

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 January 2020

Public Authority: Hertsmere Borough Council
Address: 3 Elstree Way
Borehamwood
WD6 1WN

Decision (including any steps ordered)

1. The complainant has requested information from Hertsmere Borough Council in relation to complaints received about a farm. Hertsmere Borough Council withheld the information under the exception for the course of justice – regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Hertsmere Borough Council has correctly withheld the information under regulation 12(5)(b) and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 March 2019, the complainant wrote to Hertsmere Borough Council (the "council") and requested information in the following terms:

"I am making a request under the Environmental Information Regulations 2004 for all environmental information held by Hertsmere Borough Council pertaining to odour at [redacted] in 2019. The request includes disclosure of any complaints made in relation to odour together with the location and identity of any such complainants. The request also seeks disclosure of any drafts, emails, correspondence with neighbours, notes, recordings of telephone conversations etc. produced or received in respect of odour at [Redacted], including but not limited to the spreading of digestate, in 2019.

I would also request for disclosure of any policies that Hertsmere Borough Council has in relation to digestate spreading within the Borough."

5. The council responded on 30 May 2019. It stated that it was withholding the information under the exceptions for the course of justice (regulation 12(5)(b)), interests of the information provider (regulation 12(5)(f)) and personal data (regulation 13).
6. Following an internal review the council wrote to the complainant on 14 August 2019. It stated that it was withholding all the requested information under regulation 12(5)(b).

Scope of the case

7. On 14 August 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
 8. The Commissioner confirmed that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(b) of the EIR.
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Reasons for decision

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

9. By way of background, the council has stated that the request relates to the serving of an abatement notice on the complainant's farm in relation to complaints received from members of the public about an alleged nuisance. The abatement notice was served on 4 March 2019 under the provisions of the Environmental Protection Act 1990. The complainant appealed the abatement notice to the Magistrates' Court and, at the time of the request, the appeal had not been heard.
10. The withheld information consists of complaints from members of the public and council correspondence in relation to the investigation of the complaints and subsequent issuing of the abatement notice.
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 stated that an adverse effect on the course of justice can include impugning the ability of a defendant to receive a fair trial. It has argued that in the court proceedings in question, the council is the defendant. The council considers that, if the appellant had been afforded the opportunity of discovering the identities or location data of the council's witnesses and had been able to interview them otherwise than under the supervision of the court, this, by its very nature, could

have interfered with the ability of the council to have fairly presented its evidence. The council has submitted that this would have impaired its ability to defend its decision to serve an abatement notice (relying on the original complaints and statements) and have its evidence properly ventilated and adjudicated upon.

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 matter, namely the issuing of the abatement notice and the complainant's subsequent appeal. 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.
17. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

18. 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.

Public interest arguments in favour of disclosing the requested information

19. 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.
20. The complainant has submitted that it is very difficult to see how the council could be deprived of the right to a fair hearing by disclosing information directly relevant to proceedings which it holds. They have argued that their position would be prejudiced if they are unable to view the environmental information relevant to those proceedings. The complainant has argued that this represents a valid argument for the

public interest in disclosure as, to restrict access to the information would be to prevent justice from being done or being seen to be done.

The public interest in maintaining the exception

21. The council has emphasised that the live nature of the matter enhances the public interest in withholding the information.
22. The council has argued that it would be adverse to the course of justice to utilise the provisions of the EIR as an extra-judicial pre-trial review mechanism in the Magistrates' Court. It has stated that, if the legislature had intended to introduce such a disclosure mechanism it could do so by enacting an amendment to the Magistrates' Court Rules 1981. The council has stated that the rules at present simply require parties to adduce oral evidence and do not even require pre-trial disclosure (the parties call witnesses). It has argued that pre-hearing contact made with witnesses by the opposing party (which disclosure might give rise to) is an attempt to gain an unfair litigation advantage. The council has further argued that publication of witness information to the world at large would reduce its ability to conduct investigations without interference. The council asserts that witnesses are entitled to expect that their voluntary supply of information to the council's environmental health department is done so on an understanding of confidentiality.
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.

Balance of the public interest

24. The Commissioner considers that 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. This is a well established principle which has been recognised by the First-Tier Tribunal (Information Rights) (the Tribunal).
25. The Commissioner recognises that the complainant has a personal interest in accessing the information, however, she considers that the public interest in the context of the EIR refers to the broader public good. Specifically, in this case, the public interest in allowing the council

to undertake environmental investigations and inquiries on behalf of the wider public.

26. In view of the time of the request, the Commissioner considers that it is highly likely that disclosing the information would damage the council's ability to undertake its environmental duties and compromise its legal position. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice. The Commissioner has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which exist and are already in train in relation to this matter.
27. In view of the above, the Commissioner does not consider that the arguments in favour of disclosure in this case carry significant, specific weight. She has determined 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).
28. 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

29. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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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