

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 May 2016

Public Authority: Cheshire East Council
Address: Town Hall
Macclesfield
Cheshire
SK10 1EA

Decision (including any steps ordered)

1. The complainant has requested information relating to inspections at Wood Treatment Ltd, Bosley. Cheshire East Council disclosed some information and withheld other information under the exception for the course of justice, regulation 12(5)(b) of the EIR.
2. The Commissioner's decision is that Cheshire East Council has correctly withheld the information under regulation 12(5)(b).
3. The Commissioner does not require the public authority to take any steps in this case.

Request and response

4. On 12 October 2015, the complainant wrote to Cheshire East Council (the "council") and requested information in the following terms:
"1. Dates and nature of all Cheshire East Council attendances at WTL Bosley since July 2014.
2. Copy reports/site notes/photos from such visits.
3. All photographs of the site, internal and external, taken on the visits 01 & 09 July 2015.
4. Recognising that you are unable to release details of individual complainants/informants, can you please confirm the source of the

information that led to the EXTRA visits being undertaken by Stephanie Bierwas (see attached letter) on 01 July 2015; i.e., resident, Environment Agency or similar authority another Council department (i.e. planning) etc.

5. Dates and nature of all complaints received by Cheshire East Council about the Bosley site since July 2014 and action taken, if any, on each occasion.

6. Reference is made within the letter of developing an installation action plan to ensure permit compliance. What are the plan and permit to which this requirement relates?

7. What is permit CEC/PPC/B/012?"

5. The council responded on 5 November 2015. It disclosed the dates specified in part 1 of the request and responded to parts 4, 6 and 7 of the request. The nature of site attendances requested in part 1 and the information in parts 2-5 of the request were withheld under the exception for the course of justice, regulation 12(5)(b).
6. Following an internal review the council wrote to the complainant on 15 December 2015. It stated that it was maintaining its position.

Scope of the case

7. On 11 January 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under regulation 12(5)(b).

Reasons for decision

9. The council withheld the nature of site attendances requested in part 1 and the information in parts 2-5 of the request under regulation 12(5)(b).
10. Regulation 12(5)(b) of the EIR requires that a public authority can refuse to disclose information if 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 enquiry of a criminal or disciplinary nature

Is the exception engaged?

11. The course of justice at regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice and the Commissioner considers that it is not limited to only information that is subject to LPP. This allows for information that are not subject to LPP to still be covered by the exception, as long as 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. The Tribunal affirmed this view in the case of *Surrey Heath Borough Council v Kevin McCullen and the ICO (EA/2010/0034)* when they acknowledged that the regulation covered more than just LPP.
12. The council has confirmed that the exception is being relied upon because it considers that disclosure would adversely affect the course of justice, specifically because it would adversely affect the ability to conduct an enquiry and the ability to conduct a fair trial.
13. The council has advised that the withheld information relates to an industrial accident at Wood Treatment Ltd., Bosley (WTL) on 17 July 2015 which resulted in 4 fatalities. The council confirmed that the cause of the accident and the resulting deaths are the subject of an ongoing investigation and that a working group consisting of Cheshire Police (the "Police"), the Health and Safety Executive, Cheshire Fire and Rescue and the council are actively involved in this process. The council confirmed that the withheld information forms part of the evidence being gathered by Police.
14. The council has confirmed that the incident is currently the subject of ongoing criminal proceedings. It explained that, at the time of the request (and now), the sentencing hearing still has not taken place, and at present a date has not been set. The council clarified that the Police still retain primacy over this incident and although the site has been released back to the owners a criminal investigation remains ongoing.
15. The Commissioner considers that it is clear that, disclosing the information at this time would have an adverse affect on the ongoing investigation and, it follows, the course of justice. He is, therefore, satisfied that the exception is engaged. He has gone on to consider the public interest test.

The public interest test

16. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, 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. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosing the information

17. The council has acknowledged that there is a public interest in the public having confidence in authorities' responsibility for enforcing the law. It has also recognised that there is a general public interest in disclosing information that promotes accountability and transparency in order to facilitate trust and confidence. The council has argued that, with these principles in mind, it has disclosed as much information within the scope of the request as it could do without prejudicing the ongoing police investigation.
18. The complainant has argued that, even if disclosure were to result in adverse effects, the information should be released unless, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Public interest in maintaining the exception.

19. The council has confirmed that the withheld information relates to a criminal investigation which was ongoing at the time of the request (and remains ongoing). The council has advised the Commissioner that the complainant is acting on behalf of Crawford and Company Adjusters Ltd which, in turn, is acting for WTL. It has confirmed that, when the case goes to court it is likely that the requested information will be shared by the prosecution with the defendants (WTL).
20. The Commissioner recognises that the degree of harm which would be done to the course of justice is closely linked to the timing of a request and the associated stage that a relevant process has reached. He accepts that the disclosure of information during an ongoing investigation is significantly likely to cause a greater degree of harm to an enquiry than after its completion. He has, therefore, given due weighting to this in his consideration of where the balance of the public interest lies.
21. In this case the Commissioner notes that the investigation relates to a potential criminal offence involving an incident which resulted in fatalities. He, therefore considers that there is a particularly strong public interest in allowing due process to be followed and for the smooth course of justice. The Commissioner has not been presented with any countervailing evidence which would justify interrupting this standard legal remedy to run its course.

Balance of the public interest

22. The Commissioner considers that it is not the purpose of the EIR to circumvent due legal remedies that are available and that, to do so, would be likely to undermine such processes and hence adversely affect the course of justice. Whilst he recognises that the complainant has a direct interest in accessing the information, the public interest in this context relates to the wider public interest rather than individual interests. He considers that there is a broader public interest in the smooth course of justice and the protection of such processes from unwarranted adverse affects.
23. In this instance, given the ongoing nature of the investigation prior to the trial, the grave nature of the incident and the potential seriousness of the outcome of any court proceedings the Commissioner considers that there is a particularly strong public interest in ensuring the smooth course of justice and maintaining the use of the exception.
24. The Commissioner considers that, in order for the strong public interest in maintaining the exception in this case to be overturned, there would need to be strong countervailing considerations in favour of disclosure. He has not been presented with any evidence that such considerations apply in this case.
25. In weighing the balance of the public interest arguments in this case, the Commissioner has given due consideration to the specific interests of the complainant as well as any wider public interest. Whilst the Commissioner accepts that these matters are not trivial, he does not consider that the weighting in favour of disclosure counterbalances the public interest in preventing adverse effect to the course of justice. He is also mindful that it is likely that the information would be made available to relevant parties to any court action should proceedings be undertaken, a fact which the complainant should know.
26. The Commissioner considers that the weighting is further shifted towards maintaining the exception by the fact that the requested information is still 'live'. The disclosure of the information, outside of the judicial process, would be likely to disadvantage the council's and other parties' position in the overall case and he accepts that it would weaken the general confidence in the ability to conduct proceedings.
27. In all the facts of this case the Commissioner is satisfied that the public interest favours maintaining the exception and that the council has correctly applied regulation 12(5)(b) to withhold the requested information.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Andrew White
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