

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 21 May 2018

**Public Authority:** Dover District Council  
**Address:** Council Offices  
White Cliffs Business Park  
Dover  
CT16 3PJ

#### Decision (including any steps ordered)

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1. The complainant submitted an information request comprised of two questions related to the status of enforcement action being taken by Dover District Council (the Council) regarding a specific location. The Council confirmed that information was withheld under regulation 12(5)(b) (the course of justice, etc) of the EIR.
2. The Commissioner's decision is that the Council correctly applied regulation 12(5)(b) of the EIR when it withheld the requested information.
3. The Commissioner does not require the Council to take any steps.

#### Request and response

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4. On 26 October 2017, the complainant wrote to the Council and requested information in the following terms:

*"The information I am requesting from you is [in relation to a specified planning enforcement case]:*

*1) exactly which buildings, above and below ground (and business activities ,if any) the enforcement action relates to, including any firing range relating to live ammunition as well as land for the storage of military vehicles and weaponry...*

*2) the current state that the enforcement action has reached, and the next steps to be undertaken."*

5. The Council responded on 23 November 2018. It stated that:

*"The information the Council holds which falls under the terms of your request is considered exempt from disclosure by virtue of Regulation 12(5)(b) of the Environmental Information Regulations 2004 under which a Local 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 inquiry of a criminal or disciplinary nature. In this instance the Council has a duty to investigate any such complaints and, consequently, we can confirm that these investigations are on-going. Therefore, any disclosure of this information would prejudice these on-going proceedings."*

6. Remaining dissatisfied with the response, on 1 December 2017 the complainant requested the Council to conduct an internal review.
7. Following an internal review the Council wrote to the complainant on 6 December 2017. It upheld its initial refusal.

### **Scope of the case**

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8. The complainant contacted the Commissioner 14 December 2017 to complain about the way his request for information had been handled.
9. The following analysis covers whether the Council was correct to refuse the request under regulation 12(5)(b) of the EIR.

### **Reasons for decision**

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#### **Is the requested information related to environment?**

10. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
11. Under regulation 2(1)(c), information on any measure that will affect, or be likely to affect, the elements of the environment referred to in 2(1)(a) or the environmental factors referred to in 2(1)(b) will be environmental information. In the present case, the requested information relates to enforcement action by the Council in a planning case. The planning process and enforcement action relating to it is clearly a measure that may affect several of the environmental elements

and factors listed in regulations 2(1)(a) and (b). The Commissioner therefore considers it appropriate to consider the requests as seeking environmental information under the terms of the EIR.

### **Regulation 12(5)(b)**

12. Having concluded that the requested information is environmental and consequently covered by the EIR, the Commissioner has considered the application of regulation 12(5)(b) of the EIR by the Council when it refused to disclose the information requested. Consideration of this exception involves two steps; first, the exception must be engaged as an adverse outcome relevant to the matters mentioned in regulation 12(5)(b) would result through disclosure of the requested information. Secondly, the balance of the public interests must be considered. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the requested information must be disclosed.

*Is the exception engaged?*

13. Under this exception a public authority can refuse to disclose information on the basis that "...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 Commissioner's guidance explains 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<sup>1</sup>.
14. For regulation 12(5)(b) to be engaged, it must be the case that disclosure *would* adversely affect at least one of the matters mentioned in 12(5)(b). In accordance with the Tribunal decision of Hogan and Oxford City Council v *Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "*would*" is "*more probable than not*".
15. The Council has explained that the information sought is related to on-going investigation. The Council's position is that "*...any disclosure of this information would prejudice these on-going proceedings*". In coming to this view, the Council explained that it considered how the disclosure of the information would adversely affect the ability of the Council to carry out its planning enforcement functions.
16. The Council maintains that in this instance "*it is performing its statutory role as Local Planning Authority and undertaking an investigation into whether there are breaches of planning control, before considering what*

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

*action, if any, to take under the Town & Country Planning Act 1990 (as amended)".*

17. Further, the Council argued that the disclosure of the requested information would have a significant effect on its ability to undertake an effective investigation and to take formal action under its powers. In addition, the Council considers that *"...the disclosure of this information would not only prejudice the ability to take effective action in this case but would also undermine the Council's ability to take similar action in the future"*.
18. Having considered the Council's arguments, and reviewed the withheld information, the Commissioner recognises that the information relates to an ongoing planning enforcement matter, which currently remains under investigation. She also accepts that this planning enforcement matter is an inquiry of a criminal or disciplinary nature as referred to in regulation 12(5)(b).
19. With that in mind, the Commissioner accepts that it was more probable than not that disclosure of this information would adversely affect the course of justice, and is therefore satisfied that regulation 12(5)(b) is engaged.
20. 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**

21. 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*

22. The Council recognised that there is need for transparency in all its processes and that it is important for the public to understand why the Council has acted in a specific fashion. In this specific case the Council asserted that it is likely that the complainant considers it to be in the public interest to ensure that the Council is properly executing its enforcement functions under the Town & Country Planning Act.
23. The complainant, when making his information request, stated that *"...over a number of years many thousands of cubic metres of building*

*work has been undertaken without planning permission...To many local residents the work at this site makes a complete mockery of the application of planning regulations, as all residents should be treated in the same way".*

*Public interest arguments in favour of maintaining the exception*

24. The Council argues that the reasons for maintaining the exception relate to the need for the Council to serve the wider public interest in being able to effectively enforce against breaches of planning control.
25. In this respect, the Council maintains that, taking into account that the investigation is ongoing, to disclose the exact nature of the breach of planning control, the stage of the process and the planned steps to be undertaken, would undoubtedly prejudice the Council's ability to take action in this case and possibly in future cases.

*Balance of the public interest*

26. 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 ability of public authorities to conduct inquiries of a criminal or disciplinary nature.
27. 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.
28. It is not the purpose of the EIR to circumvent due legal remedies that are available and that, to do so, would be likely to undermine such processes and hence adversely affect the course of justice. Whilst the Commissioner recognises that the complainant may have an interest in accessing the information, the public interest in this context relates to the wider public interest rather than individual interest. She considers that there is a broader public interest in protecting the ability of the Council to carry out inquiries without unwarranted adverse effects.
29. In this instance, given the ongoing nature of the investigation, the Commissioner considers that there is a particularly strong public interest in protecting the ability of the Council to carry out its inquiry and hence in maintaining the use of the exception.

30. Whilst the Commissioner considers that the arguments in favour of disclosure have some 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).
31. The Commissioner has concluded that the exception was engaged and that the public interest favours maintaining the exception. The Council was not, therefore, obliged to disclose the requested information.

## Right of appeal

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32. 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)

33. 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.
34. 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** .....

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**