

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 January 2023

Public Authority: Hinckley & Bosworth Borough Council

Address: Hinckley Hub
Rugby Road
Hinckley
Leicestershire
LE10 0FT

Decision (including any steps ordered)

1. The complainant requested from Hinckley and Bosworth Borough Council ("the Council") information relating to noise monitoring in respect of a Noise Abatement Notice. The Council withheld the requested information under regulation 12(5)(b) (course of justice).
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 12(5)(b).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 14 September 2021, the complainant wrote to the Council and requested information in the following terms:

"We made a formal complaint (No 1278 - Failure to enforce NAN) on the 26/04/21. 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 consultant's report.

We now understand from your [name redacted by ICO] that report was received on the 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 [name redacted by ICO] 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 [name redacted by ICO] is referring to together with the summary that HBBC writes to explain the formulation of the policy."
5. The Council responded on 7 October 2021. It stated that the information sought by parts 1) and 2) was exempt under regulations 12(4)(e), 12(4)(d), and 12(5)(b), and that no information was held in respect of part 3).
6. Following an internal review, the Council wrote to the complainant on 18 January 2022. It maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 28 January 2022 to complain about the way their request for information had been handled.
8. The complainant argues that the Council was not correct to apply regulations 12(4)(e), 12(4)(d), and 12(5)(b), and that other information was held – specifically the “policy” referred to in part 3) of the request.
9. The scope of this case and of the following analysis is whether the Council was entitled to rely upon 12(5)(b) to withhold the requested information – including the information sought by part 3) of the request.

Reasons for decision

The background to the request

10. The Commissioner understands that the request relates to a Noise Abatement Notice issued against the owners of Mallory Park racing circuit in 2014. The Commissioner has previously outlined this matter in decision notice IC-133854-K0G8¹, which considered a related request for legal advice pertaining to the Noise Abatement Notice.

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

11. 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.

12. The withheld information in this case is that sought by parts 1), 2) and 3) of the request.

13. Whilst the Council originally asserted that the information sought by part 3) is not held (a 'policy' document), it has since informed the Commissioner that it does hold an 'internal procedure' document, which it considers would also fall under the exemption provided by regulation 12(5)(b).

14. Having considered this, the Commissioner considers that the Council has applied an unnecessarily narrow interpretation of part 3), and that, in the circumstances of the matter and the phrasing of part 3), it is reasonable to interpret that it seeks this 'internal procedure' document. The Commissioner has therefore proceeded to consider whether this document is exempt under regulation 12(5)(b).

15. The information withheld under regulation 12(5)(b) therefore entails:

- an Acoustic Consultant's report

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021674/ic-133854-k0g8.pdf>

- correspondence between the Council and the Acoustic Consultant about the report
 - internal correspondence between Council officers discussing the report
 - An 'internal procedure' document
16. The Council has explained that this information is held to inform an inquiry under the Environmental Protection Act 1990, and specifically an investigation into whether a Noise Abatement Notice has 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 Schedule (which requires the Council's agreement), as well as any potential prosecution for breach of the Noise Abatement Notice.
17. The Council further considers that the public disclosure of specialist advice in this case would impact officers' confidence in obtaining specialist professional advice for use within the course of an investigation.
18. The Commissioner has considered the context of the information, and recognises that it relates to live matters being considered under the Environmental Protection Act 1990, for which the Council has a statutory responsibility to undertake inquiries. It is therefore reasonable for the Commissioner 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 is considering.
19. The Commissioner accepts that such disclosure would therefore adversely affect the course of justice.

The public interest test

20. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

21. In this case, the Commissioner recognises that the substantive matter remains a matter of importance to the complainant, who acts on behalf

of 18 households in the vicinity of Mallory Park racing circuit. The Commissioner has had regards to detailed submissions provided by the complainant, including their understanding that the content of some of the withheld information has since been disclosed by the Council to local residents, and that the basis of the Council's monitoring is technically flawed.

22. However, in this case it is understood by the Commissioner that the inquiry is on-going, and the findings of this will consider whether a party has breached a legal notice, which may then result in the party being subject to prosecution.
23. The withheld information therefore directly informs how the Council is undertaking the inquiry. Should this information enter the public domain, it would alert the party to how the Council is undertaking noise monitoring, and the factors it is considering. The consequence of this would be that the integrity of the inquiry would be jeopardised. There is a significant public interest that the course of justice is not adversely affected in such a way.
24. Whilst the Commissioner has noted the complainant's position that the Council has since indicated the content of some of the requested information to local residents, the Commissioner does not consider that this equates to full public disclosure of the withheld information, which is what disclosure under the EIR represents. Additionally, the Commissioner has not received any confirmation from the Council that it is withdrawing reliance upon regulation 12(5)(b).
25. The Commissioner also emphasises, as he did in decision notice IC-133854-K0G8, that his role is limited to determining compliance with the EIR. The Commissioner cannot make a decision on other matters, such as the technical validity of the Council's monitoring. Whilst he understands that the Council's and complainant's positions may be informed by conflicting expert advice, this is not a sufficient basis for the Commissioner to conclude that the Council is acting improperly or unlawfully.
26. Having considered the context of this matter, the Commissioner has therefore concluded that the Council is entitled to rely on regulation 12(5)(b) of the EIR to withhold the requested information. The Commissioner also finds that the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.
27. As the Commissioner has found the regulation 12(5)(b) is engaged, he has not proceeded to consider the other cited exceptions.

Right of appeal

28. 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

29. 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.
30. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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