

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

Decision notice

Date: 22 November 2022

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant requested legal advice relating to Temporary Event Notices (TENs). Warwick District Council (the "council") withheld the information under the exemption for legal professional privilege (section 42 of the FOIA). During the Commissioner's investigation the council reconsidered the request under the EIR and withheld the information under the exception for the course of justice (regulation 12(5)(b)).
2. The Commissioner's decision is that the council correctly withheld the information under regulation 12(5)(b) but that in initially handling the request under the FOIA it breached regulation 14(3) by failing to issue a valid EIR refusal notice.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 27 June 2022 the complainant wrote to Warwick District Council (the "council") and requested the following information:

"I would like a copy of the legal advice you received from your legal adviser which, you say, states that the Licensing Act 2003, concerning an associate not having a TENSs, cannot be applied as there is no absolute definition of an associate in the act. This is associated with TENSs awarded to [redacted] during 2021. It is specifically referred to in an email from information@warwickdc.gov.uk to [redacted] dated 24/12/2021."
5. At the time of the internal review the council confirmed it was relying on the exemption for legal professional privilege (section 42 of the FOIA) to withhold the requested information. During the Commissioner's investigation the council reconsidered the request under the EIR and confirmed it was relying on the exception for the course of justice (regulation 12(5)(b)).

Reasons for decision

6. This reasoning covers first, whether the council handled the request under the correct legislation and second, whether the information could be withheld because it would adversely affect the course of justice.
7. The requested information relates to activities affecting or likely to affect the state of elements of the environment. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) of the EIR. For procedural reasons, he has therefore assessed this case under the EIR.
8. Because the council initially issued its refusal under FOIA and not the EIR it breached regulation 14(3) of the EIR. This concerns the exception(s) a public authority is relying on to withhold information and why the exception(s) are engaged.

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

9. Regulation 12(5)(b) of EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - the course of justice, 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.

10. Temporary Event Notices (TENs) are issued under the Licensing Act 2003. A TEN is required if someone wishes to hold an event, involving less than 500 people, at which one or more licensable activities will take place that are not authorised by an existing premises licence or club premises certificates. A TEN is a notification to the licensing authority that an individual intends to carry on licensable activities for a period not exceeding 168 hours or 7 days¹.
11. The council has confirmed that the withheld information constitutes legal advice relating to a live enforcement case involving TENS submitted by a landowner. The council has explained that, as the licensing authority, in order for it to effectively investigate whether the TENS have been submitted appropriately, officers need to be able to discuss freely with legal advisors and not have this information impact on their investigation. The council has explained that it has a duty to ensure that clients are adhering to regulations, in this instance, ensuring that the correct TENS are submitted accurately.
12. The council has submitted that it is a fundamental part of the legal system for a client to be able to speak freely and frankly with their legal advisor and legal professional privilege protects the confidentiality of communications between a lawyer and client. In this case, the council has argued, if the legal advice was published into the public domain, this would adversely affect the live proceedings. The Commissioner recognises the significance of the principle of Legal Professional Privilege (LPP) and the importance to the course of justice of maintaining the confidentiality of privileged advice.
13. Having considered the council's submissions and referred to previous decision notices² issued in relation to comparable requests, the Commissioner is satisfied that the information falls within the scope of the exception and that disclosure would result in adverse effects to the course of justice.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565207/tens-factsheet.pdf

² See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022499/ic-182535-d8y5.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619911/ic-38268-h3t4.pdf>

Public Interest Test

14. The Commissioner recognises that regulation 12(2) of the EIR requires public authorities to apply a presumption in favour of disclosure when considered the application of exceptions.
15. In this case the Commissioner accepts that the complainant has genuine concerns about the council's practice in relation to the issuing of TENs and he understands that they have submitted several requests to the council associated with these concerns.
16. The Commissioner also recognises that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing investigations or of breaching the confidentiality of information subject to LPP.
17. Whilst the Commissioner recognises the complainant's concerns he does not consider that these carry sufficient weight to justify the adverse effects to the course of justice which the disclosure of information subject to LPP would cause. He considers that, other legal remedies are open to the complainant to challenge the council's position in relation to TENs rather than via disclosures under the EIR.
18. Having considered the facts of the case the Commissioner has concluded that the council has correctly applied regulation 12(5)(b) to the requested information and that the public interest favours maintaining the exception.

Right of appeal

19. 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

20. 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.
21. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF