

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 January 2018

Public Authority: Wirral Metropolitan Borough Council
Address: Town Hall
Brighton Street
Wallasey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested information relating to planning enforcement matters. Wirral Metropolitan Borough Council disclosed some information and withheld other information under the exceptions for course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Wirral Metropolitan Borough Council has correctly applied regulation 12(5)(b) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 25 April 2017, the complainant wrote to Wirral Metropolitan Borough Council (the "council") and requested information in the following terms:

"Hillbark Hotel

9. Please confirm whether the Owner has complied with the obligations within the section 106 agreements, in particular the obligations at Schedule 3 relating to the Works Programme which were used to justify the grant of a temporary permission.

10. Please respond to the following in relation to the Council's agreeing, monitoring and enforcing the delivery of the Works Programme as envisaged by the Section 106 agreement:

- a) What specific works were included in the Works Programme please? For example, our client is advised that a spend over 5/6 years on the roof of the listed building of £1,508,000 can only be justified by extensive specialist scaffolding and replacement of the whole roof, together with all associated works such as timber replacement; temporary roof; repairing and replacing gutters and downpipes; dry rot and woodworm treatment; roof insulation, electrical and pipe work in the roof space, etc. What works to the roof were required to be carried out as part of the Works Programme?*
- b) What estimates for the works were provided to the Council by contractors to enable the Council to approve the Works Programme and the costings in it?*
- c) Who supervised the works and signed these off please? What evidence of completion of the works and costs incurred was provided to and audited on behalf of the Council?*
- d) What listed building consents were require and obtained for the significant works to the listed building envisaged by the Works Programme?*

11. We repeat our reasonable request for the Council to provide copies of all communications passing between the Council and the operators of the Hillbark Hotel or their agents since the section 106 agreement was signed. This information is of public interest as it is in a planning context relating to compliance with key obligations contained within a planning agreement which were used to justify the grant of a controversial temporary permission in the green belt.

Thornton Manor

15. Please confirm whether the Owner has complied with the obligations within the section 106 agreement which were used to justify the grant of a temporary permission for an otherwise unacceptable development.

16. Please respond to the following in relation to the Council's agreeing, monitoring and enforcing the delivery of the Works Programme as envisaged by the section 106 agreement:

- a. Was a Works programme agreed as required by the section 106 agreement and costed, monitored and signed off by the Council?*
- b. Has the Event Income been accounted for to the Council, supported by invoices?*
- c. Our client comments that the Even Costs seem very high for a business doing no more than renting out and maintaining three marquees. Please advise how these were arrived at and whether they have been subsequently been monitored by the Council.*

17. Again, we repeat our reasonable request for the Council to provide copies of all communications passing between the Council and the operators or Thornton Manor or their agents since the section 106 agreement was signed. This information is in the public interest as it is in a planning context relating to compliance with key obligations contained within a planning agreement which were used to justify the grant of a controversial temporary permission in the green belt."

5. The council responded on 9 May 2017. It disclosed a copy of the Listed Building Consent referred to in part 10(d) of the request and withheld the remaining information under the exception for commercial confidentiality – regulation 12(5)(e).
6. Following an internal review the council wrote to the complainant on 11 July 2017. It stated that it had revised its position, dropping reliance on regulation 12(5)(e) and confirming that it was applying the exception for the course of justice (regulation 12(5)(b)) to withhold the remaining information.

Scope of the case

7. On 4 August the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the council confirmed that in addition to regulation 12(5)(b), it also wished to rely on regulation 12(5)(e) to withhold the information in parts 9 and 10 of the request (excluding the disclosed information in part 10(d)).
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

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

10. Excluding the information disclosed in relation to part 10(d) of the request, the council has withheld all 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.
12. 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 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.
13. 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.

14. The council has confirmed that the withheld information relates to issues of enforceability concerning Section 106 planning agreements and that disclosing the information would adversely affect the course of justice in relation to enforcement proceedings.
15. 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. 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.
16. 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

17. 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 her 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

18. 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.
19. The council has further argued that disclosure of the information would assist public participation in the planning regime.
20. The complainant has explained that it submitted its request after receiving an unfavourable response to a pre-action protocol letter to the council. The letter in question related to the perceived failure of the council to issue enforcement proceedings in relation to alleged breaches of planning law and to comply with its own policies and procedures regarding enforcement complaints from third parties.

21. The complainant has argued that disclosure would allow the public to determine whether the council has met its responsibilities as a planning authority and taken appropriate action should there be any breach of planning conditions.

The public interest in maintaining the exception

22. 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.
23. The Commissioner recognises that the degree of harm which would be done to the course of justice is closely linked to the timing of a request and the associated stage that a relevant process has reached. She accepts that the disclosure of information during an ongoing investigation is significantly likely to cause a greater degree of harm to an enquiry than after its completion. She has, therefore, given due weighting to this in her consideration of where the balance of the public interest lies.
24. The council has confirmed that an enforcement notice relating to the matters under consideration was indeed issued on 12 December 2017 and that associated Judicial Review proceedings involving the council and the complainant are also in train.

Balance of the public interest

25. 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.
26. In the circumstances of this case, the Commissioner understands that the request took place whilst the inquiry was live and ongoing. The Commissioner considers that it is reasonable to consider that the subject of potential enforcement proceedings would 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.
27. The complainant has stated that, prior to the internal review, one of its representatives visited the council and viewed relevant planning documents, including correspondence which they consider would fall

within the scope of the withheld information. They have argued that this undermines the council's application of the exception. The Commissioner notes the complainant's concerns, however, the Commissioner must consider the sought disclosure as being to the public, rather than the complainant in isolation.

28. The Commissioner recognises that the complainant's arguments for disclosure are based on concerns that the council might not have handled the inquiry appropriately. However, it is not the Commissioner's role to adjudicate in such matters. Moreover, she considers that the fact that an Enforcement notice has been issued and related Judicial Review proceedings are now ongoing bears out the council's public interest concerns regarding the timing of disclosure and the risks of pre-empting the outcome of an inquiry. The Commissioner does not consider it to be the role of the EIR to circumvent or potentially undermine existing legal processes or remedies.
29. Having considered the above factors, the Commissioner is satisfied that the public interest test supports the maintenance of the exception.
30. On the basis that all the withheld information has been correctly withheld under regulation 12(5)(b), the Commissioner does not need to consider the additional application of regulation 12(5)(e) to withhold the information in parts 9 and 10 of the request.

Right of appeal

31. 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

32. 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.
33. 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
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SK9 5AF