

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 October 2022

Public Authority: Torbay Council

Address: Town Hall

Castle Circus

Torquay

TQ1 3DR

inforequests@torbay.gov.uk

Decision (including any steps ordered)

1. The complainant requested from Torbay Council information in relation an independent review concerning a Tree Preservation Order. Torbay Council disclosed some of the information but withheld the remainder under Regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Torbay Council has correctly applied Regulation 12(5)(b) of the EIR to the remainder of the requested information and the public interest is balanced in favour of withholding it.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 10 March 2022 the complainant wrote to Torbay Council (the Council) relating to an independent review concerning a Tree Preservation Order and requested information in the following terms:

"...would you please supply the following;

Details of all persons present at the review and their position?

When the review was held?

Where the review was held?

Copies of all evidence considered?

Details of any evidence given in person and by whom?"

5. The Council responded on 11 April 2022. It disclosed the information requested under questions 1, 2 and 3, stated that no recorded information was held in relation to question 5 and withheld the information referenced in question 4 under Regulation 12(5)(b) of the EIR.
6. The complainant was dissatisfied with Council's response and on 25 April 2022 requested an internal review.
7. Following an internal review the Council wrote to the complainant on 1 June 2022 and stated that it was upholding its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 11 July 2022 to complain about the way his request for information had been handled. In particular, he was dissatisfied with the Council's decision to apply Regulation 12(5)(b) of the EIR to question 4 of his request.
9. The scope of the Commissioner's decision will be to determine whether the Council has correctly engaged Regulation 12(5)(b) of the EIR.

Reasons for decision

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

10. Regulation 12(5)(b) of the EIR requires that a public authority can refuse to disclose information if 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.
11. The course of justice at Regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to legal professional privilege (LPP). This allows for information that are not subject to LPP to still be covered by the exception, as long as disclosure would adversely affect the course of justice 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 Tribunal affirmed this view in the case of Surrey Heath Borough Council v Kevin

McCullen and the ICO (EA/2010/0034) when they acknowledged that the regulation covered more than just LPP.

12. 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, Tree Preservation Orders, planning law or environmental law.
13. The withheld information relates to a review conducted by the Council in relation to the removal of a tree at Holme Court and a potential breach of a Tree Preservation Order. The Commissioner accepts that this would fall within the definition of 'inquiry' as described above. The Council has stated the disclosure of this information 'would prejudice or would likely to prejudice 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 Council made this decision on the basis that the review had 'not been fully closed'. Furthermore, it stated that although the review of the situation regarding the trees at Holme Court had been undertaken, there were still follow up inspections which needed to take place to ensure that the replanting had occurred and was adequate.
14. Having considered the Council's arguments, the Commissioner recognises that, at the date of the request, the requested information related to a live and ongoing inquiry concerning a Tree Preservation Order. It is clear that the public disclosure of such information would not only inhibit the Council's ability to effectively conduct and continue the inquiry but would also damage public confidence in the matter being undertaken appropriately and with due regard to the rights and expectations of the parties involved.
15. 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

16. 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 his 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

17. The Commissioner considers that 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.
18. The complainant initially contacted the Council regarding a potential breach of a Tree Preservation Order in August 2021. In January 2022 he received notification that the matter had been dealt with by an independent review which had since concluded. He therefore believes there is a public interest in the evidence considered by this review to be made public to determine whether the Council met its obligations and responsibilities and reached an appropriate decision.

The public interest in maintaining the exception

19. The Council informed the complainant on 1 June 2022 that although the review concerning the Tree Preservation Order and the trees at Holme Court had been undertaken there were still follow up inspections required to ensure that adequate replanting had occurred.
20. The Commissioner recognises that, as there are ongoing activities and actions required by the Council following the independent review, the matter is still live and disclosure of the outstanding requested information would adversely affect these.
21. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries.
22. The Commissioner notes the complainant's concerns as someone who is directly affected by the matters discussed at the independent review. However, he must consider the sought disclosure as being to the public, rather than the complainant in isolation.
23. The Commissioner recognises that the complainant's arguments for disclosure are based on his concerns that the Council might not have handled the independent review appropriately. However, it is not the Commissioner's role to adjudicate in such matters. The Commissioner does not consider it to be the role of the EIR to circumvent or potentially undermine existing legal inquiries, processes or remedies.

Balance of the public interest

24. Having considered the above factors, the Commissioner is satisfied that

the public interest test supports the maintenance of the exception.

Right of appeal

25. 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

26. 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.
27. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**