

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 26 April 2016

Public Authority: Torbay Council
Address: Town Hall
Castle Circus
Torquay
TQ1 3DS

Decision (including any steps ordered)

1. The complainant requested information relating to dust monitoring data from a former gas works site. The Council refused to disclose the information citing regulation 12(5)(c) of the EIR. During the course of the Commissioner's investigation the Council also sought to rely on regulation 12(5)(e) and 12(5)(f). The Commissioner ascertained that the requested information had already been disclosed to the complainant by another public authority, and at this point the Council agreed to disclose the requested information.
2. The Commissioner's decision is that the Council breached regulation 5(2) of the EIR in that it disclosed the requested information outside the statutory time for compliance. No steps are required.

Request and response

3. On 26 October 2015, the complainant requested the following information from the Council:

"...a copy of all information/data held on the following since the start of operations on the Hollicombe site:

I quote from the Communications Strategy:

4th paragraph page 3 'A monthly email will be sent from RAW to the Council with the manual sampling results. This will include a copy of the monthly report produced by RAW.' This data is nothing to do with the real time monitoring and covers the dust and toxin levels in the long term and manual monitors around the site".

4. The Council responded to the complainant on 9 December 2015. It refused to provide the requested information, citing the exception at regulation 12(5)(c) of the EIR. This exception may be applied where disclosure of the requested information would adversely affect intellectual property rights.
5. The complainant requested an internal review on 25 November 2015. On 19 January 2016 the Council advised the complainant that, following the internal review, it maintained its decision to refuse the request in reliance on regulation 12(5)(c).

Scope of the case

6. The complainant contacted the Commissioner on 19 January 2016 to complain about the way his request for information had been handled.
7. The Commissioner contacted the Council on 16 March 2016 to request further information in respect of its handling of the request. The Council responded to the Commissioner on 11 April 2016. At this stage the Council advised the Commissioner that it also wished to rely on the exceptions at regulations 12(5)(e) and 12(5)(f) of the EIR. The Council confirmed that it had issued a revised refusal notice to the complainant.
8. The complainant confirmed to the Commissioner on 11 April 2016 that he had received the revised refusal notice. The complainant expressed dissatisfaction that the Council had sought to introduce further grounds for withholding the requested information.
9. On 19 April 2016 the complainant advised the Commissioner that another public authority, Public Health England, had disclosed the requested information to him, albeit with the names of individuals redacted. However the complainant wished to pursue his complaint about the Council, since he was of the view that the Council ought to have disclosed the information to him.
10. The Council advised the Commissioner that it had only become aware of Public Health England's disclosure after it issued the revised refusal notice on 11 April 2016. The Council agreed to disclose the information to the complainant, and did so on 22 April 2016.
11. The complainant confirmed to the Commissioner that he required a decision notice to be issued. The Commissioner's policy, where a public authority changes its position and discloses the information, is

to restrict his decision to consideration of the procedural elements of the legislation, and not the exceptions originally claimed.

Reasons for decision

Regulation 5(2): time for compliance

12. Regulation 5(2) of the EIR states that a public authority shall make information available in response to a request

"...as soon as possible and no later than 20 working days after the date of receipt of the request".

13. In this case the Commissioner notes that almost six months had passed between the original request and disclosure of the information. Accordingly he is obliged to find that the Council has breached regulation 5(2) of the EIR in disclosing the information outside of the statutory 20 day timescale.

Other matters

14. Although it does not fall within the scope of this decision notice the Commissioner wishes to comment on the Council's late reliance on additional exceptions.
15. Public authorities have the right to claim any exception for the first time before the Commissioner or the Tribunal. This was confirmed by the Court of Appeal in *Birkett v Defra*.¹ The Commissioner does not have discretion as to whether or not to consider a late claim.
16. However the Commissioner expects that public authorities will ensure as far as possible that relevant exceptions are cited as early as possible. The Commissioner also requires that authorities inform the complainant of any additional exceptions claimed, and provide a full explanation of their application as required by regulation 14 of the EIR.
17. The Commissioner is unlikely to uphold reliance on any exception if the public authority fails to provide specific and robust arguments in

¹ *Birkett v Defra* [2011] EWCA Civ 1606

support of its position. The onus is on the public authority to demonstrate that it has dealt with any request in accordance with the requirements of the EIR.

Right of appeal

18. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

19. 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.
20. 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

Sarah O'Cathain
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF