

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 4 June 2018

**Public Authority:** Oxfordshire County Council  
**Address:** County Hall  
New Road  
Oxford  
OX1 1ND

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to Oxitec UK Limited. Oxfordshire County Council refused the request, citing the exception for the course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Oxfordshire County Council failed to provide some of the requested information in time and breached regulation 5(2), and that it has correctly withheld information under regulation 12(5)(b) and 12(5)(e) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 23 August 2017, the complainant wrote to Oxfordshire County Council (the "council") and requested information in the following terms:

*"Under the Environmental Information Regulations (EIRs), I am seeking the following information regarding alleged breaches of The Animal Feed (Hygiene, Sampling etc. and Enforcement), (England) Regulations 2015, or any other regulations, by Oxitec UK Limited:*

*1. The outcome of any investigations, including dates of any site visits, and a list of all breaches of regulations that were identified;*

*2. The amended protocols that have been changed as a result of these investigations;*

*3. The opinions of the Veterinary Medicines Directorate (VMD) and Food Standards Agency (FSA) in relation to this matter."*

5. The council responded on 27 September 2017. It stated that it was withholding the information in all 3 parts of the request under the exceptions for course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)).
6. Following an internal review the council wrote to the complainant on 1 November 2017. It stated that it was maintaining its position.

## Scope of the case

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7. On 15 November 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the council disclosed some of the information requested in part 1 of the request, namely, the outcome of the investigation. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the remaining requested information under regulation 12(5)(b) and regulation 12(5)(e).

## Reasons for decision

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### Regulation 5 – duty to provide environmental information

9. Regulation 5(1) requires that public authorities that hold environmental information must make such information available on request.
10. Regulation 5(2) requires authorities to comply with regulation 5(1) as soon as possible and no later than 20 working days after the date of receipt of the request.
11. In this case the council disclosed some of the information specific in part 1 of the request during the Commissioner's investigation, long after the time for compliance set within regulation 5(2).
12. In view of the above the Commissioner finds that the council breached regulation 5(2) in its handling of the request.

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

13. The council withheld the third strand of part 1 of the request ('...breaches of regulations that were identified.) and all of part 3 of the request under regulation 12(5)(b).
14. Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect :
  - the course of justice;
  - the ability of a person to receive a fair trial; and
  - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
15. In this case the council confirmed that it is relying on the exception provided by the third limb of the regulation, namely, the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The council confirmed that, in dealing with the request, it sought the views of Oxitec in respect of any concerns it might have about the disclosure of the information. The council provided the Commissioner with copies of relevant correspondence with Oxitec and the Commissioner has considered this alongside the council's own submissions.
16. The council confirmed that its Trading Standards department has the power to conduct inquiries under The Animal Feed (Hygiene, Sampling etc. and Enforcement) (England) Regulations 2015 (the "regulations"). It explained that Trading Standards are the feed and enforcement

authority under these regulations and regulation 21 places a statutory duty on each feed authority to execute and enforce inquiries of this sort

17. The council stated that Trading Standards received a complaint (from the complainant) in early 2016 in relation to Oxitec Limited's ("Oxitec") use of antibiotics in the feed it produces for insects. It confirmed that, on the basis of the complaint received and, in accordance with the regulations, an investigation was, therefore, conducted.
18. The council has argued that disclosing the information would prejudice the enforcement activities of Trading Standards, inhibiting its ability to conduct an inquiry and damage the integrity of its investigations. The council has argued that disclosing the information would discourage the full and frank discussions and engagement between Trading Standards and businesses in question, not just the company in the current investigation, but with the broader business community. It has argued that disclosure would prejudice Trading Standards' ability to carry out an inquiry in the fullest possible manner, as required to do so by the regulations.
19. On the basis of the council's submissions and, having referred to the withheld information, the Commissioner is satisfied that disclosing the information would inhibit free and frank discussions within Trading Standards and with external organisations under investigation and that this would adversely affects its ability to conduct an inquiry. As the exception is engaged, the Commissioner has gone on to consider the public interest.

### **The Public Interest Test**

20. 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 her 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 disclosure*

21. The council has acknowledged that disclosure would further the understanding of and participation in the public debate of how Trading Standards inquiries are conducted and the robustness of such inquiries.
22. The council has also stated that disclosure would promote accountability and serve the public interest in transparency around decision making.

23. The council has further stated that disclosure would allow individuals and companies to understand decisions made which affect a matter of great interest and, where relevant, would assist the public in challenging such decisions.
24. The complainant has argued that disclosure would assist the public's ability to contribute to environmental protection, particularly in this instance as there is a genuine public interest in preventing the spread of antibiotic resistant bacteria into the environment.
25. The complainant has also argued that the matter is of particular public interest because of Oxitec's interest in expanding its work in this area.

*Public interest in maintaining the exception*

26. The council has argued that disclosure would discourage full and frank discussions and engagement between businesses and regulators. It considers that the ability of regulators to conduct such investigations, particularly those involving safety matters or areas of new scientific/technological development would be adversely affected.
27. The council has also argued that disclosure of the information would inhibit its ability to comply with the statutory Regulator's Code. The council has stated that the Regulator's Code provides a principles-based framework for how regulators should engaged with those they regulate and includes the following requirements:
  - Regulators should seek to create an environment in which those they regulate have confidence in the advice they receive and feel able to seek advice without fear of triggering enforcement action
  - Regulators should provide an opportunity for dialogue in relation to the advice, requirements or decisions, with a view to ensuring that they are acting in a way that is proportionate and consistent.
28. The council considers that disclosing the information would cause reputational harm to a business under investigation in cases where, such as the inquiry which is the subject of this request, no offence has been committed.

*Balance of the public interest*

29. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in particular, the importance of not prejudicing inquiries.

30. The Commissioner notes that the inquiry in question had concluded at the time the request was submitted, however, as the matter is still relatively fresh she accepts that, in addition to harming the general principles identified in the exception, disclosure would result in adverse affects to the integrity of the specific inquiry and attract unwarranted scrutiny outside this particular mechanism of the course of justice.
31. The Commissioner acknowledges the complainant's concerns about the substantive issues which form the subject of this matter, however, it is outside the Commissioner's remit to examine whether the council's trading standards has reached correct conclusions in relation to the inquiry in question and she has no evidence that the council's trading standards' inquiry has not acted in accordance with its statutory responsibilities.
32. The Commissioner considers that other legal remedies are available for individuals to pursue this matter should they be dissatisfied with the outcome of such an inquiry and that disclosure of the information via EIR and outside these channels would not be appropriate in this case.
33. The council has emphasised to the Commissioner the severity of the negative impact which would arise from a loss of trust between businesses and trading standards. It has stated that, whilst regulators have powers to compel businesses to provide information, should the use of such powers become the norm, the result would be increased costs and severe delays, hindering trading standards' ability to carry out inquiries.
34. Having considered the withheld information and the council's and the complainant's submissions, the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.

#### **Regulation 12(5)(e) – commercial confidentiality**

35. The council withheld the information in part 2 of the request under regulation 12(5)(e), namely *"The amended protocols that have been changed as a result of these investigations"*.
36. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

37. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

38. The council explained that Oxitec's work is in the genetic engineering of insects for the control of insect pests that spread diseases and damage crops. It confirmed that the withheld protocols set out, in a detailed, step by step format, the technical procedures and processes for one of the company's key innovations – genetically modified mosquitos that can combat the spread of harmful diseases. The council explained that the withheld information sets out the processes by which Oxitec produces these products for lawful commercial gain.

39. Having considered the council's and Oxitec's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information is commercial in nature.

*Is the information subject to confidentiality provided by law?*

40. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.

41. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

42. The council has confirmed that the withheld information was provided to trading standards expressly on a confidential basis because of the risk to Oxitec's business if it were disclosed to third parties and, in turn, competitors. The council confirmed that, whilst Oxitec provided the information to Trading Standards, it was only shared with a limited group of people. It stated that Oxitec understood that the information was being shared with the council solely to assist it in complying with its

statutory duty to investigate a complaint made in relation to the regulations.

43. The council explained that that the information is not trivial in nature, relating to know-how that Oxitec has developed in respect of a core aspect of its business. It further confirmed that the information is not in the public domain.
44. The council confirmed that it considered that any reasonable person in the council's position would conclude that the information had been provided in confidence.
45. Having considered the council's and Oxitec's submissions and referred to the information, the Commissioner is satisfied that it is subject to confidentiality provided by law.

*Is the confidentiality provided to protect a legitimate economic interest?*

46. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
47. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
48. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:  
  
*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*
49. The council confirmed that the confidentiality in this case is designed to protect the legitimate economic interests of Oxitec.
50. The council explained that the Protocols developed by Oxitec are the result of a huge investment in time and money. It has stated that disclosing the information would provide competitors with a detailed

explanation of the work undertaken in respect of genetically engineered mosquitoes. Placing the information in the public domain would assist competitors in undermining the investments made by Oxitec by utilising Oxitec's expertise in a way which would be detrimental to Oxitec's commercial position in the marketplace. In short, disclosing the information would enable competitors to adapt and enhance their commercial strategies to the detriment of Oxitec.

51. Having considered the submissions provided by the council and Oxitec and referred to the withheld information the Commissioner is satisfied that disclosing the information would have precisely the effects which are identified in the exception. Namely, disclosure would result in harm to Oxitec's legitimate commercial interests.

*Would the confidentiality be adversely affected by disclosure?*

52. As the Commissioner has concluded that disclosure would result in harm to Oxitec's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.
53. As the Commissioner has concluded that the exception is engaged, she has gone on to consider the public interest.

*Public interest in disclosing the information*

54. The council has stated that disclosure of the information would allow individuals and companies to understand a process currently being undertaken in their area and assist them in raising concerns or challenging such process.
55. The council has also confirmed that disclosure would promote transparency in the decisions reached by trading standards by provided access to evidence supplied during the course of an investigation.
56. The complainant has argued that the information should be disclosed so that they can be reassured that Oxitec is complying with the regulations and that the environment and human health are protected.
57. The complainant has further argued that disclosing the information would promote public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of the Aarhus Convention, 1998, in order to contribute to environmental protection.
58. The complainant has also argued that the matter is of significant public interest because 'Regulation (EC) No 1831/2003 is intended to prevent

the use of antibiotics in animal feed in order to prevent the spread of antibiotic resistant bacteria into the environment, which is a matter of significant public health concern.'

59. Finally, the complainant has stated that the '...recent decision by the company to expand its GM insect factory, and hence its use of the antibiotic tetracycline in feed, increases the importance and urgency of this request'.

*Balance of the public interest*

60. The Commissioner acknowledges the complainant's concerns about the environmental and human health factors that are associated with this matter. She considers that there is a strong public interest in promoting public awareness of such issues and enabling, where appropriate, the public to have access to facts which might, in the interests of public safety, need to be challenged.
61. The Commissioner is mindful, however, that the inquiry carried out by trading standards is the appropriate regulatory mechanism via which public concerns in this regard are channelled. She notes that an inquiry has been carried out in this case and the outcome has been communicated to the complainant.
62. The Commissioner understands why the complainant might wish to examine the protocols themselves to be reassured that the regulator has reached the correct decision in this case. However, she also recognises that the information was provided to the regulator on a confidential basis and that disclosing the information would result in adverse affects to Oxitec's legitimate economic interests. She is not convinced that the damage to Oxitec's economic interests can be offset against the public interest in having direct access to the protocols when these have already been seen by and scrutinised by the relevant regulator.
63. The Commissioner has not been presented with any evidence that trading standards' inquiry has, in this case, been deficient or that disclosure is needed to provide additional reassurance that Oxitec's practices are a danger to the environment or human health. In the absence of such evidence, the Commissioner has concluded that the public interest in this case has been served by the inquiry and that the balance of the public interest, therefore, is weighted in favour of maintaining the exception.

## Right of appeal

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64. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.
66. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
**SK9 5AF**