

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 15 February 2016

**Public Authority:** Birmingham City Council  
**Address:** Council House  
Victoria Square  
Birmingham  
B1 1BB

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a loft conversion. Birmingham City Council withheld the information under the exception for adverse effect to the course of justice (regulation 12(5)(b) of the EIR).
2. The Commissioner's decision is that the council has correctly applied regulation 12(5)(b) of the EIR to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 20 June 2015, the complainant wrote to Birmingham City Council (the "council") and requested information in the following terms:  
*"1. What exactly is "sub standard" about the work being carried out in the loft conversion at 164 Parkeston Crescent.*  
*2. Is this a safety and health issue for my family.*  
*3. Is the use of this loft conversion illegal due to lack of building regulations application?*  
*4. Is the use of this loft conversion illegal due to the lack of permission given by the City Council building inspector.*

*5. Why are all of Birmingham City Council being totally obstructive about the safety issues?"*

5. The council responded on 24 June 2015 and confirmed that it was withholding the information requested in part 1 of the request under the exception for adverse affect to the course of justice (regulation 12(5)(b) of the EIR). The council responded to the queries raised in the remaining elements of the request.
6. Following an internal review the council wrote to the complainant on 29 July 2015 stating that it was maintaining its position.

### **Scope of the case**

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7. On 9 August 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under regulation 12(5)(b) of the EIR.
9. In relation to part 5 of the request the Commissioner advised the complainant that the EIR provides a right of access to recorded information which is held by, or might conceivably be held by, public authorities at the time the request is made. He explained that authorities do not have a duty to create information in order to answer a request.
10. The Commissioner advised that complainant that, in view of this, he did not consider it reasonable to think that the council would hold a pre-existing, recorded response to the question asked in part 5 of the request. The Commissioner explained that the council would need to create a new response in order to satisfy this query. As the council does not have a duty to do this, the Commissioner advised the complainant that he would not investigate the council's response to this part of his request further.

### **Reasons for decision**

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#### **Regulation 12(5)(b) – Adverse affect to the course of justice**

11. The council confirmed that the exception has been applied to information falling within the scope of parts 1-4 of the request. The withheld information consists of a database record for the Building Control case which relates to the matter identified in the request.

12. Regulation 12(5)(b) of EIR states that:

*"(...a public authority may refuse to disclose information to the extent that 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."*

*Is the exception engaged?*

13. The course of justice element of this exception is very wide in coverage. The other aspects listed in the exception: "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" are, in practice, sub-sets of the course of justice and may therefore be argued under the general course of justice heading, rather than being distinct provisions.

14. The Commissioner's guidance clarifies that the exception can cover information about civil and criminal investigations and proceedings, such as those carried out under planning or charity law, or those related to tax collection, immigration controls and health and safety regulations.<sup>1</sup>

15. The council has confirmed that the information falls within the scope of the "ability to conduct an enquiry" element of the exception. Under section 91 of the Building Act 1984, the council has a general duty to enforce the Building Regulations 2010 (as amended) in its area. The council went on to say that it seeks to carry out this duty by informal means wherever possible but that, where this does not deliver compliance with the Building Regulations it has two formal enforcement routes which it may use in appropriate cases. These are:

- Prosecution in the Magistrates' Court, under section 35 and section 35A of the Building Act 1984 and, alternatively, or in addition:
- service of an Enforcement Notice under section 35 of the Building Act 1984 on the building owner.

16. The council explained that the Building Regulations process has no requirement to notify neighbours or other parties and there is no public

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

consultation element. It confirmed that the generic details of a Building Regulations application (address of property, description of work, etc.) are readily available via public access channels and that this had previously been provided to the complainant.

17. The council said that the complainant's request seeks technical details of what had been identified on the site in question and what was being done to address any issues arising. Essentially, the information relates to a live Enforcement case and Building Regulations application.
18. The council confirmed that disclosure of the information would hinder its ability to resolve its investigation on an informal basis, potentially averting unnecessary use of public money and would inhibit its ability to carry out its enquiry in an effective way. The council further said that disclosing the information at this stage would present a misleading picture of a case where conclusions have not yet been reached. It would promote engagement from third parties and potential legal action which would hinder its ability to consider the evidence and conclude its enquiry effectively.
19. The Commissioner considers that the focus of the exception is the protection of the processes which support the smooth running of the course of justice. The council's enquiry provides a mechanism for facilitation the course of justice in relation to planning enforcement and Building Regulations and interrupting this process or damaging its effectiveness would result in adverse affect to the course of justice itself.
20. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
21. 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**

22. Regulation 12(1)(b) requires that, where the exception in regulation 12(5)(b) is engaged, then 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 has applied the requirement of regulation 12(2) which requires that a public authority shall apply a presumption in favour of disclosure.

*Public interest arguments in favour of disclosing the requested information*

23. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's decisions. His view is that it helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He considers that this is especially the case where the public authority's actions have a direct effect on the environment.
24. The complainant is a neighbour of the property which is the focus of the request and has concerns that the building works pose a health and safety threat. Disclosing the information would allow the complainant to determine whether there is any such threat and provide reassurance that the council is handling the matter appropriately.

*Public interest in maintaining the exception*

25. The council has argued that, as the investigation relating to the property is ongoing, the early release of enforcement files would hamper any further investigations and the determination of whether formal enforcement action is necessary.
26. 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. He 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. He has, therefore, given due weighting to this in his consideration of where the balance of the public interest lies.
27. The council has noted that the complainant has a valid personal interest in this matter, however, it confirmed that it has provided them with assurances that the building works provide no health and safety risk to their person or property. Beyond this, the council has argued that there is a stronger public interest in a local authority being able to effectively carry out its legal obligations and being able to effectively investigate potential planning enforcement and Building Regulations breaches.

*Balance of the public interest*

28. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of maintaining the smooth course of justice.
29. The Commissioner acknowledges that the complainant has a personal interest in accessing the information and has concerns about the

potential impact of building works on their property and health and safety. However, he is mindful that the council has provided the complainant with assurances in this regard. Whilst the complainant might be sceptical about these assurances, the Commissioner does not consider that this provides sufficient grounds for disclosing the information and damaging the integrity of a live investigation and harming the course of justice.

30. Furthermore, the public interest in the context of the EIR refers to the broader public good and, in weighing the complainant's interests against those of the council and its ability to undertake planning and enforcement matters on behalf of the wider public, the Commissioner does not consider that the interests of the complainant tip the balance in favour of disclosure this case.
31. Whilst the Commissioner considers that the arguments in favour of disclosure have some weight he 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).
32. 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

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33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**