

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 March 2012

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested information concerning the review of the licence of a nightclub which had been the subject of noise pollution complaints. Westminster City Council (the Council) refused to disclose this information and cited the exception from the EIR provided by regulation 12(5)(b) (adverse effect on the course of justice).
2. Apart from in relation to communications between the Council and the complainant, the Commissioner's decision is that the Council has applied this exception correctly and so it is not required to disclose the information. In relation to correspondence between the Council and the complainant, the decision of the Commissioner is that the exception is not engaged. The Council also breached the requirements of the EIR in that it did not respond to the request within 20 working days of receipt and it should ensure that it has appropriate procedures in place to respond to requests promptly.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information in relation to which the Commissioner has found that regulation 12(5)(b) is not engaged, that is all information within the scope of the request that records communications between the Council and the complainant.
4. The Council must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 August 2010, the complainant wrote to Westminster City Council (the Council) and requested information in the following terms:

"1. External correspondence and instructions in relation to [Oxygen, Irvine St, WC2] since the 2008 review was instigated.

2. Internal (including those with the Police) instructions and correspondence, as above.

3. Any other unused material which had not been previously served, as above."

6. After a delay and further correspondence, the Council responded to the request on 17 November 2010. It stated that the request was refused, but no exception from the EIR was cited and little other explanation for the refusal of this request was given.
7. Following an internal review that the complainant requested on 17 November 2010, the Council wrote to the complainant, after a further delay, on 28 April 2011. It stated that the request was refused and cited the exception from the EIR provided by regulation 12(5)(b) (adverse effect on the course of justice etc).

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled on 22 June 2011. The complainant indicated at this stage that they did not agree that the exception cited had been applied correctly.

Reasons for decision

9. Regulation 12(5)(b) of the EIR states that environmental information is exempt from disclosure if disclosure would adversely affect the course of justice, or 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. This exception is also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.

10. There are three steps to considering this exception. First the information must be environmental in accordance with the definition given in regulation 2. Secondly, it must be established whether disclosure would result in any of the adverse affects mentioned in regulation 12(5)(b); and thirdly the balance of the public interest must be addressed.
11. Covering first whether this information is environmental, environmental information is defined within regulation 2(1) of the EIR as follows:

“any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

12. The information requested concerns a nightclub, the licence of which has been reviewed more than once. These reviews followed complaints that the nightclub was being operated in a manner contrary to its licence and causing a noise nuisance to its neighbours. The information records these licence reviews.
13. The Commissioner believes that the information in question here is environmental information in accordance with regulation 2(1)(c). The view of the Commissioner is that the licence reviews recorded within this information were an administrative measure likely to affect the state of the environment referred to in regulation 2(1)(a) by virtue of affecting noise, which is a factor referred to in regulation 2(1)(b).
14. When corresponding with the Commissioner's office, the Council stated that it believed that some of the information falling within the scope of the request was not environmental. However, the view of the Commissioner is that the wording *“any information...on”* in regulation 2 should be interpreted broadly. In this case his view is that as all of the information in question relates to the review of the nightclub licence, it is all information *“on”* the noise issue and hence is all environmental.

15. Turning to whether the exception to disclosure provided by regulation 12(5)(b) does apply, the argument of the Council is that disclosure would adversely affect the process of reviewing the licence of the nightclub. The Council has explained that at the time of the request the process of reviewing the licence for the second time began. The Council stated that this process involved review by the licensing sub-committee and a subsequent appeal to the Magistrates' Court.
16. On the basis of this explanation, the Commissioner accepts that this process is relevant to the 'course of justice' as this wording is used in regulation 12(5)(b). As to whether disclosure would adversely affect this process, the public authority has argued that much of the information is subject to legal professional privilege. This protects the confidentiality of confidential communications between legal adviser and client and exists to ensure that legal advisers can advise clients without inhibition. The relevance of legal professional privilege to this exception is the argument that the course of justice would be adversely affected if legal advisers were inhibited in the advice provided to clients due to concern that the record of this advice may later be subject to disclosure.
17. The Information Commissioner accepts that the content of the information in question here that records the provision of legal advice from adviser to client is subject to legal professional privilege. In relation to this content the Information Commissioner accepts the argument of the Council about the importance of preservation of the confidentiality of information covered by legal professional privilege and that an erosion of this confidentiality would result in an adverse affect to the course of justice. In relation to this content his conclusion is, therefore, that the exception provided by regulation 12(5)(b) is engaged.
18. As noted above the Council has argued that 'much' of the information in question is covered by legal professional privilege, indicating that it recognised that some of this information is not subject to legal professional privilege. The Council has stated that it was open to the complainant to request court ordered disclosure of the information in question, but that the complainant did not do so. It also stated that it would have been "*unthinkable*" for a court to have granted any such request. The Council argued that courts should retain the ability to define what information should be disclosed as part of legal proceedings and that an erosion of this right would adversely affect the course of justice.
19. The Information Commissioner recognises the importance of preserving for the courts the role of defining what information should be disclosed during the course of legal proceedings. Court-ordered disclosure is the correct means by to which to seek access to information in relation to

legal proceedings. He also recognises that encroaching on this role could result in an adverse effect on legal proceedings. In relation to this information, the conclusion of the Commissioner is, therefore, that the exception provided by regulation 12(5)(b) is engaged.

20. However, some of the information supplied by the Council to the ICO appears to be information to which the complainant will clearly have previously had access other than through court-ordered disclosure, as they are of communications between the complainant and the Council. The arguments advanced by the Council in relation to regulation 12(5)(b) do not appear to be relevant to this information and so the conclusion above that regulation 12(5)(b) is engaged does not apply in relation to communications between the complainant and the Council.
21. In its correspondence with the ICO the Council suggested that a number of other exceptions from the EIR may apply. It did not however confirm that it did cite other exceptions, or set out any reasoning for the citing of this exception. It also appears unlikely that an argument that any of the other exceptions referred to by the Council were engaged could be sustainable in relation to communications between the complainant and the Council. At paragraph 3 above the Council is required to disclose this information.
22. In addition to the arguments above concerning this exception, the Council had also suggested that the EIR may not have applied as a result of regulation 3(3). This regulation provides that the EIR does not apply where a public authority is acting in a judicial capacity. The Council argued that it was acting in a judicial capacity when adjudicating on the nightclub licence.
23. The view of the Commissioner is that when acting as a licensing authority the Council is implementing its own policy, which does not constitute acting in a judicial capacity. Regulation 3(3) does not, therefore, apply to the Council in this case.

Public interest test

24. Turning to the balance of the public interest, in reaching a conclusion here the Commissioner has taken into account the general public interest in improving the transparency and openness of the Council and that in avoiding an adverse effect on the course of justice. In addition, the Commissioner has also included those factors that relate to the specific information in question, including arguments advanced by the Council.
25. Covering first those factors that favour disclosure of the information, as well as the general public interest in improving the transparency and

openness of the Council, there is a valid public interest in the specific information in question here on the basis of understanding more about how the Council has used its powers in this case. The impact of the decision made by the Council in this case would have been broad. This will have affected, amongst others, local residents and those who have a business interest in, or who patronise, this nightclub. The Commissioner considers the public interest in understanding more about how the Council has used its licensing powers in this case to be a valid public interest factor in favour of disclosure of some weight.

26. Turning to those factors that favour maintenance of the exception, as referred to above there is a public interest in favour of avoiding the adverse effect on the course of justice that the Commissioner has accepted would result through disclosure in this case. The Council has emphasised the importance of this public interest and the Commissioner recognises that the public interest inherent in the exception is a valid public interest argument in favour of maintenance of the exception of some weight.
27. The Council has also argued that the public interest favours maintenance of the exception in order to protect the identities of individuals who have provided information to the Council. The Council believes that individuals who may potentially provide information to it in its role as a licensing authority could be discouraged from doing so if they were concerned that their contributions would later be subject to disclosure.
28. The Information Commissioner recognises that had individuals been discouraged from contacting it in relation to the activities of this nightclub, this could have adversely affected the course of justice if the Magistrates' Court had not been provided with the information that those individuals would otherwise have been willing to supply. The Commissioner recognises, therefore, that this argument is relevant to the exception provided by regulation 12(5)(b). He also recognises that there is a public interest in preserving the confidence of individuals with relevant information that they could supply information to the Council without fear of disclosure. The information in question does record the identities of individuals who have provided information to the Council so the Information Commissioner finds that this is a valid public interest factor in favour of maintenance of the exception of some weight.
29. The Council has also argued that the public interest favours the maintenance of the exception on the basis that this is necessary for the protection of the environment. This is because an adverse effect on the course of justice as it relates to the issue of noise pollution from the nightclub in question may prevent this issue being resolved, to the detriment of the environment.

30. The Information Commissioner agrees that in a situation where a potential noise issue exists, there is a public interest in resolving that issue. An adverse effect to the process of resolving the issue would, therefore, be counter to the public interest and this is a valid argument of some weight in favour of maintenance of the exception.
31. The Information Commissioner has recognised a valid public interest factor in favour of disclosure on the basis that this would improve openness and transparency around the decision making of the Council in this case. However, he has also recognised that the public interest inherent in the exception in avoiding an adverse effect to the course of justice is significant and has also recognised other valid factors in favour of maintenance of the exception. The conclusion of the Commissioner is that, whilst the public interest in favour of disclosure is valid, this is not sufficient to equal the combined weight of the factors in favour of maintenance of the exception. His decision is, therefore, that the public interest in the maintenance of the exception outweighs the public interest in disclosure and so the Council is not required to disclose this information.
32. The Information Commissioner also notes, however, that the Council appeared to fail to recognise that the request should have been responded to in accordance with the requirements of the EIR. This necessitated the complainant repeatedly contacting the Council to secure a response to their request and to a delay in this response being provided. The internal review was also only completed after a delay.
33. The Council breached the statutory requirements of regulations 14(2) and 11(4) of the EIR that a request for environmental information should be responded to within 20 working days of receipt, and an internal review completed within 40 working days. It should ensure that it has appropriate procedures in place to deal with information requests and particularly to recognise these and respond to them in accordance with the statutory time limits of the FOIA and the EIR.

Right of appeal

34. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Jon Manners
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