

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 March 2024

Public Authority: Surrey County Council
Address: Woodhatch Place
11 Cockshot Hill
Reigate
RH2 8EF

Decision (including any steps ordered)

1. The complainant has requested information relating to Surrey County Council's (the Council) decision to approve works without a Temporary Traffic Regulation Order. The Council provided some of the information falling within scope of the request but refused to disclose the remainder of the information citing regulation 12(5)(f) (interest of the confider) of EIR as the basis for doing so.
2. The Commissioner's decision is that the Council has failed to demonstrate that the exception in regulation 12(5)(f) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information or issue a fresh response that does not rely on regulation 12(5)(f).
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

5. On 8 June 2023, the complainant wrote to the Council and requested information in the following terms:

“With reference to your email of 6 June 2023 what was the information provided with the request and who provided it?”
6. The Council responded on 30 June 2023 and stated that the request to carry out works on Epsom Downs Racecourse was received from the Jockey Club. It stated that the request was to carry out works to skim the road surface where it crosses the racecourse. The Council withheld the remainder of the information citing section 40(2) (personal information) of FOIA as the basis for doing so.
7. On 5 July 2023, the complainant requested an internal review in which they clarified that the information they were seeking is information submitted to the Council on which it based its incorrect conclusion that the road where it crosses the racecourse is not a public highway.
8. Following an internal review, the Council wrote to the complainant on 4 August 2023. It stated that the request for information was initially handled under the wrong access regime and that it should have been considered under the EIR instead of the FOIA. Therefore, the Council revised its position to withhold the information requested citing regulation 12(5)(f) of EIR.

Scope of the case

9. The complainant contacted the Commissioner on 17 October 2023 to complain about the way their request for information had been handled.
10. The Commissioner considers the scope of his investigation is to determine whether the Council was entitled to rely on regulation 12(5)(f) of EIR to withhold the requested information.

Reasons for decision

Is the requested information environmental?

11. The Commissioner agrees that the requested information is environmental information falling within the scope of regulation 2(1) of the EIR, and therefore the Council was right to handle the request under the EIR.

12. He has seen the requested information which relates to a request to approve works on a highway. The Commissioner considers that the requested information is likely to be information on the elements of the environment and has therefore assessed this case under the EIR.

Regulation 12(5)(f) Interests of the information provider.

13. Regulation 12(5)(f) states:

14. 12.— (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
15. (f) the interests of the person who provided the information where that person—
16. (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
17. (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
18. (iii) has not consented to its disclosure.

Would disclosure adversely affect the interest of the person/s who provided the information to the Council?

19. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.
20. In its internal review response, the Council stated that it considers that disclosure of the information requested would adversely affect the interest of the person who provided the information. The Council provided that:
- the person was not under any legal obligation to supply that information to any public authority;
 - the person supplying the information did not supply it in circumstances in which the public authority is entitled, apart from under the EIR, to disclose it;
 - the person supplying the information has not consented to its disclosure.
21. In its submission to the Commissioner the Council again relied on the same argument as in its internal review. It however stated that the person who provided the information was contacted, but they refused to

give consent for the information to be released. The Council added that due to the matter being a complaint, it believes that there could be an adverse effect on the information being released and the person who provided the information had said that they would be willing to discuss the issues directly with the complainant.

22. In this case the Commissioner considers that the arguments provided by the Council are generic, containing no reference to the specific information being withheld and no explanation of the causal relationship between disclosure and adverse effects to the information provider. While the Council states that it has consulted the person who provided the information to seek their view, it has provided no evidence as to the potential effects of disclosure.
23. In relation to the decision notice cited by the Council¹ the Commissioner considers that the conclusions he reached were predicated on specific arguments provided by the public authority which were linked to a particular context. The Commissioner has not been provided with any evidence from the Council which suggests that the same conditions apply in this case.
24. The Commissioner considers that the key element of this exception is for the public authority to demonstrate that the release of the information that has been withheld would adversely affect the interests of the provider and in so doing ensure that those particular interests of the provider are clearly identified, and that the explanation demonstrates a clear link between disclosure of the information that has been withheld and any adverse effect. The Commissioner does not consider that the Council has adequately demonstrated how the adverse effect would occur.
25. The Commissioner is left with the impression that the Council has sought to withhold the information on a general basis and that it has failed to explain what specific harm to the interests of the confider disclosure would cause. The Commissioner acknowledges that a case might be made for applying the exception but that the Council has failed to make it and he does not consider it to be his role to supply the Council's deficiencies or to make arguments on its behalf.
26. For the reasons set out above the Commissioner has concluded that regulation 12(5)(f) of the EIR is not engaged. He has not, therefore, gone on to consider the public interest test.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026457/ic-235003-x1v9.pdf>

Right of appeal

27. 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

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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