Neutral citation number: [2024] UKFTT 129 (GRC)

Case Reference: EA/2023/0085

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard: by CVP

Heard on: 6 December 2023

Decision given on: 12 February 2024

Promulgated on: 13 February 2024

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER TATAM
TRIBUNAL MEMBER GRIMLEY EVANS

Between

GARRY BALL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

Appellant:	Not legally represented.
Respondent:	Did not attend the hearing and was not represented.

Decision: The appeal is ALLOWED. The Information Commissioner's Decision Notice, referenced as IC-153050-W1C0, is not in accordance with the law.

Substituted Decision Notice:

By 4.00 p.m. on 12th March 2024 Hinckley & Bosworth Borough Council shall send to the Appellant the disputed information, save for the information contained in the single paragraph therein which commences with the words "Legal advice...", which it may withhold.

DECISION AND REASONS

Introduction

1. On 15 September 2021, the Appellant made a request for information, in three numbered parts, to Hinckley & Bosworth Borough Council ("the Council"). By its response of 7 October 2021, the Council refused disclosure, placing reliance on Regulations 12(4)(a), 12(5)(b) and 12(4)(e) of the Environmental Information Regulations ("EIR"). The Council maintained that position upon internal review. The Appellant complained to the Information Commissioner ("the Commissioner"). In responding to the Commissioner's investigation of that complaint, the Council maintained that it was justified in refusing disclosure, relying on Regulation 12(5)(b) EIR.

2. This is an appeal against the Commissioner's Decision Notice drawn in response to the aforementioned complaint, referenced as IC-153050-W1C0 and dated 26 January 2023 ("the Decision Notice"). Therein the Commissioner concluded that the Council was entitled to rely on Regulation 12(5)(b) EIR. The Commissioner required no steps to be taken by the Council.

3. The Appellant appealed the Decision Notice to the First-tier Tribunal. The hearing of the appeal took place remotely on 6 December 2023.

4. By way of an email to the Tribunal dated 21 August 2023, the Commissioner evinced an intention neither to be present nor represented at the hearing and sought to place reliance on his written submissions. Having considered the papers before us, and the First-tier Tribunal (General Regulatory Chamber) Rules 2009, we conclude that it would not impinge upon the two primary tenets of the overriding objective, fairness and justice, to determine this appeal in the absence of the Commissioner. The Council did not seek to be joined as a Respondent to the appeal.

5. We had before us an OPEN bundle of 559 pages of material and a CLOSED bundle containing the disputed information, which is the subject of this appeal, which runs to 3 pages. The Appellant has referred to that disputed information as the "'Remote Monitoring Location Enforcement and Monitoring Procedure' as applied to the Noise Abatement Notice 14/00058/EPA served on Real Motor Sport Limited" and as the "'Investigation and Enforcement Procedure' that the Council use to decide if breaches have occurred to the 2014 Noise Abatement Notice they served on Real Motorsport who operate Mallory Park Racetrack." We refer simply to it as "the disputed information".

6. We give our decision in this single, OPEN judgment, and do not consider it necessary to refer to the contents of the disputed information in a separate CLOSED annex or judgment.

Background, the Request and the Council response

Background

7. The Appellant and his wife are long-time residents of the village of Kirkby Mallory, Leicestershire. The Appellant's wife was born in the village. Together with, or on behalf of, residents of the village, the Appellant has engaged in sustained correspondence with, and issued a number of formal complaints to, the Council, concerning the noise which emanates from Mallory Park Racing Circuit ("Mallory Park"), owned by Real Motorsport Limited ("RML"). Mallory Park is close to the village.

8. The Council is responsible for monitoring the noise from Mallory Park. On 21 November 2014, the Council issued a Noise Abatement Notice ("the NAN") against RML, pursuant to the provisions of Part III of the Environmental Protection Act 1990 ("the EPA"), following a report by the Local Government Ombudsman dated 15 March 2014 (reference: Complaint against Hinckley and Bosworth Borough Council reference 12 001 338 626 and 12 010 505).

9. The NAN provided, inter alia, that: the noise from Mallory Park's activities had given rise to a statutory nuisance and that the statutory nuisance was likely to recur; that RML must cease or cause to cease the operation of the racing circuit by motor vehicles other than in accordance with the Schedule attached to the NAN; if RML contravened without reasonable excuse or failed to comply with any requirement of the NAN, it might be guilty of an offence under s80(4) of the EPA and on summary conviction would be liable to a fine not exceeding £20,000. The NAN stipulated different ranges of permitted

upper limits for noise levels across days defined as race days, high noise days and medium noise days; an annual limit on the permitted number of those days; a limit on how many such days could occur within set periods for time; the permitted duration of, and required intervals between, noise on given days; and other, associated restrictions.

The Request

10. On 15 September 2021, the Appellant requested several items of information from the Council as follows:

> *"We made a formal complaint (No 1278 – Failure to enforce NAN) on the 26/04/01. HBBC responded 27/05/21 that it has commissioned an acoustic consultant to comment on the technical detail in the complaint.*
>
> *We made a formal complaint (No 1370 regarding the delay in addressing the issues raised in 1278) - and in it asked for a copy of the acoustic consultants report.*
>
> *We now understand from your Steve Merry that report was received on 14th September.*
>
> *1. Please now provide a copy of the Acoustic Consultant's report.*
>
> *As it is now approaching 5 months since complaint 1278, which this report is in response to, please expedite this request.*
>
> *2. There has been various drafts of the report, as advised in our correspondence with HBBC, please also provide the correspondence and draft reports that guided the final report.*
>
> *3. We have been informed by Mr Bowers that quote:*
>
> *"The Council is considering drafting a policy specifically for investigating possible breaches of the Statutory Noise Notice that is currently in place with respect to operations at Mallory park motor racing circuit."*
>
> *and that the Acoustic Consultant's Report will guide that Policy.*
>
> *Please provide the policy Mr Bowers is referring to together with the summary that HBBC writes to explain the formulation of the policy.*
>
> *Thank you in advance."*

The Council's Response

11. On 7 October 2021, the Council refused the request. It refused parts 1 and 2 of the request in reliance on Regulations 12(4)(e) and 12(5)(b) EIR, and the first

part of part 3 of the request in reliance on Regulation 12(4)(a) EIR, namely that as there was not a current policy in place, it did not hold the information requested. It did not address the second part of part 3 of the request at all. In balancing the public interest factors, it concluded that disclosure would have a detrimental impact on its ongoing enquiries and impact on its ability to maintain a robust approach "*to this case*", which weighed heavily in favour of maintaining the exception from disclosure under Regulation 12(5)(b) EIR.

12. On 15 December 2021, the Appellant requested an internal review of the Council's refusal. By an email to the Appellant of 18 January 2022, the Council maintained its position upon internal review.

13. On 28 January 2022, the Appellant complained to the Commissioner. The Commissioner investigated. In responding to the Commissioner, on 26 October 2022, the Council said, "... a "*Policy*" *has not been drafted. As such Regulation 12(4)(a) still applies to that request. The Council does have an internal procedure document which is considered throughout the conduct of any investigations concerning Mallory Park. A copy of this is attached for your reference. The Council considers that Regulation 12(5)(b) would apply to this document, if it had been requested.*"

The Commissioner's Decision Notice

14. By his Decision Notice of 26 January 2023, the Commissioner decided that the Council was entitled to withhold information requested by the Appellant in reliance on Regulation 12(5)(b) EIR. He reasoned as follows:
    a. while the Council originally asserted that part of the information requested was not held, the Council had since informed him that it did hold an "internal procedure document", which it considered was exempt from disclosure pursuant to Regulation 12(5)(b) EIR; he considered that the Council had applied an unnecessarily narrow interpretation of this part of the request, and that it was reasonable to construe it as a request for that internal procedure document;
    b. the Council had explained that the information requested was held to inform an inquiry under the EPA, and, specifically, an investigation into whether the NAN had been breached; disclosure of the information would reveal the basis of the Council's position in the event of any requests for variation of the NAN Schedule, as well as any potential prosecution for breach of the NAN; he recognised that the information related to live matters being considered under the EPA, for which the Council has a statutory responsibility to undertake inquiries; it was

therefore reasonable for him to conclude that disclosure of the information would reveal to the party under inquiry, the basis of the Council's position and the factors it was considering in that context; such disclosure would therefore adversely affect the course of justice.

c. he was mindful that Regulation 12(2) EIR required the Council to apply a presumption in favour of disclosure when relying on Regulation 12(5)(b) EIR; on the one hand, he recognised that the matter was a matter of importance to the Appellant and other residents of the village affected by the noise, and that the Appellant had submitted to him that certain parts of the information requested had since been disclosed by the Council to local residents and that the basis of the Council's monitoring was technically flawed;
d. on the other hand the information requested directly informed how the Council was undertaking its duty in inquiries, the findings of which would consider whether a party had breached a legal notice, and which might then result in that party being subject to prosecution; disclosure would alert that party to how the Council was undertaking noise monitoring, and the factors it was taking into account; consequently the integrity of its inquiries would be jeopardised; there was a significant public interest that the course of justice should not be adversely affected in such a way;
e. he did not consider that the Council's subsequent indication of the content of some of the requested information to local residents equated to full public disclosure of the disputed information equivalent to disclosure under EIR; in that context, the Council had not indicated that it was withdrawing reliance on Regulation 12(5)(b) EIR;
f. his role was limited to determining compliance with EIR and his role was not to decide matters such as the technical validity of the Council's monitoring;
g. the public interest in maintaining the exemption outweighed the public interest in disclosure.

Notice of Appeal, the Commissioner's Response and the Appellant's Reply

15. The Notice of Appeal, dated 16 February 2023, addressed only the Commissioner's finding in relation to the first part of part 3 of the Appellant's request, namely the disputed information. Accordingly, our decision is restricted to consideration of the Council's handling of the Appellant's request for that information alone.

16. The grounds of appeal may be summarised as follows:
    a. provisions within the disputed information are already known to the Appellant, other residents of the village, and to RML, and are effectively in the public domain. Disclosure of the disputed information would not therefore prejudice the Council's monitoring of, or inquiries, into the noise levels emanating from Mallory Park.
    b. there is a need for transparency as to the Council's approach to enforcement (or non-enforcement) of the NAN, and, specifically, whether the procedure it is adopting permits far greater noise levels from Mallory Park than those permitted by the NAN;
    c. there is a public interest in disclosure of the information where the existence and scope of a Council's legal powers to vary a NAN are in issue, and where non-disclosure of the disputed information prevents a person from pursuing an appropriate legal remedy against the Council in the event of the Council failing to discharge its legal duties.

17. The Commissioner's Response to the Notice of Appeal, dated 16 May 2023, may be summarised as follows:
    a. disclosure of the disputed information would adversely affect the Council's inquiries; although the Appellant says that the contents of the disputed information are already in the public domain as a result of certain information from it already having been provided by the Council to the Appellant and other village residents, the disputed information contains information which is not in the material already provided by the Council;
    b. it is reasonable to accept the view of the Council in this case that disclosure of the information would reveal the basis of the Council's position in the event of any requests for variation of the NAN (which requires the Council's agreement) as well as any potential prosecution for breach of the NAN; consequently, disclosure of the disputed information would be likely adversely to affect the Council's inquiry and investigation;
    c. the Commissioner accepts that the substantive issue of the changes to the NAN remains a matter of importance to the Appellant and the residents he represents but the Council's inquiries remain ongoing, and disclosure of the disputed information would prejudice these; there is a clear and strong public interest in ensuring that the course of justice is not adversely affected in this way;
    d. the public interest inherent in this exception will always be strong because the general principle of upholding the administration of justice is fundamental. The Commissioner was correct to conclude that the

public interest in maintaining the exception outweighs, on the facts of this case, the public interest in disclosure of the disputed information.

18. By his Reply to the Commissioner's Response, dated 30 May 2023, the Appellant reiterated points made in his Notice of Appeal. He also provided further detail, with supporting material, of information which the Council had disclosed as of 30 May 2023 explaining its approach to monitoring and investigating noise levels at Mallory Park in relation to individual events by reference to the application of certain of the provisions of the disputed information. He submitted that the Council's disclosure of such partial information, as distinct from the whole of the disputed information, was a tactic intended to prevent residents from making effective inquiry into, or complaint about, the Council's exercise of its powers and duties in relation to enforcement of the NAN. He refuted the public interest factors weighed by the Commissioner as favouring non-disclosure.

The Appellant's submissions about the NAN

19. There is a long history to the residents' concerns about the noise levels of RML's operations at Mallory Park, which we summarise below, based on the material included in the OPEN bundle and the Appellant's submissions at the hearing. The Appellant submits that matters which post-date the Council's refusal of his request (October 2021) form a pattern of behaviour by the Council in relation to the NAN which explain his need for the information he has requested.

20. On 5 March 2014, the Local Government Ombudsman found the Council guilty of maladministration of justice in delaying taking enforcement action for repeated breaches by the operators of Mallory Park of a Statutory Notice under s58 of the Control of Pollution Act 1954 (subsequently repealed by the EPA) in relation to noise levels, and made recommendations for redress by the Council. Following that finding, the Council issued the NAN to RML on 21 November 2014, whose terms we have already summarised.

21. It is apparent from the judgment of Eyre J handed down on 1 August 2023 in R (on the application of Garry Ball) v Hinckley and Bosworth Borough Council. [2023] EWHC 1922 (Admin) (which we shall address below) that the NAN has been varied on several occasions over the years since 2014. The Appellant says, and based on the material before us, we accept that the variations agreed by the Council over the years have permitted a substantial increase in the noise levels from Mallory Park.

22. On 8 April 2021, the Appellant procured a report from an environmental specialist, which was highly critical of the Council's approach to measuring and addressing the noise levels from Mallory Park. It is not within the jurisdiction or the expertise of the Tribunal to assess the merits of that report, but we note that the Council's response to his request for Internal Review did not address the points made therein.

23. On 26 May 2022, a person (not the Appellant) requested information from the Council relating to the Council's investigation of the noise related to an event held at Mallory Park on 30 December 2021, including a copy of the Council's documented enforcement procedure and +3db policy. The Council responded on 20 June 2022. In its response, it included a document called "Assessment Report RML Noise Abatement Notice Breach 30 December 2021", ("the December 2021 Breach Assessment Report"). That document is undated in the bundle before the Tribunal.

24. On 17 July 2022, the Appellant emailed the Council's Technical Officer (Pollution) subject "*Remote Monitoring Location Enforcement and Monitoring Procedure*", seeking clarification of matters referred to in the December 2021 Breach Assessment Report, including the Council's measurement of wind speed and direction in relation to the breaches identified, the uncertainty increments permitted by the Council, and the Council's criteria for measuring and admitting extraneous noise. The Council responded substantively to those queries on 2 August 2022.

25. At some point in 2022, a complaint was lodged with the Local Government & Social Care Ombudsman about the Council's amendments to the NAN, its failure to take enforcement action in relation to breaches of the NAN, and its failure to enforce a requirement on RML to publish a calendar of upcoming events for residents' information. In responding to the Ombudsman's investigations in June 2022, the Council provided to the Ombudsman its Environmental Health (Pollution) Enforcement and Procedure Policy, and its Corporate Enforcement Policy. It also provided the Ombudsman with what it described as "*the procedure for compliance with a noise abatement notice*" but on the basis that it was confidential. We do not know whether that procedure is the disputed information, or some form of it. The Council said that it had reviewed the procedure in 2021 after taking advice from independent noise consultants, and that it had applied the procedure to all potential breaches identified in 2021 and 2022. It summarised its approach to noise monitoring and investigation and said that it applied "*an incremental approach to enforcement in accordance with any appropriate corporate and departmental*

enforcement policy where levels are above those that would warrant further investigation and further investigation indicated that a breach of the notice had occurred." It noted also that in 2021, the Council had identified potential breaches of the NAN on nine dates.

26. On 19 July 2022, the Ombudsman rejected the complaint. Although he said in his summary of the complaint, that "*There is no fault in the Council's decisions about enforcing a noise abatement notice.*", he made clear that he was limited to considering whether there was fault in the way the Council went about considering enforcement rather than fault in its concluded response. He said that the Council had provided a very detailed breakdown of its "procedure", which explained how it gathered and processed compliance data by using noise monitoring equipment at the circuit; the enforcement thresholds it applied, including how these vary across the different categories of days; how it took into account other factors which may affect the results of noise monitoring, such as wind speed and direction, about which it had sought advice from professional consultants; how it assessed a number of incidents during 2021 where the data showed the noise limit had been breached; and why it decided to take no action in some instances, and in others, it issued warning letters. He concluded that there were no grounds to criticise the Council.

27. The Appellant says that in November 2022, the Council further revised its procedure for investigating and enforcing breaches of the NAN. We do not know whether such revisions are incorporated in the disputed information.

28. On 28 December 2022 the Appellant obtained permission to apply for a judicial review of the Council's decision of 31 March 2022 to vary the NAN. The Appellant contended that the Council had no power to vary a NAN, and that consequently the variation was unlawful. By judgment handed down on 1 August 2023, the Court held that the Council had the power to make the variation: R (on the application of Garry Ball) v Hinckley and Bosworth Borough Council. [2023] EWHC 1922 (Admin). At the hearing of this appeal, the Appellant told us that he has been granted permission to appeal against that decision.

The EPA

29. Section 79(1)(g) of the EPA provides that "statutory nuisances" for the purposes of the relevant part of the EPA include those consisting of "noise emitted from premises so as to be prejudicial to health or a nuisance".

30. Section 79(1) imposes this duty on local authorities:

> ...it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 below or sections 80 and 80A below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint."

31. Section 80 provides as follows for the issuing of an abatement notice in respect of a statutory nuisance caused by noise:

> (1) [Subject to subsection (2A)] where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice ("*an abatement notice*") imposing all or any of the following requirements:
>
> (a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
>
> (b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,
>
> and the notice shall specify the time or times within which the requirements of the notice are to be complied with.
>
> ...

32. Section 80(3) gives a person served with an abatement notice a right of appeal to the Magistrates' Court subject to a time limit of 21 days.

33. Regulation 2(2) of the Statutory Nuisance (Appeals) Regulations 1995 lists the grounds on which such an appeal may be made. Those grounds include the following:

> (2) …
>
> (c) that the authority have refused unreasonably to accept compliance with alternative requirements, or that the requirements of the abatement notice are otherwise unreasonable in character or extent, or are unnecessary;
>
> …
>
> (e) where the nuisance to which the notice relates-

(i) is a nuisance falling within [section 79(1)(a), (d), (e), (f), (fa) or (g)] of the 1990 Act and arises on industrial, trade, or business premises, or

...

(iii) is a nuisance falling within section 79(1)(ga) of the 1990 Act and is noise emitted from or caused by a vehicle, machinery or equipment being used for industrial, trade or business purposes,

...

that the best practicable means were used to prevent, or to counteract the effects of, the nuisance.

34. By regulation 2(5)9b) the Magistrates' Court may, instead either of quashing the abatement notice or dismissing the appeal, vary the abatement notice in favour of the appellant as it sees fit.

35. We are not aware that RML has ever sought to appeal the NAN or that the Council has sought to prosecute any breach of it.

36. Where a party has failed to comply with an abatement notice, and prosecution follows, such prosecution is usually brought by the relevant local authority, but it is open to others, such as affected neighbours, to bring a private prosecution, or to make a complaint to the Magistrates' Court (section 82 of the EPA).

37. In R (on the application of Garry Ball) v Hinckley and Bosworth Borough Council. [2023] EWHC 1922 (Admin), Eyre J said this [40]:

> "*The purpose of the* [Environmental Protection] *Act is indeed to protect members of the public from statutory nuisances but that purpose is to be achieved against the background of a recognition of matters of practicality and of the interests of others. The purpose cannot be said to be that local authorities are to draw a balance between the competing interests because the primary thrust of the Act is clearly the prevention and removal of statutory nuisances. To the extent that there is a balancing exercise the scales start off weighted in favour of enforcement. However, that primary thrust is not unqualified and the balance can change. The purpose of the Act is to provide for the removal of statutory nuisances but for that to be done in a way which takes account of the existence of other factors including the fact that the total removal of a nuisance might not be practicable and that in such circumstances the taking of the best practicable means to counteract its effects might be the most that can be achieved*."

Applicable Law/Legal Principles

38. The parties agree, and the Tribunal finds, that the information requested is environmental information within the meaning of Regulation 2 of the EIR.

39. The provisions of the EIR which are relevant to the disputed information, which is the subject matter of this appeal, are as follows:

Regulation 5

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

...

Regulation 12

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5);

and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

(b) 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;

...

40. The EIR transpose the European Council Directive 2003/4/CE on public access to environmental information ("the Directive"), pursuant to paragraph 2(2) of Schedule 2 to the European Communities Act 1972. The Directive was intended to give effect to the United Nations Economic Commission for

Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention ("the Convention"). The Convention entered into force on 30 October 2001, and was ratified by the United Kingdom on 23 February 2005. Provisions of the Convention have been reproduced in the Directive.

41. The EIR are retained EU law pursuant to s2 of the European Union (Withdrawal) Act 2018. Subject to an exception made for the Supreme Court and other specified appeal Courts, s6(3)(a) of the European Union (Withdrawal) Act requires that "any question as to the validity, meaning or effect of any retained EU law is to be decided … in accordance with any retained case law and any retained general principles of EU law." This means that the interpretive approach applicable to EU law applies to retained EU law; legislative provisions should be interpreted in light of the objectives they are intended to achieve. By virtue of the Marleasing principle of consistent interpretation (pursuant to the CJEU ruling in Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentación SA, EU:C:1990:395), domestic courts must interpret domestic legislation compatibly with EU law

42. It is established that the right to information means that disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal: Office of Communications v ICO [2010] UKSC3. C-71/10.

Analysis

Regulation 12(5)(b) EIR

43. In his investigation, the Commissioner asked the Council to clarify: on which limb of Regulation 12(5)(b) EIR it was relying (the course of justice, ability to receive a fair trial or ability to conduct an inquiry); if the first of those, whether it was because the information attracted legal advice or litigation privilege; whether privilege had been waived; why disclosure of privileged material would adversely affect the course of justice; the exact nature of any inquiry which might be adversely affected and how; and the Council's application of the public interest test.

44. In response, the Council said this:

> *"...The Council can confirm that disclosure would adversely affect the course of justice and any potential enquiry of a criminal nature.*
>
> *The adverse effect would be considerable as it would prejudice the Council's position in the ongoing monitoring and assessment of requests for variations to the Schedule (which requires the Council's agreement) as well as any potential prosecution of a breach of the Noise Abatement Notice. This in turn would adversely affect the Council's statutory responsibilities under the Environmental Protection Act 1990, its ability to protect the public from nuisance and its ability to effectively address enforcement of this race track site.*
>
> *In the exercise of the Council's duty a flexible approach is essential to balance the often conflicting needs of a Company, residents and the local economy as well as ensuring that the Council can meet its duty under the Environmental Protection Act. Disclosure would adversely affect the Council's ability to balance those needs as it would undermine the discretional and enforcement abilities*."

45. The "course of justice" is a broad term. The Council appeared to regard it as an umbrella term covering its ongoing monitoring and assessment activities, and "*any potential enquiry of criminal nature*."

46. We note the Council's use of the word "enquiry" as opposed to the EIR's use of the word "inquiry". The Directive refers to "enquiry" not "inquiry": see section 2(c) of Article 4 of the Directive which provides that Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect "the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature". It is unclear whether the Council considers there is a difference between "enquiry" and "inquiry" in this context. Ultimately, however, it makes no difference to our decision.

47. The only evidence before us from the Council on such matters was the Council's response of 26 October 2022 to the Commissioner's investigations, which we have already set out. The Council said that disclosure would adversely affect "*any potential enquiry*" and "*any potential prosecution.*" We consider that these references are speculative. As the Appellant put it to us, and we accept, there will always be some ongoing monitoring and enquiry into noise levels, given both the Council's general obligations in that regard and the number of complaints about Mallory Park being considered at any given time.

48. There is no evidence before us that there were any court proceedings or pre-proceeding activities relating to enforcement of the NAN which were live, imminent or in contemplation either at the time of refusal of the request (October 2021), or the Council maintaining its position on internal review (January 2022) or even a year on from refusal of the request, in October 2022 when the Council was responding to the Commissioner's investigation.

49. In addition to the adverse effect on any potential enquiry or potential prosecution for which it contended, the Council said that disclosure would prejudice its ongoing monitoring and variation request assessment activities, which would in turn adversely affect its statutory responsibilities under the EPA, as well as its ability to protect the public from nuisance, and effectively "*address*" enforcement. It said that disclosure would undermine its "*discretional and enforcement abilities"* and consequently adversely affect its ability to balance the often-conflicting needs of RSL, residents and the local economy.

50. The test is that disclosure "would" adversely affect the protected interest. That is a higher hurdle than "would be likely" and requires a finding of the adverse effect on the balance of probabilities. We note that although the Commissioner initially correctly identified the test as "would adversely affect" in his Response to the Notice of Appeal, he fell into error when he subsequently submitted that the disclosure of the disputed information "would be likely to adversely affect" what he described as the Council's inquiry and investigation.

51. We do not accept that the Council has demonstrated that disclosure of the disputed information would adversely affect any of the interests it has sought to identify, whether on the balance of probabilities or at all. Its reference to potential prosecution is a speculative one. The Council's monitoring activity is a technical exercise which would, in our view, be unaffected by disclosure of the disputed information. Its assessment of variation requests will presumably be undertaken on a case-by-case basis, and there is no evidence explaining how this assessment would be adversely affected by disclosure. The Council did not identify precisely how or why its statutory responsibilities would be adversely affected. It did not identify what its relevant, discretional abilities are or how they, or its enforcement abilities, would be undermined by disclosure. It gave no explanation at all as to how disclosure would adversely affect its ability to protect the public from excess noise. To the extent that the Council must consider matters of practicality and the interests of others as recognised by Eyre J, that is not an exercise which, in our view, would be adversely affected by disclosure of the disputed information.

52. In our view, the Council's statements as to these matters were bare assertions. The Commissioner has not drawn our attention to any other, relevant evidence, and thus on the evidence available to us, we cannot see how disclosure of the disputed information would adversely affect any of the matters identified by the Council.

53. As a final factor in its regard for "the course of justice", the Council referred to it having to be able to adopt a flexible approach in balancing the often conflicting needs of a Company, residents and the local economy. However, it elaborated no arguments or evidence identifying those needs, and it did not indicate how that balancing exercise was or might be undertaken. Again, this statement was a bare assertion, and we do not, on the evidence available to us, consider that this interest would be adversely affected by disclosure of the disputed information.

54. There is a paragraph within the disputed information which starts with the words "Legal advice...". Although, in his investigation, the Commissioner invited the Council to address whether any of the disputed information should be withheld on the basis that it was subject to legal professional privilege, the Council did not engage with that question at all. We consider that the information within that paragraph is information which would appear to be the subject of legal professional privilege. We consider that its disclosure would, on the balance of probabilities, adversely affect the course of justice in that, in tending to reveal the (or at least some of the) Council's legal advice, that might inhibit the Council in its approach to enforcement, whether because its or its advisers' views of the merits of its position have been made public or otherwise.

55. We find that Regulation 12(5)(b) EIR is not engaged, save in relation to the paragraph in the disputed information which starts with the words "Legal advice...".

Analysis of The Public Interest factors

56. Even if we are wrong in the above, for the reasons given below, we consider that it is in the public interest for the information in the disputed information to be disclosed, save, possibly, for the information contained in the single paragraph we have referred to, which we shall address separately.

57. The public interest is to be assessed as at the date of refusal of the Request: Montague v Information Commissioner and the Department for International

Trade [2022] UKUT 104 (AAC) (overturned in the Court of Appeal on the issue of aggregation of exemptions under Part II of the Freedom of Information Act 2000, but not in relation to the time (refusal of the request) at which the public interest should be assessed: The Department for Business and Trade v The Information Commissioner and Montague [2023] EWCA Civ 13).

58. As we have noted, the Council initially refused the Request in reliance on Regulation 12(4)(a) EIR. When responding to the Commissioner's investigations in October 2022, it said that Regulation 12(5)(b) EIR would apply to the disputed information, had it been requested, and that the public interest arguments were those contained in its initial refusal of October 2021 and its internal review of December 2021, together with what it said was an additional factor in favour of non-disclosure, which we address below.

59. In October 2021, the Council identified the following three matters as factors in favour of disclosure: that there was a general presumption in favour of disclosure in the EIR; that there was a public interest in the transparency and accountability of the Council and how it uses the EPA to protect the environment and residents; and that the Appellant was a resident of Kirkby Mallory and affected by the operations and decisions of the Council. In relation to this last factor, it went on to say that this was a private interest, not a public interest. It is not clear whether by that the Council was intending, in fact, to discount this as a factor in favour of disclosure.

60. The Council identified the following in favour of maintaining the exception: the need to maintain the confidentiality of an investigation to enable the Council effectively to monitor and determine the appropriate course of action in the wider public interest; that disclosure of the noise levels at which enforcement action would be successful would prejudice future action the Council might take and potentially undermine the Council's ongoing monitoring of the site; the Council's role was to consider the impact on local residents as well as a wider public benefit to people who use the circuit, those who generate an income locally from the existence of the racetrack, and the business interests of the operator; it was necessary to maintain confidence in the ability of the Council to ensure that investigations, case management and consideration of variation requests were fair and thorough.

61. In the balancing exercise of the factors for and against disclosure, the Council concluded that:

> "*Whilst there is a public interest in environmental information and accountability the detrimental impact disclosure would have on the ongoing nature of enquiries and this unique case means the public interest associated with protecting that information is significant.*
>
> *To disclose the information could impact on the councils ability to maintain a robust approach to this case as disclosure is to the world at large and as such the balance of the public interest test is heavily weighted in favour of application of the exception 12(5)(b).*"

62. For completeness, we note that in balancing the public interest factors in October 2022, the Council developed its position, saying,

> *"Whilst there is a public interest in environmental information and accountability, the detrimental impact disclosure would have on the ongoing nature of enquiries and this unique case means that although the information requested was produced several years ago, the advice, information and public interest associated with protecting that information is still very much current.*
>
> *As stated in the original response to Mr Ball, the Council is applying the exception Regulation 12(5)(b), because to disclose the information to him, is to disclose to the world at large. Whilst there may be minimal impact in a disclosure of these documents to him as a resident, to disclose such documents and information to the Operator RML would have a detrimental impact to the ongoing case.*
>
> *By maintaining the exception the Council is able to exercise its discretion and duty to protect the environment and community in its management of Statutory Nuisance. To disclose advice any policies or procedures and communication and would lead to other matters being treated differently, perhaps leading to future Statutory Notices being appealed, challenged or being unenforceable*."

63. It is not obvious whether by its reference in October 2022 to "*the ongoing case*", the Council meant the general situation relating to Mallory Park or the Appellant's challenge by judicial review of the Council's 31 March 2022 variation of the NAN (for which he obtained permission on 28 December 2022, and which, presumably, had entailed pre-action correspondence before that date so that the Council must have been aware of that challenge). We do not consider that disclosure of the disputed information would have had any adverse impact on the judicial review proceedings, but in any event, the relevant public interest factors are those in play at the time of the initial refusal of the request (October 2021).

64. Taking each of the Council's public interest factors in favour of non-disclosure in turn:
    a. *the need to maintain the confidentiality of an investigation to enable the Council effectively to monitor and determine the appropriate course of action in the wider public interest*: we do not consider that disclosure of the disputed information would prevent the Council from maintaining appropriate confidentiality in any investigation.
    b. *disclosure of the noise levels at which enforcement action would be successful would prejudice future action the Council might take and potentially undermine the Council's ongoing monitoring of the site*: we do not consider that the information in the disputed information would be determinative of, or influence, the success of any enforcement action, which would stand or fall on its merits. We see no basis on which its disclosure would undermine the Council's monitoring activities.
    c. *the Council's role is to consider the impact on local residents as well as a wider public benefit to people who use the circuit, those who generate an income locally from the existence of the racetrack, and the business interests of the operator:* we do not consider that the information in the disputed information has any impact on the Council's roles, whether as the Council describes its roles, or at all.
    d. *it was necessary to maintain confidence in the ability of the Council to ensure that investigations, case management and consideration of variation requests were fair and thorough:* we do not consider that the information in the disputed information would undermine confidence in the Council's ability to ensure that investigations, case management and consideration of variation requests are fair and thorough. Such matters are the Council's responsibility in any event.

65. We do not consider that, individually or collectively, the Council's arguments as to the public interest favouring non-disclosure are compelling.

66. It is evident from its December 2021 Breach Assessment Report that the Council appeared at that date to have a number of procedures it applied, although which, if any, of those may have existed or been applied in assessing noise levels as of 7 October 2021, the date of refusal of the request, is unclear. That Report referred to the Council's current Breach Assessment procedure (it is not clear whether that was a reference to the disputed information, whether in the form filed with the Tribunal or otherwise), which included consideration of its Uncertainty Procedure (in relation to measurement of noise levels), its Wind Procedure and its Extraneous Noise Procedure. It also explained how the application of those procedures informed its thinking as to what action it might take in relation to what it characterised as "noise exceedances" on 30

December 2021, that is to say, issue of an informal warning letter, a formal caution, or prosecution; Report ; its invitation to a director of RML to attend interview under caution on 17 February 2022; that director's response to the noise exceedances put to him; a summary of RML's compliance history and the responsive action taken by the Council; and the basis for the Council's conclusion that prosecution was not justified on this occasion, resulting in the Council's decision instead to issue a warning letter in relation to the event on 30 December 2021.

67. In our view, disclosure of the disputed information would provide transparency and accountability in relation to the Council's approach to investigating compliance with, and enforcement of the NAN. We consider that there is a strong public interest in knowing how the Council investigates compliance with the NAN, and its approach to enforcement of a statutory notice whose purpose is to protect the public. The Council has referred repeatedly in correspondence with the Appellant and other residents to its enforcement procedure and its breach assessment procedure (as distinct, apparently, from what it has described elsewhere as its Corporate Enforcement Procedure and Pollution Enforcement Policy). Whether or not it has meant by these procedures the disputed information is unclear, but we consider that there is a strong public interest in the public knowing the existence and content of the Council's procedures and policies, how they interplay, and, specifically, that the Council is not, in fact, operating by reference to a different set of procedures and policies from those which it formally espouses.

68. As the Appellant put it to us in the hearing, disclosure would give the public some certainty around the real threshold for enforcement. He gave the example of someone considering purchasing a house in the village; pre-purchase they might view, assess and consider acceptable the noise levels permitted by the NAN, but then realise post-purchase that the Council does not, in fact, enforce the NAN because it applies a private procedure or policy which permits greater noise and/or more noisy days than those identified in the NAN. We are prompted to recall the Council's apparent conclusion at the time of refusal of the request that the Appellant's residency of the village, and thus his being affected by the operations and decisions of the Council, was a private interest, not a public interest. We disagree. The relevant operations and decisions of the Council affect, more or less, all the residents of the village, and those of potential residents as well. All members of both categories constitute "the public" for the purposes of assessing the public interest in this context.

69. If, for whatever reason, the Council is not enforcing the NAN on the occasion of any breach, that would appear to operate, effectively, as a retrospective variation of the NAN, without any express request for variation having been made, and without reasoned and visible consideration being applied by the Council to that request. That is, potentially, a significant reduction in the protection which the public might reasonably expect. There may, of course, be perfectly good reasons for the Council deciding not to enforce the NAN on any given occasion, but the public should be able to understand any such decision by reference to the policy or procedure under which the Council approaches such decisions.

70. To the extent that the Council argues that prejudice to any potential prosecution is a public interest factor in favour of maintaining the exception from disclosure, we are unconvinced. The outcome of any prosecution would rest on whether the prosecuting authority could establish the requisite elements of the offence to the Court's satisfaction, on the facts of the given case, and the Magistrates' Court would consider the defences submitted. We do not consider that it can be asserted as a general truth that disclosure of the disputed information would prejudice any particular prosecution. Moreover, if there were anything in it which, if disclosed, might undermine prosecutions generally, then it seems to us that that raises a fundamental matter of public interest as to the Council's general ability to protect the public in any event. That is a force for disclosure in the public interest balance.

71. We do not consider that this was, or is, a unique case, as the Council has described it. There is a presumption in favour of disclosure under the EIR (Regulation 12(2)). We remind ourselves of the impetus behind the EIR, per (1) of the Recital to the Directive: "*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*"

72. We find that there is a strong public interest in disclosure of the disputed information, save for the paragraph in it which starts with the words "*Legal Advice...*", which we consider to appears to be subject to legal professional privilege. There is a strong public interest in a public authority being able to seek and receive impartial, dispassionate and comprehensive legal advice as to the discharge of its legal duties, without fear of public scrutiny of that advice.

73. The rationale for privilege was addressed by the Upper Tribunal in DCLG v IC and Robinson [2012] UKUK 103 (AAC) [37], observing the summary of that rationale by Lord Taylor of Gosforth CJ in R v Derby Magistrates Court, Ex parte B, [1996] AC 487 as follows:

"*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.*"

74. We have not identified any public interest factor in favour of disclosure which outweighs the public interest in maintaining what appears to be privileged information in this case as excepted from disclosure pursuant to Regulation 12(5)(b) EIR.

75. Save in relation to the paragraph in the disputed information which starts with the words "Legal advice...", we find that the Council's response to the request for the disputed information which is the subject of this appeal is not accordance with Regulation 5 of the EIR. Accordingly, and to this extent, we find that the Decision Notice is not in accordance with the law and the Appellant's appeal is allowed.

Signed: ***Judge Foss*** Date: 12 February 2024