

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 November 2022

Public Authority: Cornwall Council
Address: New County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information relating to a Planning Enforcement case. Cornwall Council ("the Council") confirmed that the information was withheld under regulation 12(5)(b) (the course of justice and inquiries), regulation 12(5)(f) (Interest of the person who provided the information to the public authority) and regulation 13 (personal information) of EIR.
2. The Commissioner's decision is that the Council correctly applied regulation 12(5)(b) to withhold the requested information and that the balance of the public interest favours maintaining that exception.
3. The Commissioner does not require the Council to take steps.

Request and response

4. The complainant requested information in the following terms:

"I have received a notification letter in respect of Planning Enforcement case EN20/01248 which refers to a full site survey in which all missing plants and issues regarding their health have been noted. May I request an emailed copy of this survey to understand what has been agreed?"
5. The Council confirmed that it holds the information requested by the complainant, but refused to disclose it, relying on regulation 12(5)(b) and regulation 12(5)(f) of EIR. Following an internal review, the Council maintained its position to withhold the information under the above-mentioned exceptions and also added regulation 13 of EIR as an additional exception it has relied on.

Scope of the case

6. The complainant contacted the Commissioner on 11 April 2022 to complain about the way his request for information had been handled.
7. The Commissioner does not consider that the scope of the complainant's original request for information covers complaints from third parties and therefore are not in scope for investigation.

Reasons for decision

8. The Commissioner agrees that the requested information is environmental and therefore, the Council was right to handle the request under EIR. The following analysis sets out why the Commissioner has concluded that the Council was entitled to rely on regulation 12(5)(b).
9. Regulation 12(5)(b) states 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.
10. The Commissioner's guidance on this exception¹ explains that the exception is fairly broad and covers a wide range of judicial or quasi-judicial processes. The ability of a local planning authority to determine whether a breach of planning consent has occurred and, if so, whether remedial action is necessary would fall under the definition of "an inquiry of a criminal or disciplinary nature."

The Council's Position

11. The Council has stated that its duty to conduct planning enforcement action is derived from section 171A of the Town and Country Planning Act 1990². It believes that the disclosure of the information would prejudice investigations and proceedings of either criminal or disciplinary nature.

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

² <https://www.legislation.gov.uk/ukpga/1990/8/section/171A>

12. The Council considers that disclosure of the information would impact possible enforcement action at a later date. While it recognises that the current enforcement case was closed at the time of the request, a new one was created in January 2022 to determine if the developer had fulfilled their planning agreement. It explains that the information was subject to a plethora of investigations resulting in an ongoing issue which the Council are still actively involved with. It says that the information is subject to future live investigation and that subsequent rolling planning enforcement cases are to ensure that any agreements are fulfilled.
13. The Council states that disclosure would likely impede the gathering of information and evidence in future investigations as those under investigation will be less willing to provide information voluntarily if they thought it would be placed within the public domain, ahead of planning enforcement decisions. It says that it would be unfair to the developer if disclosure went ahead, and no breach of planning is found. The Council says this would cause reputational damage to the individuals concerned. Also, as planning enforcement is a legal matter, the developer has complete expectation that information would not be shared within the public domain.
14. It believes that the disclosure of the information would be prejudicial to the Council's legal position in relation to such matters which remain to be concluded and therefore would be exempt. The Council also contends that disclosure would provide an indication of the arguments, strengths, or weaknesses, in relation to ongoing enforcement investigations. The Council says that the investigations in this matter require certain information to remain confidential in order to be effective and to effectively carry out its legal obligations and planning enforcement investigations without damaging the integrity of a live investigation.
15. The Council argues that the disclosure of the information is likely to cause greater degree of harm as the issue is ongoing. It says that it would be likely to avert unnecessary use of public money and inhibit the Council's ability to conduct its inquiry in an effective way.

The Commissioner's view

16. Whilst the Commissioner considers that the Council's arguments could have been more closely linked to the actual content of the withheld information, he nevertheless accepts that disclosure, at the time of the request, would have had an adverse effect on the ability of the Council to investigate and determine alleged planning breaches. The Commissioner has disregarded the Council's argument that disclosure would provide an indication of the arguments, strengths or weaknesses, in relation to ongoing enforcement investigations. He does not consider that the Council has provided adequate reasons in support of this view.

17. However, the Commissioner recognises that planning matters, by their very nature can often be contentious. Rules exist to prevent the wrong development in the wrong place. It is important that those rules are adhered to and that they are applied consistently. Where allegations of a breach of consent are made, the local planning authority has a duty to investigate those concerns and, where appropriate, order remedial steps to be taken to bring a development back within similar terms to those on which consent was granted. In deciding whether enforcement action is necessary, the Commissioner also accepts that a local planning authority will need to engage with the developer and that this conversation is usually more productive if it is kept confidential.
18. The Commissioner accepts that although the enforcement case was closed at the time of the request, unfulfilled agreements remained outstanding up to and beyond the point that the request was responded to. The Commissioner accepts that disclosing the survey in relation to a previous enforcement case would prejudice the Council's ability to adjudicate on active cases in a way that would be seen to be fair.
19. The Commissioner therefore accepts that the disclosure of the information would adversely affect the Council's investigations.

Public interest test

20. The Commissioner has considered the EIR's presumption in favour of disclosure, in determining whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. The Council has stated that disclosure will increase access to information it holds and allow scrutiny of its decisions. It says that disclosure could make evident, the reasons for the Council's decision and increase public understanding, which will promote good decision making by public bodies. The Council says disclosure will contribute to public debate, safeguard the democratic process, increase accountability for the spending of public money, uphold standards of integrity and secure the best use of public resources.
22. In its public interest arguments to maintain the exception, the Council argued that disclosing the requested information would impact on possible enforcement action and be prejudicial to the Council's legal position in relation to those matters that remain to be concluded. It also argues that disclosure would not allow certain information to remain confidential to ensure effective investigations. It says that there is a strong public interest in the local authority being able to effectively carry out its legal obligations and planning enforcement investigations without damaging the integrity of a live investigation and harming the course of justice. The Council also noted that disclosure during an ongoing issue is likely to cause a greater degree of harm to an enquiry and would

potentially avert unnecessary use of public money that would inhibit the Council's ability to conduct its enquiry in an effective way. It argues that there is a wider public interest in enabling the Council to effectively investigate planning enforcement matters and protect the processes which support the smooth running of this investigation.

Balance of the public interest

23. The Commissioner recognises that the complainant may have an interest in accessing the information in order to understand what has been agreed. The public interest in this context relates to a wider public interest rather than an individual interest. The Commissioner considers that there is a broader public interest in protecting the ability of the Council to conduct investigations without unwarranted adverse effects.
24. Having considered the matter, the Commissioner is satisfied that in the circumstances of this case, the balance of the public interest favours maintaining the exception. While the Commissioner notes the implications of disclosure, it is his view that the public interest in maintaining the exception outweighs the public interest in disclosure and therefore regulation 12(5)(b) of EIR was engaged and the Council was not obliged to disclose the requested information.
25. In their complaint to the Commissioner, the complainant advised that names of any individuals mentioned was not required by them, therefore it has not been necessary for the Commissioner to consider the application of regulation 13 of EIR to the information.

Right of appeal

26. 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

27. 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.

28. 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

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