

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 15 August 2022

Public Authority: Cheshire West and Chester Council
Address: The Portal
Wellington Road
Ellesmere Port
CH65 0BA

Decision (including any steps ordered)

1. The complainant requested from Cheshire West and Chester Council copies of the documents submitted to the planning enforcement team by the landowners in relation to an alleged lawful use of the site.
2. Cheshire West and Chester Council withheld the entirety of the requested information under Regulation 12(5)(b) of the EIR on the basis that it related to a live and ongoing planning enforcement case and disclosure would adversely affect its investigation and therefore the course of justice.
3. The Commissioner's decision is that Cheshire West and Chester Council has successfully engaged Regulation 12(5)(b) of the EIR and therefore does not require it to take any steps to ensure compliance with the legislation.
4. However, the Commissioner does find that Cheshire West and Chester Council breached Regulations 14(2) and 11(4) of the EIR by failing to respond to the complainant's initial request within 20 working days and her internal review request within 40 working days respectively.

Request and response

5. On 2 February 2021, the complainant wrote to Cheshire West and Chester Council (the Council) and requested information in the following terms:

"Under the Freedom of Information Act 2000 please provide me with:

1. Copies of the documents submitted to the planning enforcement team by the landowners in relation to the alleged 'lawful use of the site'. (Email trail below for reference and enforcement officer cc'd).
2. Please also provide me with a copy of the PCN issued for this site.

This is for my own information as the adjacent landowner and homeowner."

6. The Council responded on 8 March 2021. It stated it held the requested information but was withholding it in its entirety under Regulation 12(5)(b) of the EIR on the basis that disclosure would adversely affect the course of justice.
7. On the 8 April 2021 the complainant requested an internal review as she was dissatisfied with the Council's response.
8. Following an internal review the Council wrote to the complainant on the 22 June 2021 upholding its original decision.

Scope of the case

9. The complainant contacted the Commissioner on a number of occasions in 2021 to complain about the way her request for information had been handled. In particular, she was unhappy with the time it took for the Council to respond to her internal review request and its decision to withhold the entirety of the requested information.
10. On 24 March 2022 the Commissioner contacted the Council and requested copies of the requested information together with any further arguments it wished to raise in support of its application of Regulation 12(5)(b) of the EIR.
11. The Council responded on 7 June 2022 with a copy of the withheld information stating that Regulation 12(5)(b) was still applicable as the enforcement case was 'still open and ongoing'.
12. The Commissioner will therefore consider the Council's application of Regulation 12(5)(b) of the EIR to the requested information.

Reasons for decision

Regulation 12(5)(b) – adverse affect on course of justice

13. In this case the Council has withheld the entirety of the requested information under Regulation 12(5)(b) of the EIR.
14. 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.
15. 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.
16. 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. The Council has confirmed the withheld information relates to an open and live planning enforcement case under the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991) and that disclosing the information would adversely affect the course of justice in relation to its ongoing investigations.
18. 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 and during his investigation, 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 such an inquiry, but would also damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.
19. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the requested information would adversely affect the course of justice, and that the exception provided by Regulation 12(5)(b) is therefore engaged.

Public interest test

20. 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

21. 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.
22. The Council acknowledges there is a presumption in favour of disclosure of information under the EIR and that there is a need for openness and transparency in relation to actions and decisions made by local authorities.
23. The Council also recognises it has an obligation to provide detailed explanations for any actions or decisions it takes to allow a greater understanding by the public as to the reasons behind them.
24. The complainant has argued that disclosure of the requested information would allow the legitimacy of the statements provided to the Council as part of its investigation to be assessed as she has doubts regarding their credibility.

The public interest in maintaining the exception under Regulation 12(5)(b)

25. The Council has argued it has the right to refuse the disclosure of information that could be part of any current/pending or future enforcement case.
26. The Council has also argued it has a right to gather information and obtain views as to its legal rights and obligations and/or the risks and benefits of proposed options without that information being disclosed prematurely whilst the issues being discussed are still current.
27. The Council has also argued that its officers who are responsible for making decisions on its behalf must be allowed to discuss options and be advised of the legal risks involved in any options for works considered.
28. The Council believes it should be entitled to be informed of the advantages and disadvantages and associated risks and benefits of its

actions and to carefully consider disclosure when any matter of enforcement is under consideration.

29. The Council also believes there is an expectation from the public that a local authority will undertake all enquires appropriately with due regard to the rights and expectations of all parties.

Balance of the public interest

30. In view of the above, the Council is of the view that the public interest is balanced in favour of maintaining the exception under Regulation 12(5)(b) of the EIR.
31. The Commissioner takes the view that the public interest inherent in Regulation 12(5)(b) 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.
32. The Commissioner notes that the Council's planning enforcement case was live at the date of the request and was still ongoing during his investigation. The Commissioner considers it is reasonable to allow the Council to opportunity to obtain and consider the relevant evidence as part of its investigation, to assess its legal rights and obligations, weight up the benefits and risks of any proposed action and take advice in relation to these without the relevant information being disclosed to the world at large.
33. The Commissioner recognises the complainant has a direct interest in the information being requested as the Council's investigation concerns matters affecting her property and land. She has pointed out the reason she wishes to see this information is because she has doubts regarding the credulity and legitimacy of the evidence and statements provided to the Council by the land owners subject to the investigation. The Commissioner has to be mindful that any disclosures under the EIR are effectively to the world at large and not just the complainant. He must therefore consider the effect of disclosure on the wider public and not just the complainant in isolation. The Commissioner is not aware of and there is no indication that any of the requested information is already in the public domain.
34. Having considered the above factors, the Commissioner is satisfied that the public interest is balanced in favour of the exception under Regulation 12(5)(b) being maintained.

Regulation 14 – Refusal to disclose information

35. Under Regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under Regulation 12, the

refusal must be made as soon as possible, and no later than 20 working days after the date of receipt of the request.

36. In this case, complainant submitted her request on 2 February 2021 and the Council responded on 8 March 2021 stating it was withholding the information under Regulation 12(5)(b). Therefore the Council failed to issue a refusal notice to the complainant within 20 working days of receipt of the request and the Commissioner has found a breach of Regulation 14(2) of the EIR.

Regulation 11 of the EIR - Representations and reconsiderations

37. Regulation 11(4) of the EIR states:

“A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.”

38. In this case the complainant requested an internal review on 8 April 2021 but did not receive a response from the Council until 22 June 2021. This was in excess of 40 working days and therefore the Commissioner finds the Council breached Regulation 11(4) of the EIR.

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

40. 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.

41. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**