

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 20 March 2017

**Public Authority:** Bromsgrove District Council

**Address:** Parkside  
Market Street  
Bromsgrove  
Worcestershire  
B61 8DA

#### Decision (including any steps ordered)

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1. The complainant has requested information from Bromsgrove District Council ("the Council") about a planning enforcement matter. The Council confirmed that some information was not held, and confirmed that some was held but was subject to the exception provided by regulation 12(5)(b) of the Environmental Information Regulations ("the EIR"). The complainant contested both aspects of the Council's response.
2. The Commissioner's decision is that Council does not hold the information sought by part 1 of the request, and has correctly withheld the information sought by parts 2 to 6 under regulation 12(5)(b). However the Council breached the requirement of regulation 5(2) by failing to respond within the time for compliance.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 11 May 2016, the complainant wrote to the Council and requested information in the following terms:

*...please supply dates of contact by Planning and Enforcement with [redacted property] regarding demolition and replacement of stables and illegal erection of shed.*

- 1. Dates and subjects of phone calls after January 19<sup>th</sup> 2016 with [redacted property].*
  - 2. Visits by Planning/Enforcement after 19.01.16 to [redacted property].*
  - 3. Dates and subject of any emails after 19.01.16 to [redacted property].*
  - 4. Dates and subjects of any correspondence after 19.01.16 to [redacted property].*
  - 5. Is there new photographic evidence of the yard and number of stables to date?*
  - 6. Date photos taken.*
5. The Council responded on 14 June 2016. It stated that no information was held in respect of part 1, and withheld that sought by parts 2 to 6 under regulation 12(5)(b).

## Scope of the case

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6. The complainant contacted the Commissioner on 9 November 2016 to complain about the way his request for information had been handled, including that no internal review had been provided despite being requested.
7. The ICO subsequently requested submissions from the Council on the basis of its original response. The Council provided its submission on regulation 12(5)(b), and also confirmed that an internal review outcome had been provided to the complainant on 13 September 2016. In this internal review outcome the Commissioner notes that the Council maintained its original position, and also applied the exception provided by regulation 13 to the withheld information.
8. The Commissioner considers the scope of this case to be the determination of whether the Council holds the information sought by part 1 of the request, and whether the Council has correctly withheld the information sought by parts 2 to 6 of the request.

## Reasons for decision

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### Is the information environmental?

9. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any measures that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to the development of built structures. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

### Regulation 5(1) – Duty to make information available on request

10. Regulation 5(1) states that any person making a request for information is entitled to have that information communicated to them. This is subject to any exceptions that may apply.

#### *The complainant's position*

11. The complainant contests that the Council should record phone calls in relation to enforcement matters, so that they can be referenced in the event of future action.

#### *The Council's position*

12. All information about the enforcement matter under consideration is held within the ‘Uniform’ planning database, which the Council uses to manage planning application and enforcement cases. This database was searched using the relevant enforcement reference, and no records of telephone calls were found. The Council would not expect relevant information to be held elsewhere as officers are not permitted to save data locally.

#### *The Commissioner's conclusion*

13. The Commissioner must decide on the balance of probabilities whether information is held by the Council that would fall within the scope of part 1.
14. Whilst the complainant contests that a record of all telephone calls should be created as a matter of course, the EIR does not impose an obligation on public authorities to record information. The Council has provided a clear explanation of how information about planning and enforcement cases is stored, and the searches that have been undertaken. There is no evidence available to the Commissioner that

suggests any relevant records are held, and on this basis must find it unlikely that such information is held.

### **Regulation 12(5)(b) – The course of justice**

15. Under this exception a public authority can refuse to disclose information on the basis that *"...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"*.
16. As explained in the Commissioner's guidance<sup>1</sup>, the exception encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege. 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, planning law or environmental law.
17. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information 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?

18. The Council has informed the Commissioner that the sought information relates to an inquiry undertaken by the Council under the terms of the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991). The purpose of this inquiry was to investigate an unauthorised development and issue any necessary enforcement notice. An enforcement notice, and the evidence on which it is based, may be challenged through an appeal process. On this basis, the Council considers that the public disclosure of the evidence may not only adversely affect the inquiry process through the disclosure of gathered evidence, but also undermine public confidence in the inquiry process

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

and directly impact on the rights and expectations of justice and fair treatment held by the involved parties.

19. 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.
20. 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

21. 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*

22. 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.
23. In the circumstances of this case the complainant has explained to the Commissioner that the enforcement matter relates to a property that neighbours his own, and seeks the requested information in order to ascertain what progress has been made. The complainant also considers that the basic nature of the information sought would not adversely affect the course of justice, and that some of the requested information (namely dates) has already been disclosed to him in correspondence from the Council.
24. The Council has informed the Commissioner that it considers disclosure would demonstrate and provide assurance to the public that appropriate action is being undertaken in respect of a potentially illegal building.

#### *The public interest in maintaining the exception*

25. The Council has confirmed that, at the time of the request, the information related to a live and ongoing inquiry, with any resultant enforcement notice subject to appeal. The disclosure of the information would not only impede the Council from being able to undertake an inquiry effectively, confidentially, and without outside influence, but would compromise the justice and fair treatment expected by involved parties.

26. The Council has additionally stressed to the Commissioner that the subject of the request is that of an enforcement case against a potentially illegal building, and cannot be equated to the planning application process and its expectation of public scrutiny.

*The Commissioner's conclusion*

27. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the Council.

28. 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.

29. In the circumstances of this case, the Commissioner understands that the request took place whilst the inquiry was live and ongoing. The Commissioner also notes that inquiry relates to a private individual and 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 publically known, or that the inquiry has been conducted improperly by the Council.

30. 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 he is already aware of some of the context to the inquiry due to its relation to his own property, the Commissioner must consider the sought disclosure as being to the public, rather than the complainant in isolation.

31. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.

32. On the basis that the withheld information has been correctly withheld under regulation 12(5)(b), the Commissioner does not need to consider the application of regulation 13.

**Regulation 5(2) – Time for compliance**

33. Regulation 5(2) requires that an information request should be responded to within twenty working days of receipt. In this case the Council responded outside of this time.
34. On this basis the Commissioner must find a breach of regulation 5(2).

## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**