

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 10 February 2011

Public Authority: Stafford Borough Council
Address: Civic Centre
Riverside
Stafford
ST16 3AQ

Summary

The complainant requested a copy of all recordings that had been taken in respect of a neighbourhood dispute regarding a complaint about alleged excessive noise emanating from his property. The Council considered the request under the EIR and refused to provide the information citing regulation 12(5)(b). It also informed the complainant that in the event that regulation 12(5)(b) was no longer applicable it would need to consider whether it contained any personal information that would be exempt from disclosure under regulation 12(3). The Commissioner finds that regulation 12(5)(b) was engaged at the time of the request and has not therefore gone on to consider regulation 12(3). The Commissioner also recorded a breach of regulation 14(5)(a) and (b) in the way the request was handled.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 14 June 2009, as a result of the Council notifying the complainant that a complaint had been made about the noise of a cockerel crowing emanating from his property, the complainant requested the following information from the Council:

"...a copy of all recordings that have been undertaken against me."

3. The complainant also requested:

"...a copy of the calibration certificate for the equipment and history of maintenance together with a certificate of competency and qualifications of the individual whom analysed the recordings."

4. On 24 June 2009 the Council provided a substantive response to the complainant. The Council confirmed that it was:

"...only able to disclose the recordings once we have served an abatement notice and as we have not served a notice I am not able to provide the recordings...I will be able to let you have copies of the calibration information."

5. Not satisfied with the Council's refusal to provide the recordings, on 30 June 2009 the complainant requested an internal review of the Council's original decision and the Council communicated the outcome of its review to the complainant on 9 July 2009.

6. The Council informed the complainant that it considered the EIR to be the correct access regime under which to consider the request as the requested information related to noise emissions, and that, as it considered disclosure would adversely affect the conduct of an inquiry, it was refusing his request on the basis of regulation 12(5)(b). The Council added that if it were to serve an abatement notice requiring the complainant to control the noise from his cockerel, its investigation would be complete and the recordings could be made available.

7. However, the Council also informed the complainant that:

"If the recordings did become open for inspection, the Council would also need to consider whether they contained any personal information ...such information would be exempt from disclosure under regulation 12(3) and would need to be removed before sound recordings could be made available."

The Investigation

Scope of the case

8. In July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner firstly considered the request under the Data Protection Act, in order to establish whether the information constituted the personal information of the complainant, and if so, whether he would have been entitled to it under that regime. At that time it was considered that the information did not constitute his own data, and on 21 July 2010 the complaint became a valid section 50 complaint under the Act/EIR.
9. The complainant specifically asked the Commissioner to consider the following points:
 - The Council's failure (at the time of the complaint) to provide an internal review
 - The Council's refusal to provide the information
10. As the complainant has not complained about his request for the calibration certificate the Commissioner has not investigated this aspect of the request.
11. Although the Council has subsequently confirmed that its investigation is no longer ongoing and that regulation 12(5)(b) is no longer applicable, the Commissioner's investigation has focused on the situation at the time of the request. He notes however that any subsequent request for the same information would necessarily be subject to different considerations, as the investigation has concluded and regulation 12(5)(b) would no longer be relevant.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. Having previously been unable to speak to the relevant person at the Council, on 22 September 2010 the Commissioner contacted the Council to clarify whether it still intended to rely on regulation 12(5)(b) and for an estimated completion date of the investigation (he had previously been informed that the investigation had been suspended).
14. Between 23 September 2010 and 29 October 2010 the Commissioner tried to negotiate an informal resolution. It was explained to the

Commissioner that copies of the recordings could not be made, due to the software licence and the specialist nature of the software and the recording equipment. The Council said they could only be listened to at its offices. A member of the Commissioner's staff attended the Council offices on 13 October 2010 in order to assess a sample of the recordings, and the Council subsequently agreed to let the complainant attend its offices to listen to a five of the recordings it was sure did not contain personal data of third parties, but the complainant declined. Having been unable to agree an informal resolution, the Commissioner therefore considered the position at the time of the request, that is, when the investigation was ongoing.

Analysis

Substantive Procedural Matters

15. Details of the relevant legislation applicable to this case are reproduced in full in the attached legal annex.

The appropriate access regime

16. The definition of environmental information is set out in regulation 2(1) of the EIR which states that:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

17. The Commissioner considers that tape recordings of a cockerel crowing are captured by regulation 2(1)(b) of the EIR and is therefore satisfied that the requested information is environmental information.

Exceptions

Regulation 12(5)(b)

18. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that 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 inquiry of a criminal or disciplinary nature. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial."

19. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Venderers of the New Forest* [EA/2008/0020], which stated,

"...the Regulations refer to the 'course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice...'"

20. The Council has argued that the disclosure of the information would adversely affect the conduct of an inquiry as it had not (at the time of the request) decided whether a Noise Abatement Order should be served. It took the view that releasing the information at that stage in the investigation would be premature and prejudicial to the inquiry.
21. In deciding whether this exception has been applied correctly, the Commissioner has considered whether the withheld information related to an inquiry or investigation conducted by the Council of a criminal or disciplinary nature. The Commissioner is satisfied that the information would form part of the evidence the Council would later rely on, in the course of its investigation into the complaint of excessive noise emanating from the complainant's property.
22. The Council has argued that the premature release of information collected as part of a current investigation into an alleged nuisance, could unwittingly allow subjects of investigations to artificially alter their patterns of behaviour or even seek to avoid further detection during the remainder of the investigation. The Council believes that this would undermine the ability of investigators to obtain a true account of all relevant contributing factors to a nuisance, in order to make a fully informed view over a period of time. The Council has further argued that this would adversely affect the ability of investigators to plan and

complete investigations without fear of potential offenders temporarily altering their behaviour in order to avoid detection.

23. The Commissioner accepts that disclosure of information which forms part of an investigation, however innocuous the information itself may appear, would risk the integrity of the investigation as outlined above by the Council. The Commissioner is therefore persuaded that as the investigation was ongoing at the time of the request disclosure would have an adverse affect on the Council's ability to conduct the investigation. Accordingly, he finds that the exception is engaged and has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

24. The complainant argued that the disclosure of the information is incompatible with his right to a fair trial as its non-disclosure would put him at a disadvantage.
25. The Commissioner is mindful of the fact that there is a strong presumption in favour of disclosure of information under the EIR as stipulated in regulation 12(2) which states:
"A public authority shall apply a presumption in favour of disclosure."
26. The Commissioner has also considered that the disclosure of the requested information would promote a general transparency and accountability in the actions of the Council.
27. More specifically, the Commissioner also recognises that disclosure of the information could build confidence in the Council's investigative and enforcement activities as it would demonstrate that the Council has conducted a thorough and fair investigation of the complaint. This in turn would enhance its standing in terms of its investigation of complaints.

Public interest arguments in favour of maintaining the exemption

28. The Commissioner is mindful that there is a strong public interest in the public maintaining confidence in the ability of the Council to ensure that its conduct of the investigation into this complaint is fair and thorough. The Commissioner considers that the disclosure of information used as part of its investigation makes it vulnerable to accusations of a flawed investigation as outlined in paragraph 22 of this notice. The Commissioner therefore considers that disclosure would be prejudicial to the Council's ability to conduct a fair, thorough and effective investigation.

29. The Commissioner is also mindful of the fact that disclosure could endanger the confidentiality of information provided by individuals and organisations. He recognises that its disclosure may inhibit its ability to communicate freely and frankly with individuals in the course of future investigations. This, in turn would inhibit its ability to conduct future investigations thoroughly and effectively as third parties would be less willing to volunteer information.

Balance of the public interest arguments

30. The Commissioner notes the complainant's argument about his right to a fair trial but whilst he fully concurs with the right of an individual to a fair trial, he is not persuaded by the argument in the circumstances, and even if he were, he considers that the private interests that might be served by a limited disclosure of information to a particular individual are less relevant to an assessment of the public interest.
31. The Commissioner would highlight his previous Decision Notice (FS5008944, paragraphs 17 and 18) in this regard, as he considers it relevant to this case even taking into consideration that it dealt with the application of section 30 of the Act. It stated:

"...there needs to be balanced the potential impact of disclosure on the success of the public authority's investigation; and the prejudicial effect that disclosure will have on the ability of the public authority to effectively perform its regulatory functions.

The Commissioner has considered the competing public test arguments, in favour of maintaining the exemption and in favour of disclosure, in the context of the information held in the analysis section of HSE's report into this case. It should be made clear at this stage that the Commissioner's concern is not with the private interest of individuals, however understandable that interest might be or however sympathetic he may feel towards it. As the Information Tribunal recognised in its decision in the case of Hogan v Oxford City Council (Tribunal reference: EA2005/0026 and EA2005/0030, paragraph 61): 'the public interest test is only concerned with public interests, not private interest (my emphasis). While the analysis (which would not, in any event, add materially to the complainant's knowledge of the accident) will clearly be of interest to the complainant, this does not necessarily mean there is a wider public interest that would be served by its release. It is important for public confidence in the activities of HSE that accidents should be thoroughly investigated by it, and that its ability to discharge its statutory functions should be effective and unimpeded.'

32. Whilst the Commissioner recognises the strong public interest in favour of transparency, accountability and building confidence in the Council's

investigative and enforcement activities, he is mindful of the fact that the investigation was ongoing at the time of the request for information and this fact means that very considerable weight should be given to the public interest in maintaining the exception. As previously stated, the disclosure of the information during the course of an investigation could impact on the Council's ability to conduct its investigation in a thorough, fair and consistent manner. The Commissioner is also mindful of the effect that disclosure could have on the effectiveness of future investigations.

33. The Commissioner has therefore concluded that the balance of public interest favours maintaining the exception and accordingly, regulation 12(5)(b) is engaged. As the Commissioner has determined that regulation 12(5)(b) is engaged, he has not gone on to consider the Council's application of regulation 12(3) in respect of the third party data held on some of the recordings.

Procedural Requirements

Regulation 14 – Refusal of the request

Regulation 14(5)

34. Regulation 14(5) places a duty on the public authority to provide details of its internal complaints procedure and the appeal provisions of the Act as applied by regulation 18.
35. The Commissioner notes that the Council failed to provide details of its internal complaints procedure or the appeal provisions under regulation 18 of the EIR in either its refusal notice or its internal review. The Commissioner has therefore recorded a breach of regulations 14(5)(a) and (b) of the EIR.

The Decision

36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
- Its refusal to provide the information at the time of the request by virtue of Regulation 12(5)(b) of the EIR.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- By failing to provide details of its internal complaints procedure or the appeal provisions of the Act, the Council breached Regulation 14(5)(a) and (b) of the EIR.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 10th day of February 2011

Signed

**Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2(1)

In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (c) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (d) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (e) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (f) reports on the implementation of environmental legislation;
- (g) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

- (h) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given in paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

"transferred public record" has the same meaning as in section 15(4) of the Act; and

"working day" has the same meaning as in section 10(6) of the Act.

Regulation 12(3)

To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 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 –

- (b) 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;

Regulation 14(5)

The refusal shall inform the applicant –

- (c) that he may make representations to the public authority under regulation 11; and
- (d) of the enforcement and appeal provisions of the Act applied by regulation 18.