

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

### **Decision notice**

**Date:** 23 October 2017

**Public Authority:** Horsham District Council

**Address:** Parkside  
Chart Way  
Horsham  
West Sussex  
RH12 1RL

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

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1. The complainant has requested information relating to an acoustic sound test. Horsham District Council ("the Council") confirmed that information was withheld under regulation 12(5)(b) of the Environmental Information Regulations ("the EIR"). The complainant disputed the application of this exception.
2. The Commissioner's decision is that regulation 12(5)(b) is not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, ensuring that any personal data is redacted in accordance with the Council's obligations under the Data Protection Act 1998.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 14 September 2016, the complainant wrote to the Council and requested information in the following terms:

*This request is for information believed to be held by Horsham District Council. It relates to material information relating to an acoustic sound test report submitted to the Council in December 2013 by ACA Acoustics limited. The test measured the noise levels discharged by Bill's restaurant in Market Square, Horsham.*

*Please note that the details of the sound test is not what is sought as it is available on the portal.*

*It is a request for any emails, notes or other correspondence between Environmental Health Department and Planning Department relating specifically to the sound test, the methodology of the sound test and the results recorded.*

*Also requested is any material held relating to emails, notes and any other correspondence between Horsham District Council and persons representing Bill's restaurant prior to the south test being carried out and following its completion. The material sought is only that which specifically relates to the sound test.*

*This request for information is made in the knowledge that a previous application (case ref. number FER0619176) has been investigated by the Information Commissioner's Office. The result of that investigation is accepted by me. This application is new and is absolutely specific in its narrow search parameters.*

*Please also note that any material subject to legal privilege is 'NOT' being sought.*

6. The Council responded on 10 October 2016. It confirmed that relevant information was held but was exempt from disclosure under the exception provided by regulation 12(5)(b).
7. On 11 October 2016 the complainant requested an internal review. As part of this the complainant also sought to refine the request:

*I can narrow my request further by removing the request for information between Horsham District Council and the ACA Acoustician and Horsham District Council and Bill's restaurant. Perhaps this is where I have gone wrong.*

*I could not be clearer in my request that I do not require information which is subject to Legal Privilege.*

*I now only seek the following information – emails, notes and other correspondence between Environmental Health Department and Planning Department relating specifically to the sound test carried out by ACA Acoustics in December 2013, the methodology of the sound test and the results recorded.*

8. Following an internal review the Council wrote to the complainant on 8 November 2016. It maintained the earlier application of regulation 12(5)(b).

### **Scope of the case**

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9. The complainant contacted the Commissioner 17 January 2017 to complain about the way his request for information had been handled, and specifically that the Council had incorrectly applied regulation 12(5)(b).
10. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly applied regulation 12(5)(b).

### **Reasons for decision**

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#### **Is the information environmental?**

11. Information is "*environmental*" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(b), any factors that will affect, or be likely to affect, the elements referred to in 2(1)(a), will be environmental information. The requested information relates to the consideration of noise pollution. The Commissioner therefore considers that the request should be dealt with under the terms of the EIR.

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

12. Regulation 12(5)(b) provides an exception from the duty to disclose information where the 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*".

13. As explained in the Commissioner's guidance<sup>1</sup>, the exception encompasses any adverse effect on the course of justice, and is not limited to information only subject to legal professional privilege. In particular, the guidance clarifies that "*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*", are in effect sub-sets of the "*course of justice*".
14. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "*adverse*" effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "*would*" is "*more probable than not*".

What information has been withheld?

15. The Council has provided the Commissioner with a copy of the information withheld in this case. The Commissioner understands that this information relates to an approved planning application and associated concerns about noise pollution. The information contains:
  - Email correspondence between various parties, including Council officers and several businesses, between the dates of 14 November 2013 and 21 January 2014.
  - Four documents deriving from a ventilation business which contain plans and technical data.
  - A planning application decision letter deriving from the Council, dated for 16 December 2009.
  - A planning application noise assessment deriving from an acoustic testing business, dated for 31 July 2013.

Is the exception engaged?

16. Following receipt of the complaint, the Council was asked to provide submissions to the Commissioner in support of the applied exception. In

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

response, the Council provided submissions that argued that the withheld information was subject to legal professional privilege.

17. Following consideration of these submissions, the Council was asked to provide further information in respect of its position, and was referred to the Commissioner's guidance on legal professional privilege<sup>2</sup>. This was on the basis that the withheld information did not clearly represent communications between a client and legal adviser for the purpose of legal advice.
18. The Council subsequently provided further submissions that argued that the information, if disclosed, would adversely affect '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'.
19. The Commissioner considers that the Council has withdrawn reliance upon the argument that the information is subject to legal professional privilege, and is now relying upon two other scenarios to which the exception can apply. The Commissioner will therefore consider each of these scenarios in turn.

*'The ability of a public authority to conduct an inquiry of a criminal or disciplinary nature'*

20. The Commissioner has first considered whether the exception is engaged in respect of the conducting of an inquiry. In requesting the submissions for this exception, the Council was specifically asked to explain the basis on which the Council has a duty or power to conduct an inquiry, and further, how disclosure of the information would adversely affect the inquiry. The Council was also directed to the Commissioner's guidance on this exception.
21. The Commissioner considers that the meaning of 'an inquiry of a criminal or disciplinary nature' is likely to include information about investigations conducted in respect of potential breaches of legislation, for example, planning law or environmental law. To apply this exception, the disclosure must adversely affect the inquiry by causing real harm<sup>3</sup>.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

<sup>3</sup> <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/refusing-a-request/>

22. Having considered the Council's submissions, no clear explanation of the nature of the inquiry, its legal basis, its status, or how disclosure may adversely affect it has been provided. Whilst the Commissioner has reviewed the content of the withheld information, it is not appropriate for the Commissioner to speculate about the Council's reasoning and attempt to formulate arguments on its behalf. On this basis, the Commissioner does not find the exception to be engaged for this scenario.

*The ability of a person to receive a fair trial*

23. The Commissioner has secondly considered whether the exception is engaged in respect of the ability of a person to receive a fair trial.

24. The Council has informed the Commissioner that it considers the complainant is seeking the information in order to support litigation. In particular, the Council has received emails from the complainant in which he confirms he will pursue legal action against the Council, in addition to submitting a complaint against the Council to the police. The Council considers that the disclosure of the information would affect the Council's ability to defend itself when faced with criminal or civil legal challenges, and that it should have the ability to defend its position from any claim without having to reveal its position in advance. The Council considers that this would be unfair and unjust to the Council.

25. The Commissioner has considered the Council's submissions, including the withheld information. Having done so, the Commissioner does not consider that the Council has provided any clear explanation of the context of the withheld information, or how the alleged adverse effect would occur in respect of the Council receiving a fair trial. In particular, the Commissioner notes that the Council appears to have relied upon the general arguments normally associated with information that holds legal professional privilege.

26. In addition to the above, the Commissioner is mindful of the Tribunal decision of *Watts v Information Commissioner* (EA/2007/0022), in which the Tribunal highlighted the importance of a public authority giving careful consideration to any decision to withhold information in this scenario. In particular, the Tribunal emphasised in that case that the simple connection of information to the subject matter of a prosecution was not a sufficient justification for non-disclosure.

27. Having considered the Council's submissions, the Commissioner does not consider that the Council has provided sufficient evidence to prove that disclosure of the withheld information would cause an adverse effect. On this basis the Commissioner does not find the exception to be engaged for this scenario.

28. Having determined that the exception provided by regulation 12(5)(b) is not engaged, the Commissioner does not need to proceed to consider the public interest test for this exception.

### **Other matters**

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29. The Commissioner reminds the Council that the ICO provides full guidance for public authorities through its webpages. This guidance includes detailed advice on the application of the EIR exceptions.

## Right of appeal

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30. 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)

31. 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.
32. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**