

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 January 2017

Public Authority: Cornwall Council

Address: County Hall
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information relating to a Planning Contravention Notice. Cornwall Council initially withheld the information under the exception for personal data, regulation 13 of the EIR but during the Commissioner's investigation it revised its position to withhold the information under the exception for the course of justice – regulation 12(5)(b).
2. The Commissioner's decision is that Cornwall Council has correctly applied regulation 12(5)(b) to withhold the information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 7 July 2016, the complainant wrote to Cornwall Council (the "council") and requested information in the following terms:

"The Cornwall Council served on Shire Oak Energy a Planning Contravention Notice ("PCN") dated 17 June 2016, which is associated with planning complaint EN16/00936 and land at Dean Quarry, St Keverne, TR12 6NY....

....Under the Freedom of Information Act 2000, or the Environmental Regulations 2004, we request a copy of any response to the PCN Cornwall Council has received from Shire Oak Energy."

5. The council responded on 4 August 2016 and confirmed that it was withholding the requested information under the exceptions for personal data (regulation 13) and interests of the information provider (regulation 12(5)(f)).
6. Following an internal review the council wrote to the complainant on 5 September 2016. It stated that it was withdrawing its reliance on regulation 12(5)(f) but maintaining its use of regulation 13 to withhold the information.

Scope of the case

7. On 14 September 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied exceptions to withhold the requested information.
9. During the course of the Commissioner's investigation the council revised its position and confirmed that it wished to withhold the information under the exception for the course of justice – regulation 12(5)(b) of the EIR. The Commissioner has considered whether the exception has been correctly applied.

Reasons for decision

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

10. The council has withheld the information under regulation 12(5)(b).
11. 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 enquiry of a criminal or disciplinary nature

Is the exception engaged?

12. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

13. 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 is not subject to LPP to still be covered by the exception, as long as 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 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.
14. The council has confirmed that the information being requested relates to a Planning Contravention Notice (PCN) - a document relating to a Planning Enforcement Case served by the Council if it is believed that a breach of planning control may have occurred. The council has explained that a PCN is used to find out more information on the situation and to determine whether enforcement action should be taken. It has stated that a PCN compels the recipient to provide certain information within a set timeframe.

15. Having considered the withheld information and the council's submissions the Commissioner considers that it is clear that, disclosing the information at this time would have an adverse affect on the council's ongoing Planning Enforcement proceedings and, it follows, the course of justice. She is, therefore, satisfied that the exception is engaged and has gone on to consider the public interest test.

The public interest test

16. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

17. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. Her view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. She considers that this is especially the case where the public authority's actions have a direct effect on the environment.
18. The council has argued that disclosure will increase access to information held by the authority, and allow scrutiny of the public authority's decisions. It would also make reasons for the authority's decision more evident and increase public understanding on the issues. The council considers that an informed and involved public helps to promote good decision making by public bodies.
19. The complainant has argued that they wish to protect the environment from unauthorised development at the quarry which is the focus of the request and PCN. Access to the information will enable them to determine whether the council is taking appropriate enforcement action.
20. The complainant has argued that they have had to bring a Judicial Review against the Planning Authority for its activities in relation to the Town and Country (Environmental Impact Assessment) Regulations 2011 and, without being able to access the information, they are unable to effectively protect the environment in this specific matter.

Public interest arguments in favour of maintaining the exception

21. The council has confirmed that the information being requested in this instance relates to a "live" planning enforcement case. In this particular case the planning enforcement issue is ongoing and is subject to Judicial Review proceedings that were current at the time of the request and have yet to be concluded. The council has stated that the issue is going to the High Court in January 2017.
22. The council has argued that disclosure of the requested information would therefore be prejudicial to both the Council's and Shire Oak Energy's (the recipient of the PCN) legal position in relation to such matters which remain to be concluded
23. The council has argued that there are compelling arguments that its investigations in this matter require certain information to remain confidential in order to be effective. There is a strong public interest in the local authority being able to effectively carry out its legal obligations and planning enforcement investigations without damaging the integrity of a live investigation and harming the course of justice.

Balance of the public interest

24. The Commissioner notes that the proceedings to which the information relates are ongoing. She accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would reveal the Shire Oak Energy's strategy in relation to the PCN, providing insights for those wishing to challenge its position which would not be reciprocated. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
25. Furthermore, the Commissioner considers that there is a strong public interest in the council being able to carry out its planning enforcement duties without outside influence being brought to its deliberation process. Maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that, where the process is ongoing, disclosure would prejudice this integrity.
26. The Commissioner acknowledges that the complainant has concerns about the matters to which the PCN relate and she understands why they would like to be reassured that the council is handling the matter appropriately. However, the Commissioner is mindful that there are other remedies for addressing these concerns which, via the Judicial Review, are already being pursued. The Commissioner does not consider that it is appropriate to use the EIR to attempt to circumvent

these existing mechanisms except perhaps in exceptional cases where there is direct evidence of wrongdoing or malpractice.

27. The public interest in the context of the EIR refers to the broader public good. In weighing the complainant's interests, representing those of a group from within the local community, against those of the council and its ability to undertake planning and enforcement matters, the Commissioner does not consider that the interests of the complainant tip the balance in this case.
28. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight, she does not consider that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).
29. The Commissioner has, therefore, concluded that the council has correctly applied the exception and that, in this case, the public interest favours maintaining the exception.

Right of appeal

30. 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

31. 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.
32. 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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