

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 21 May 2013

Public Authority: Hinckley & Bosworth Borough Council
Address: Council Offices
Argents Mead
Hinckley
Leicestershire
LE10 1BZ

Decision (including any steps ordered)

1. The complainant has requested noise monitoring raw data and summary information collected at his house and nearby public areas. The Commissioner's decision is that Hinckley & Bosworth Borough Council ('the council') has correctly applied the exception where disclosure would have an adverse effect on 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, at regulation 12(5)(b) of the EIR. He does not require any steps to be taken.

Background

2. The complainant explained that he is one of five village representatives of a democratically elected Village Liaison Committee, set up as an initiative of the council to address noise issues at Mallory Park Motor Racing Circuit operated by Mallory Park Motorsports Ltd. ('MPML'). 95% of the village of Kirkby Mallory is within 500m of the circuit and houses are as close as 75 metres from a circuit hairpin bend. There is also a Motocross track. In October 2011 Mallory Park described itself as 'the busiest racetrack in Europe' and an increase in days of activity and noise volume has been noticeable since 2005 when MPML was purchased by a Motorsport Promoter who operates three other circuits in the UK. Residents have complained about noise and other issues since March 2011 with a large group of residents making complaints since August 2011. The council has taken extensive remote noise measurements at

the complainant's property and another property beginning in October 2011. Data has also been taken at public areas and other residences. The data was recorded automatically by equipment mounted in gardens and collected on a weekly basis. The data will be used by the Liaison Committee on behalf of those individuals and residents of the Village of Kirkby Mallory Leicestershire.

3. The complainant also explained that the council served a statutory notice on MPML in 1985 but the notice has not been enforced to date despite residents and the council gathering evidence of continuing breaches, especially in recent years. The council has stated that it wishes to negotiate a voluntary noise agreement with Mallory Park. A draft agreement was produced in April 2012, and again in October 2012, both of which offered an increase in activity over what is currently allowed.

Request and response

4. On 4 October 2012 the complainant wrote to the council and requested information in the following terms:

"I formally request that you release copies of all Noise Monitoring Raw Data and the Summary Information you have collected at my house [complainant's address] and at public areas within Kirkby Mallory."

5. The council responded on 11 October 2012. It stated that the request has been considered under the FOIA rather than the EIR as the information is held by the council for the purpose of conducting an investigation. It applied the exemption at section 30(1)(b) as the information is held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct.
6. The complainant requested an internal review on 11 October 2012. He pointed out that the request should be dealt with under the EIR and clarified that he is requesting the data collected before 1 August 2012.
7. On 15 November 2012 the council provided its internal review response. It agreed that the request should be considered under the EIR and concluded that the information is exempt from disclosure under regulation 12(5)(b) as the requested information forms part of an on-going investigation into noise levels at Mallory Park and release would adversely affect the course of justice.

Scope of the case

8. The complainant contacted the Commissioner on 19 November 2012 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the council correctly applied the exception at regulation 12(5)(b).

Reasons for decision

10. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on 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.
11. In the case of *Kirkaldie v ICO & Thanet District Council*¹ the Tribunal stated that:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial.”
12. The council has explained that the investigation was at the time of the request, and remains, on-going and that release of the requested information would adversely affect the council’s ability to conduct an inquiry of a criminal nature. It stated that it is the duty of the council, under section 80 of the Environmental Protection Act 1990, to investigate potential statutory nuisances (including noise nuisance) and, if appropriate, to serve an abatement notice. The breach of a noise abatement notice is a criminal offence under section 80 of the Environmental Protection Act 1990 and is also a matter which the council, as the relevant local authority, is under a duty to investigate.
13. The council further explained that discussions continue to reach a voluntary agreement but a new abatement notice, at least partially based on the evidence of the requested information, will be served should this not be possible.

¹ Appeal number EA/2006/0001

14. The council considers that should it release the information requested it may be used by the MPML to temporarily ameliorate the noise levels emanating from the racing circuit and such action would impede the ability of the council to carry out effective monitoring of the true account of all the relevant contributing factors to the nuisance. The council explained that the site continues to be monitored on a regular basis at present.
15. The complainant has made the point that the noise nuisance is proved to exist as a statutory notice was served in 1985 and that the notice has been and continues to be comprehensively broken every week. He pointed out that the council have been attempting to negotiate a reduction in activity/noise unsuccessfully for more than a year and that MPML have been made fully aware, in multiple meetings with the council and village representatives, of the fact that the council and residents have collected noise data, and that residents have made complaints. He stated that MPML may have already moderated their excesses and it is hard to understand what additional noise data is required or how releasing it to residents or MPML can be detrimental. He stated that 'the historical data is just so – historical and not releasing it will not affect the future activity or noise levels'.
16. The complainant also informed the Commissioner that on 15 June 2012 the council gave MPML 6 weeks' notice that it would enforce the existing statutory notice on 1 August 2012. He stated that the council has documented breaches to the existing statutory notice from 1 August 2012 to 10 September 2012 but it is the data before 1 August 2012 that has been requested which the council will not use for any reason other than understanding the degree of nuisance to formulate a voluntary agreement or an updated notice. The Commissioner notes that the council informed the complainant, in its response of 11 October 2012, that the current prosecution proceedings relating to activities since 1 August 2012 do not rely on the monitoring data from across the village as it is based on the measurements carried out at the monitoring position on Stapleton Lane. However, it confirmed that the requested data would be required to support any service of new noise abatement notices and it is therefore still part of the current investigation as it may be necessary to serve new notices depending on the outcome of current negotiations.
17. In deciding whether this exception has been applied correctly, the Commissioner has considered whether the withheld information relates to an inquiry or investigation conducted by the council of a criminal or disciplinary nature. The Commissioner is satisfied that the information would form part of the evidence the council would later rely on, should a voluntary agreement not be possible, to serve a new noise abatement notice. He has therefore gone on to consider whether the disclosure of

the withheld information would have an adverse effect on the course of justice.

18. In *Archer v ICO & Salisbury District Council*² the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.
19. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*³ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
20. The Commissioner accepts that disclosure of information which forms part of an investigation, however innocuous the information itself may appear, would risk the integrity of the investigation as outlined above by the council (paragraph 14). The Commissioner is therefore persuaded that as the investigation was on-going at the time of the request disclosure would have an adverse effect on the council's ability to conduct the investigation. This is in line with the Commissioner's decision in FER032484 which the council took into account when coming to its conclusion in this case. Accordingly, he finds that the exception is engaged.
21. 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.

² Appeal number EA/2006/0037

³ Appeal numbers EA/2005/0026 & EA/2005/0030

Public interest arguments in favour of disclosing the requested information

22. The Commissioner is mindful of the fact that there is a strong presumption in favour of disclosure of information under the EIR as stipulated in regulation 12(2) which states:

“A public authority shall apply a presumption in favour of disclosure.”
23. The council stated that in favour of releasing the requested information it considered the general presumption in favour of disclosure described above. In addition, it recognised the public interest in the transparency and accountability of the council’s investigatory process into public nuisances generally. Finally, the council considered the interests of the applicant who would naturally have an interest in the results of the recordings taken in his own property but considered this point to be a private interest rather than part of the general public interest.
24. The Commissioner considers that disclosure would promote general transparency and accountability in the actions of the council and could also build confidence in the council’s investigative and enforcement activities by demonstrating that the council has conducted a thorough and fair investigation.
25. The complainant has stated that any noise abatement notice or voluntary agreement would be for the protection of residents and that if the residents are to judge whether if the contents of either are reasonable, and in line with the protection afforded by legislation and given to other residents at other circuits around the country, then such residents must have an understanding of the substantial amount of noise measurements that have been taken. He has stated that withholding the requested data prevents residents making an informed decision on the acceptability of a voluntary agreement or new noise abatement notice. He pointed out that residents have already spent a considerable amount of time, effort and expense on this issue and in withholding the data residents will have to incur extra expense in commissioning an acoustic consultant to duplicate readings already taken by the council. He has also stated that this is not inclusive government, does nothing to assure the residents of the councils best intentions and reinforces the opinion that that the council continue to disadvantage residents in the formulation of a new agreement with MPML which would be aligned with the commercial interests of MPML and consideration of the economic advantage that Mallory Park has for the area rather than the residents amenity.
26. The complainant has noted that the council do not wish to release data to a third party but has stated that the third party in this case are the

residents, the ones who are most affected and who have driven this issue from the beginning. He has also noted that the council do not necessarily think it would be prejudicial to release the data to the residents but that disclosure under the EIR is disclosure to the world at large and therefore it would effectively be disclosure to MPML. He stated that MPML made a verbal statement at a public meeting in October 2012 that they have seen and dispute the data and therefore the complainant believes there is no reason to withhold the information from any party. The Commissioner specifically asked the council whether the requested information has been shared with MPML. The council confirmed that the only noise data which has been shared with MPML is the summary data which was also released to the complainant, and other members of the Village Liaison Committee, on 27 February 2013 as a gesture of goodwill aimed at seeking a resolution of the issues between Mallory Park and the residents. The Commissioner notes that this limited disclosure occurred after the internal review response and is therefore not relevant to this decision.

Public interest arguments in favour of maintaining the exception

27. In favour of maintaining the exception the council considered the general public interest in maintaining the confidentiality in on-going investigations, in particular the public interest in not prejudicing the investigation by the premature release of information. In considering this the council stated that it was mindful that the investigations are on-going with the intent of providing an evidence base for the drafting of a new abatement notice on the Mallory Park circuit should it prove necessary and as such it is essential that the baseline noise recording of the activity at Mallory Park including the requested information is not prejudiced.
28. The Commissioner is mindful that there is a strong public interest in the public maintaining confidence in the ability of the council to ensure that its conduct of the investigation is fair and thorough. He considers that the disclosure of information used as part of an investigation makes it vulnerable to accusations of a flawed investigation as it would undermine the ability of investigators to obtain a true account of all relevant contributing factors to a nuisance in order to make a fully informed view over a period of time. The Commissioner therefore considers that disclosure would be prejudicial to the council's ability to conduct a fair, thorough and effective investigation.
29. The Commissioner also considers that disclosure of the requested information would adversely affect the ability of investigators to plan and complete investigations without fear of potential offenders temporarily altering their behaviour in order to avoid a statutory notice being served.

30. In addition, the Commissioner also considers that in a situation where a potential noise issue exists, there is public interest in resolving the issue. An adverse effect to the processing of resolving the issue would be counter to the public interest in that it would be disruptive to the administration of justice.

Balance of the public interest arguments

The Commissioner considers that the arguments submitted by the complainant relate to the interests of individuals, namely the residents, and is mindful that his own guidance on the subject, 'The course of justice and inquiries exception (regulation 12(5)(b))'⁴, states that in applying the public interest test to cases involving civil and criminal investigations, proceedings and enquiries, the distress of individuals associated with the case is not a relevant factor under the exception. Although the Commissioner can appreciate the interest of the complainant, it is essentially a private interest and not that of the wider public interest.

32. In response to the complainants argument that the council are disadvantaging residents in favour of the commercial interests of MPML and consideration of the economic advantage for the area, the Commissioner has not seen any evidence of this and it is not within his jurisdiction to adjudicate on that matter. The Commissioner also notes that the residents have made an application to the Local Government Ombudsman in respect of their lack of confidence on this issue.
33. Whilst the Commissioner recognises the strong public interest inherent in environmental information and in favour of transparency, accountability and building confidence in the council's investigative and enforcement activities, he is mindful of the fact that the investigation was on-going at the time of the request and this fact means that very considerable weight should be given to the public interest inherent in the exception in avoiding an adverse effect to the course of justice. As previously stated, the disclosure of the information during the course of an investigation could impact on the council's ability to conduct its investigation in a thorough, fair and consistent manner. The Commissioner is also mindful of the effect that disclosure could have on the effectiveness of future investigations.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/course_of_justice_and_inquiries_exception_eir_guidance.ashx

34. The Commissioner has therefore concluded that the balance of public interest favours maintaining the exception and accordingly, regulation 12(5)(b) is engaged and the council is not required to disclose the information.

Right of appeal

36. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

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