

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 17 July 2023

Public Authority: Flintshire County Council
Address: County Hall
Mold
Flintshire
CH7 6NB

Decision (including any steps ordered)

1. The complainant requested, from Flintshire County Council (the Council), information about communication between the Council and the site owner of a residential park, relating to the land. The complainant wanted information “particularly in relation to applications for a site licence and enforcement of the conditions of the site licence”. The Council handled the request under the EIR and refused to provide any information, citing (in its internal review) regulation 12(5)(b) and 12(4)(e) (the course of justice and internal communications exceptions).
2. The exception that the complaint focuses on is regulation 12(5)(b).
3. The Commissioner’s decision is that the Council is entitled to withhold information under regulation 12(5)(b). However he also finds that the Council breached regulation 11(4) because it took more than 40 working days to provide its internal review.
4. The Commissioner does not require any steps as a result of this decision notice.

Request and response

5. On 21 February 2023, the complainant wrote to the Council and requested information in the following terms:

"I request that a copy of the following documentation be provided to me:

(1)(a) Copies of all communication, and

(b) Records of communication (such as the time and date of telephone calls and notes kept of calls)

Between (i) Flintshire County Council or any agents acting on the Council's behalf, and (ii) the site owner of Willow Park residential park home site on Colliery Lane, Mancot.

relating to the land referenced above in part ii, **particularly in relation to applications for a site licence and enforcement of the conditions of the site licence** [emphasis added].

(2) To assist the Council in finding records relevant to this request, the site owner is understood to be Wyldecrest Parks (Management) Ltd, also known simply as Wyldecrest, and the site owner is regularly represented by a [name redacted]. This request also covers any representations made by any other representative such as solicitors or planning consultants.

(3) Information in paragraph (2) is provided solely to assist the Council in locating records and should not constrain the request set out in paragraph (1) nor the search for relevant records in any way".

6. The Council responded on 29 March 2023. It stated that the request was being dealt with under the EIR and the information was being refused under regulations 12(5)(b), 13 and 12(4)(e) (the course of justice, personal data and internal communications exceptions respectively).
7. Following an internal review (requested on 13 April 2023), the Council wrote to the complainant on 22 June 2023. It maintained that the request falls under the EIR (the Council said regulation 2(1)(f) is the relevant provision), and upheld its application of regulations 12(5)(b) and 12(4)(e). It did not uphold regulation 13, but applied regulation 12(5)(b) to the information previously withheld under regulation 13.
8. The Commissioner's understanding is therefore that the Council is applying regulations 12(5)(b) and 12(4)(e) to the withheld information.

Scope of the case

9. The complainant contacted the Commissioner on 27 June 2023 to complain about the way their request for information had been handled.
10. In their complaint form, the complainant listed the specific issues that they are dissatisfied with.
11. Based on those comments, the Commissioner considers that the scope of this case is to decide whether the Council was correct to handle the request under the EIR; whether it was entitled to rely on regulation 12(5)(b) to refuse disclosure; and whether the internal review was late.
12. The Commissioner has used his discretion in not asking the Council to provide him with any submissions about its handling of the request, or a copy of the withheld information. He considers that he is able to make his decision without seeing those things, based on the wording of the request itself and the Council's original and internal review responses to the complainant.

Reasons for decision

Would the requested information be environmental?

13. Regulation 2(1) of the EIR defines environmental information as being:
 - "... any information ... on—
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...".
14. Although he has not seen the requested information, in this case the complainant requested information specifically "relating to the land" and "particularly in relation to applications for a site licence and enforcement of the conditions of the site licence". The Council has cited regulation 2(1)(f). The Commissioner considers that the requested information would be information falling under regulations 2(1)(c) and 2(1)(f) of the EIR.
 15. Because he considers that the information would fall under regulations 2(1)(c) and 2(1)(f), the Commissioner finds that the Council was correct to handle the request under the EIR.
 16. The Commissioner has himself assessed the case under the EIR.

Regulation 12(5)(b)

17. Regulation 12(5)(b) was the only exception referenced by the complainant when specifying their grounds of complaint to the Commissioner.
18. It provides 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 inquiry of a criminal or disciplinary nature.
19. It is necessary to establish that disclosure would have an adverse effect, and in this context would mean more probable than not (ie more than a 50% chance).
20. The exception, if engaged, is also subject to a public interest test.
21. Unlike the Freedom of Information Act 2000, under the EIR the public authority must apply a presumption in favour of disclosure, both in engaging the exception and carrying out the public interest test.
22. The Council's responses to the complainant indicate that it is relying on the course of justice element.

23. As the Commissioner's guidance¹ explains, the course of justice element covers a wide range of information. It notes that public authorities may wish to consider applying regulation 12(5)(b) to information about law enforcement investigations or proceedings. It explains that this could include information about civil and criminal investigations and proceedings. It goes on to explain that "[t]he principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on law enforcement and investigations and proceedings".
24. In this instance the request was particularly for information about applications for a site licence and enforcement of licence conditions.
25. The Council has said that the complainant's request "refers to a case that has yet to reach a conclusion". Its comments also indicate that the case in question relates to the Council's powers to take action over breaches of licence conditions, and it has referenced the Mobile Homes (Wales) Act 2013.
26. For the public interest test, the Council acknowledged factors in favour of disclosure, such as transparency and public confidence in the Council investigating cases thoroughly.
27. However against disclosure, the Council emphasised its desire to protect information collected during investigations, and the impact of disclosure on the running of the investigation. Furthermore the Council's responses to the complainant indicate that some of the information being withheld under regulation 12(5)(b) is complaints received from individuals (presumably complaints relating to the site and site licence in the request).
28. The complainant, both in their internal review request and their complaint to the Commissioner, has queried whether all of the information within scope of the request engages the exception, however the Council has said that it does.
29. The Commissioner notes that the complainant is particularly interested in information regarding enforcement.
30. Whilst he has not seen the withheld information, the Commissioner is prepared to accept that it engages the exception. He notes the Council's reference to an ongoing case, the envisaged harm to an investigation

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

and the fact that the Council has already confirmed to the complainant that all information within scope of the request engages the exception.

31. For the public interest test, the Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These can help to increase public understanding, trust and participation in the decisions taken by public authorities, including environmental decisions.
32. There is also a strong public interest in transparency as to how justice is administered.
33. However, against disclosure, the public interest inherent in regulation 12(5)(b) will always be strong because the general principle of upholding the administration of justice is fundamental.
34. The Commissioner has published guidance² on applying the public interest test to cases involving civil and criminal investigations, proceedings and inquiries. It explains that the public interest that favours maintaining the exception in these cases is in not prejudicing investigations, proceedings and inquiries.
35. It notes that the timing of the request may be relevant. For instance, when applying the public interest test, the public authority should consider whether there is a need to protect information acquired during investigations, especially when an investigation is still open. Such points are relevant in the present case.
36. The Commissioner's understanding is that a wider concern behind the complainant's request is that some residents believe the Council is not taking proper action to enforce licensing conditions, with reference to the site mentioned in the request. The Commissioner would suggest that an appropriate way to pursue such a concern may be to follow any relevant complaints process at the Council. The Council's website outlines its complaints process. This includes referring a complaint to the Public Services Ombudsman for Wales.
37. Having considered the factors involved, the Commissioner is satisfied that the public interest favours maintaining the exception, rather than the matter being equally balanced. This means that the Commissioner's decision, whilst informed by the 'presumption in favour of disclosure'

² https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/#125b_test

under the EIR (regulation 12(2)), is that the exception provided by regulation 12(5)(b) was applied correctly to the complainant's request.

Procedural matters

38. Regulation 11(4) of the EIR provides that a public authority shall provide its internal review outcome as soon as possible and no later than 40 working days after the date of receipt of the internal review request.
39. In this case, the Council acknowledged that there was a delay in providing its internal review. The Commissioner notes that it was provided 47 working days after it was requested (there were three bank holidays during that period).
40. The Commissioner thus finds that the Council breached regulation 11(4).

Right of appeal

41. 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

42. 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.
43. 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 Kennedy
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