

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 October 2019

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Royal Leamington Spa
CV32 5HZ

Decision (including any steps ordered)

1. The complainant requested from Warwick District Council ("the Council") information in relation to noise nuisance complaints submitted to the Council. The Council responded by providing some information and cited regulation 12(4)(b) of the EIR as the basis for refusal claiming that complying with the remaining parts of the request would exceed the costs limit.
2. The Commissioner's decision is that the Council has provided all the information it held within the scope of questions 6 and 10 and it was correct when it applied the exemption provided under regulation 12(4)(b) of the EIR in relation to questions 1, 2, 3, 4, 5, 7, 8 and 9.
3. The Commissioner also found that the Council has complied with its duty to provide advice and assistance as required by regulation 9 of the EIR.
4. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

5. On 10 December 2018, the complainant wrote to the Council and requested information in the following terms:

"1. Can you confirm the number of noise nuisance complaints received by Warwick DC in relation to licensed premises in Leamington Spa; this to only relate to bars, clubs & restaurants.

2. Can you confirm the number of those noise complaints which were subsequently investigated by the WDC Environmental Health team.

3. Can you detail the number of visits made by WDC EH team following the initial complaint & the amount of time between each visit.

4. Can you confirm whether each visit to a premises was as a consequence of a further/ subsequent complaint

5. What dates were complaints received & which premises gave rise to the complaints

6. Can you confirm how many noise abatement notices were issued under the Environmental Protection Act 1990 and which premises were they issued to

7. In all circumstances where a noise abatement notice was issued, can you provide a comprehensive list of dates from the initial complaint, through each visit to the premises by the EH department to the date of the issue of the abatement notice

8. Can you confirm all instances where a breach of abatement notice has been issued by WDC EH department & which premises they relate to

9. Can you provide a comprehensive list of dates from the issue of abatement notice through subsequent visits to the complainants property to the date of issue of the breach of abatement notice

10. Can you confirm whether visits to a complainants property are at the request of a complainant or the council officers."

6. The Council responded on 9 January 2019. It stated that:

- in order to respond to questions 1, 3, 4, 5, 7, 8 and 9 it would have to assess manually a large number of records and that process would exceed the appropriate time limit, thus the Council refused to respond to these questions relying on section 12 of the FOIA.

- in relation to question 2 the Council stated: *"All noise nuisance complaints about commercial buildings (including bars, clubs and restaurants) are dealt with under the Environmental Protection Act 1990. The Council will advise and investigate all complaints on its own merits."*
 - in relation to question 6, the Council provided the complainant with an excel spreadsheet recording the abatement notices served.
 - in relation to question 10 the Council stated that *"Complainants are advised, that officers need access to the complainant's property to assess the nuisance"* and provided the complainant with a link¹ containing information on how the Council deals with noise complaints.
7. On the same day, the complainant requested an internal review. He also stated that he was aware of an earlier request for similar information from a third party, which received a more detailed and comprehensive response.
8. The Council provided the complainant with the outcome of its internal review on 4 February 2019. The Council informed him that due to its environmental implication the information request should have been dealt under the EIR. It now cited regulation 12(4)(b) as the basis of its refusal to comply with the request. This provision allows public authorities to refuse a request if dealing with it would create unreasonable costs or unreasonable diversion of resources. The Council stated that *"The information requested at Questions 1, 3, 4, 5, 7, 8 and 9 is for specific information relating to noise complaints received by the EH department over a 10 year period (2008-2018). You have been advised that there are 1248 service requests recorded related to noise...The time estimate produced estimates a total of 541 hours to deal with the request therefore given the time involved the decision is to refuse the request on these grounds."*

Scope of the case

9. The complainant contacted the Commissioner on 27 February 2019 to complain about the way his request for information had been handled. He expressed his dissatisfaction with the amount of information he

¹

https://www.warwickdc.gov.uk/info/20109/crime_and_law_enforcement/109/noise_or_neighbour_nuisance

received in response to questions 6 and 10 and the application of regulation 12(4)(b) in relation to questions 1, 2, 3, 4, 5, 7, 8 and 9.

10. During the course of the Commissioner's investigation, the Council explained that after revisiting and reconsidering the request, it concluded that, due to the way it had been formulated question 2 should have been read in conjunction with question 1 and should also have been refused under regulation 12(4)(b). The Council informed the complainant of this change of position.
11. The Commissioner has therefore focused her investigation on the following:
 - whether the Council provided all the information it held within the scope of questions 6 and 10 as required by regulation 5(1) of the EIR; and
 - whether the Council correctly applied regulation 12(4)(b) of the EIR in relation to questions 1, 2, 3, 4, 5, 7, 8 and 9.

Reasons for decision

Is it environmental information?

12. As explained above, during the course of its internal review the Council considered that the information requested was environmental in nature and decided to apply the EIR access regime.
13. Regulation 2(1) of the EIR defines what "environmental information" consists of. In the circumstances of this case, the relevant parts of the definition are found in regulation 2(1)(a) to (c) which define environmental information as any information in any 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);

(c) 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..."

14. The Commissioner considers that the phrase "any information...on" should be interpreted widely in line with the purpose expressed in the first recital of the *Council Directive 2003/4/EC*², which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity or factor in question.
15. The Commissioner considers that the noise nuisance complaints and noise abatement orders are measures under regulation 2(1)(c). As the requests relate to noise which is a factor under 2(1)(b), she considers that the requests fall within the EIR.
16. In this respect, the Commissioner considers that the Council was correct when it decided to handle the complainant's request under the EIR.

Regulation 5 – Duty to make environmental information available on request

17. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
18. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
19. The Commissioner invited the Council to submit its submissions in relation to the searches it conducted to identify the information it held at the time of the request.
20. The Council confirmed that it believed that it had provided all the information it held within the scope of questions 6 and 10.

² http://www.legislation.gov.uk/eudr/2003/4/pdfs/eudr_20030004_adopted_en.pdf

Relating to question 6

21. In relation to question 6 the Council explained that complaints about noise are submitted to the Council by letter, email, telephone or online via its web-page. These complaints subsequently are logged on a data management system which is called *Civica APP*.
22. The Council stated that noise complaints are known as requests for service and each noise complaint has a unique reference number which makes it identifiable in its management system as a case in its own right. Each case has records of all actions taken regarding the relevant complaint. The Council explained that in some cases it is necessary to issue a Noise Abatement Notice (NAN).
23. The Council explained that *"In all but the most serious cases, EHT offices take a graduated approach to enforcement and initially try to work with a premise owner to resolve a problem. The consequence of this is the number of NANs received by the Council is small in comparison to the number of complaints received which may explain why [the complainant] considers the Council has not provided all the information requested."*
24. The Council confirmed its view was that all necessary searches had been conducted and that no further information was identified beyond what had been disclosed.
25. The Council stated that no information falling within the scope of this part of the request was deleted or destroyed. It provided the Commissioner with its Records Management Policy and Retention Schedule and explained that NANs are required to be kept permanently.
26. The Council explained that the business purpose for NANs to be kept is to enable the Council to comply with its statutory responsibilities under the Environmental Protection Act 1990 (EPA).

Relating to question 10

27. The Council explained that in the absence of a specific policy on the subject matter of this request it provided the complainant with the response explained in paragraph 6 of this decision notice, and provided a web-link containing further information on how the Council handles noise complaints.
28. The Council explained that during the handling of this request and the Commissioner's investigation, its regulatory manager conducted searches in its internal files but did not identify any further information relevant to this request. The regulatory manager also enquired with relevant officers if a specific policy on visits relating to noise complaints

existed. These searches did not locate any additional recorded information falling within the scope of this part of the request.

29. The Council confirmed that, to its knowledge, there has not been any information deleted or destroyed that would fall within the scope of the request. It explained that its Records Management Policy and Retention Schedule obliges the Council to retain permanently copies of its policies, which means that if a policy of operational procedures existed, a paper copy would have been kept.
30. The Council explained that there is no business purpose or statutory obligation to have a policy on its operational procedures in place.

Regulation 5 conclusion

31. Whilst the Commissioner recognises that the complainant does not consider that the Council has fulfilled these requests, it has provided a clear explanation of the searches that underlay its responses. No evidence is available to the Commissioner that indicates that the Council's searches and efforts to comply with these requests have been insufficient, or that further recorded information is held.
32. In conclusion, the Commissioner has considered the searches performed by the Council, the amount of information provided, the Council's explanations as to why there is no further information held and the complainant's concerns. On the balance of probabilities, the Commissioner considers that the Council does not hold any further information to that already provided in relation to question 6 and question 10.

Regulation 12(4)(b) – manifestly unreasonable

33. The Council's position is that the request was manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on the Council's resources, in terms of officer time and cost.
34. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either as it is considered vexatious, or on the basis of the burden that it would cause to the public authority. In this case the Council is citing regulation 12(4)(b) due to the burden the request places on it.
35. The EIR differ from the Freedom of Information Act 2000 (FOIA) in that there is no specific cost limit set for the amount of work required by an

authority to respond to a request, as that provided by section 12 of the FOIA.

36. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.
37. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is “manifestly” unreasonable, rather than simply being “unreasonable”. The Commissioner considers that the term “manifestly” means that there must be an obvious or clear quality to the identified unreasonableness.
38. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the DBERR case³ where the Tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

“We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be ‘to the widest extent possible’. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information.”

39. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
 - Proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority and the

³ Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097

resources available to it, including the extent to which the public authority would be distracted from delivering other services.

- The nature of the request and any wider value in the requested information being made publicly available.
 - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
 - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
 - The presumption in favour of disclosure under Regulation 12(2).
 - The requirement to interpret the exception restrictively.
40. The Council responded to the Commissioner's enquiries by sending her its arguments in support of its position.
41. The Council stated that the information requested by the complainant is not recorded in the format requested: *"As such, in order to answer fully the requests made by [the complainant], an officer would first need to access each of the 1248 records separately to determine what data was on each record, then whether the relevant data is held on each record and manually record any relevant data (as described above) in some form of spreadsheet/word document. In each case, this would involve accessing each Action Diary, reading each action, following any links to saved documents on the network, reading each document, then manually recording from there any relevant data."*
42. The Council maintains that it would take an estimate of 541 hours to deal with the complainant's information request. This effort would include manually examining 1248 casefiles to determine whether information within the scope of questions 1, 2, 3, 4, 5, 7, 8 and 9 was held. The Council explained that reviewing each casefile would take approximately 20 minutes, *"based on average of 5-10 actions per complaint (noting that some complaint records may have just 2-3 actions, whereas others can have in excess of 30-40 actions)."*
43. Upon receiving the Commissioner's investigation letter, the Council carried out a sampling exercise to confirm this estimate and provided the Commissioner with its detailed results.
44. The Council examined 4 casefiles of complaints received in order to determine whether the information requested by the complainant is held and to extract them on a separate spreadsheet. The spreadsheet

provided shows that it took a Council officer 1 hour and 13 minutes to search 4 records. The minimum amount of time spent examining a case file was 12 minutes, whereas the most voluminous one out of these four casefiles required 27 minutes to be reviewed.

45. The Council confirmed that this was the quickest method of gathering the requested information.
46. Having considered the Council's response, its arguments and the evidence provided in respect of how it records and maintains the relevant information and the actions it undertook to address the request in this case, the Commissioner is of the view that complying the complainant's request would incur excessive costs and impose an unreasonable burden to the Council.
47. The Commissioner accepts that the complainant's request would take the Council a very substantial amount of time to comply with, and that this means that the request was manifestly unreasonable. Regulation 12(4)(b) is, therefore, engaged.

The public interest test

48. The Council's reliance on regulation 12(4)(b) is subject to consideration of the public interest test. The Commissioner must decide whether the public interest in the maintenance of the exception outweighs the public interest in disclosure of the requested information.
49. The Commissioner will always give weight to factors which favour the disclosure of information which would increase the public's understanding of the actions taken by the Council and of the processes by which it makes its decisions. Such disclosure of information enhances transparency and provides accountability of public authorities.
50. The public interest test in this case concerns whether the Council should be required to carry out activities to locate and retrieve the information described by the complainant's request where to do so would be time consuming and costly.

Public interest arguments in favour of disclosure

51. The Commissioner appreciates that the request relates to issues that are of concern to the complainant, and that some of these issues may have a direct impact on the complainant's community. The disclosure of the requested information may therefore allow the complainant to better understand the basis and the nature of these issues.
52. The Council acknowledged and considered at the time of the request that there were accepted reasons why it is in the public interest that this

type of information is made available to demonstrate its transparency and accountability, to inform members of the public about the process of its decision making, as well as the duty to increase public awareness and understanding of how the Council's EHT officers have responded to noise nuisance complaints.

53. The Council also took into account that there is a presumption of disclosure under the EIR and it gave the necessary consideration when it took its decision to apply regulation 12(4)(b) – manifestly unreasonable on the grounds of costs.

Public interest in favour of maintaining the exception

54. However, the Council asserted that it considered that the public interest in maintaining the exception provided under regulation 12(4)(b) lies in protecting the Council from exposure to disproportionate burden and an unjustified level of disruption or irritation in handling the requests.
55. The Council considered that responding the complainant's request in its entirety would place a strain on resources and would get in the way of the Council delivering its mainstream services. The whole process would take an extensive amount of its officers' work time that could not be objectively justified.

Balance of the public interest

56. The Commissioner recognises the importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
57. Having examined the submissions of both parties, the Commissioner's position is that the public interest in this case lies in ensuring that the Council's resources are used effectively and are not diverted from its other core business functions. Therefore in all of the circumstances she considers that dealing with the complainant's requests do not best serve the public interest. Consequently the public interest lies in favour of maintaining the exception under regulation 12(4)(b).

Regulation 9 – Duty to advise and assist

58. Regulation 9(1) of the EIR states that:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

59. When a request is refused because it is burdensome and thus manifestly unreasonable, the Commissioner considers that the public authority should provide the requestor with advice and assistance such that the request can be refined to bring it within a reasonable cost.
60. The Commissioner notes that the Council in its initial response of 9 January 2019 advised the complainant that if he would like to refine his request, it could be reviewed. The Council also explained that, when it acknowledged receipt of the request for internal review, it sought further clarifications from the complainant as part of its efforts to bring the request within the limit of costs. However, the Council did not receive any further clarification or refinement of the request from the complainant.
61. In light of the above, the Commissioner has concluded that the Council complied with regulation 9 of the EIR in its response to this request for information.

Right of appeal

62. 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@justice.gov.uk

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

63. 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.
64. 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

Ben Tomes
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