on it, and that the council may be taking into account any wider public interest in allowing a degree of nuisance to continue.
34. The complainant has sought expert opinion which argues that there is no legal basis for the ability to vary NAN's which are in place to prevent a statutory nuisance, and that there is no legal scope for the council to take into account any wider public interest when making a decision on the levels of nuisance which should be allowed.
35. There is a public interest in allowing interested parties to determine whether the council's approach to the NAN is correct. The result of an incorrect NAN may be noise nuisance continuing to affect local residents when that should not be case. Alternatively, restrictions may have been placed upon the circuit owners, affecting their ability to carry out their business, which should not be in place.

Arguments for the exception to be maintained

36. The council's view is that the balance of the public interest lies in the exception being maintained in this case.
37. It has stressed the public interest in the preservation of confidence in the general principle of LPP.
38. It argues that there is a need to maintain the confidentiality of an investigation, and the legal advice on which it bases its actions, as it means that the council can effectively monitor and determine the appropriate course of action in the wider public interest.
39. It argues that it is in the public interest to ensure that a public authority can obtain open and frank legal advice to understand all of the options and the extent of discretion it has available. It argues that if LPP were to be overturned, this may create a reluctance to seek legal advice in the future in case the advice is subsequently disclosed. This would have a detrimental impact on the course of justice.
40. It argues that the council's role is to consider the impact on local residents as well as a wider public benefit to persons who use the circuit. It argues that in addition to residents affected by the noise, it needs to consider those who generate an income locally from the existence of the racetrack, as well as the business interests of the operator. It argues that all of these can be better served by maintaining the exception, to maintain confidence in the ability of the council to ensure that investigations, case management and consideration of variation requests are fair and thorough.

The Commissioner's decision

41. The Commissioner's role does not include making a decision over the legal arguments of either party as regards the terms of the NAN itself. The Commissioner's role is limited to deciding whether the council was correct to refuse to provide the requested information for the reasons it has stated.
42. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.

43. There will always be a strong argument in favour of maintaining LPP because of its very nature and the importance of it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy² case when it stated that: "...there is a strong element of public interest inbuilt into privilege 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...".
44. 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.
45. The Commissioner has made his decision in this case based on the contents of the information, and on the evidence he has regarding the council's decision-making process and conduct in the relevant matters.
46. The Commissioner is not satisfied that any of the factors described in paragraph 44 above are present to the extent that it would provide the required weight to tip the balance against the strong public interest in maintaining the exception.
47. A number of people are affected by the imposition of the NAN. Additional restrictions on the circuit will affect businesses and those who enjoy the circuit as a hobby. On the counter side, a continuance of noise creates a nuisance for local residents. The number of people affected is not decisive in this instance, however.
48. The public are clearly affected by the issues involved; however the council has been transparent about its reasons for specifying the conditions in the NAN. It has not misrepresented the legal advice it has received, and it is for the complainant, or other parties, to take the council's decision to court and argue their own legal case if they consider that the council's legal position is wrong over the NAN. The Commissioner has also not seen any evidence of unlawful activity by any party.

² Bellamy v Information Commissioner and Secretary of State for Trade and Industry (ES/2005/0023)

49. The Commissioner therefore considers that the balance of the public interests favours the exception being maintained.
50. As regards the 'without prejudice' correspondence, there is a strong public interest in allowing the parties to a dispute to settle as much between them as possible prior to taking the matter to the courts. Where agreement can be reached between the parties, this saves public costs, lessens the time and resources which public authorities expend on litigation, and can address issues more quickly than via the legal routes. The Commissioner considers that this outweighs the public interest in creating greater transparency over the council's actions and how it goes about seeking to resolve some issues informally, in this instance.
51. The Commissioner therefore considers that the balance of the public interests favours the exception being maintained. This means that the council was not obliged to disclose the requested information.
52. 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).
53. 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. 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.

Right of appeal

54. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. 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.
56. 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

Ian Walley
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