

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

Decision Notice

Date: 4 June 2021

Public authority: Royal Borough of Kensington & Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant requested information relating to the Council's handling of a noise complaint about her family home. The Council provided some of the requested information and stated that the remainder was not held. The Council withheld some information in reliance on the exception at regulation 12(5)(b) of the Environmental Information Regulations 2004 (EIR) on the basis that disclosure would adversely affect the course of justice.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(b) in respect of the withheld information. On the balance of probabilities the Commissioner also finds that the Council does not hold any further information relevant to the request other than that which has already been identified. No steps are required.

Background

3. The complainant in this case has been in dispute with the Council for several years regarding the Council's handling of noise complaints submitted by the complainant's neighbour about the complainant's family home. The Council issued an abatement notice in 2015, which the complainant appealed via the Magistrates' Court in 2016. The Court upheld the Council's decision to serve the abatement notice, but varied the terms of that notice. The Council subsequently withdrew the abatement notice.

4. The Commissioner has issued a number of decision notices involving requests for related information.¹ This decision notice should therefore be read in conjunction with the decision notices issued in respect of the other complaints submitted by the complainant regarding these linked requests.

Request and response

5. On 7 January 2020 the complainant submitted a multi-part request for information to the Council. The request was intermingled with the complainant's comment and opinion on the way the noise complaint had been handled by the Council. Therefore the Commissioner has extracted the parts of the correspondence describing the information sought by the complainant:

All information requested is in relation to the piano dispute throughout the duration of legal proceedings, between 7th April 2015 and 4th July 2017.

The information requested is:

1. Environmental Health Officers' Communications

Instructions given to the environmental health officers, Dom Stagg, Melanie Adam, James Guinan and Raymond Asagba, with respect to the preparation of their witness statements submitted to the Westminster Magistrates' Court on 17th August 2015.

2. Councillor Involvement and the Decision to Appeal

a) Who specifically provided updates to the Leader, Cllr Paget Brown, and his fellow Cabinet Members between 17th February 2016 and 21st July 2016?

(b) [letter added by the Commissioner for reference] Please disclose these "updates" (correspondence, documentation, minutes of meetings etc.) from the Bi-borough Director of Environmental Health (Nicholas

¹ Including FER0808893, FER0817232, IC-47441-M3J6 and IC-40388-W6P0

Austin) or his representative, to Cllrs Paget-Brown, Coleridge and / or Ahern.

3. Communications to and from Senior Officer Keith Mehaffy from 17th February 2016 until the 21st July 2016

The information requested is:

a) Communication between Mr Mehaffy and the complainant, from 17th February 2016 until the 21st July 2016; and

b) Mr Mehaffy's communications with his senior officers and the RBKC legal department from 17th February 2016 until the 21st July 2016;

4. External Legal Counsel

a) Whose decision was it to terminate the services of legal counsel, Mr Jack Parker, prior to the Magistrates' Court hearing?

b) What were the reasons given for the termination of Mr Parker's services?

c) What was Mr Parker's legal advice to RBKC in respect of RBKC's prospects of success in the Magistrates' Court proceedings?

Please verify with the relevant correspondence.

5. [Number added by the Commissioner for reference] a) What was Mr James Pereira's advice with respect to the council's prospects of success in the High Court appeal hearing and the merits of their appeal?

6. On 27 January 2020 the Council advised the complainant that it was extending the time for compliance as permitted under regulation 7 of the EIR. The Council explained that the complexity of the searches required additional time, and indicated that a substantive response would be issued by 3 March 2020.
7. The Council responded to the request on 2 March 2020 (albeit that its correspondence was dated 28 February 2020). It stated that it did not hold information relating to parts 1, 2b and 3b of the request. It provided information in response to parts 2a, 4a and 4b.
8. It also indicated that some information falling within the scope of part 3b and part 4c would be subject to legal professional privilege, although it was not clear whether the Council actually held information relevant to part 4c.
9. Finally, the Council refused to provide information falling within the scope of part 3a on the basis of regulation 12(3). The Council did not address part 5a of the request in its response.

Scope of the case

10. The complainant contacted the Commissioner on 5 March 2020 to complain about the Council's response to her request.
11. The Commissioner does not usually accept complaints for investigation unless the complainant has exhausted the public authority's internal review process. However, in this case the Commissioner is mindful that the complainant has been in correspondence with the Council for a number of years regarding various information requests on the related subject matter. The Commissioner has issued a number of decision notices in respect of these requests, the most recent of which found that the Council was entitled to refuse requests as manifestly unreasonable. The Commissioner considers that this latest request represents an attempt by the complainant to submit a refined request that is not manifestly unreasonable. Therefore she considered it appropriate to accept the complaint for investigation without requiring a further internal review.
12. As set out in previous decision notices involving this complainant, the Commissioner has emphasised that some of the requested information, if held, could be the complainant's personal data. This is because the request relates to a noise complaint that was made about the complainant's family by their neighbour. Regulation 5(3) of the EIR states that the personal data of the applicant does not fall within the scope of the EIR. Therefore the Commissioner's decision relates only to the information that, if held, would not be the complainant's personal data.
13. The Commissioner would also reiterate that her role is to decide whether a particular request has been handled in accordance with the requirements of the EIR. She cannot comment on or become involved in the complainant's wider dispute with the Council.
14. During the course of the Commissioner's investigation the Council conducted further searches and confirmed that it did not in fact hold information falling within the scope of parts 3a, 3b and 4c of the request. The Council also confirmed that it did hold information falling within the scope of part 5a of the request. The Council considered that this information was exempt on the basis that it was subject to legal professional privilege and cited the exception at regulation 12(5)(b).
15. In light of the above the Commissioner has examined whether the Council was correct to state that it does not hold information relating to parts 1, 2b, 3a, 3b and 4c of the request, and whether the Council was entitled to rely on regulation 12(5)(b) in respect of part 5a.

Reasons for decision

Regulation 5(1): duty to make information available

Regulation 12(4)(a): information not held

16. Regulation 5(1) of the EIR states that, subject to other provisions, a public authority that holds environmental information shall make it available on request. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
17. The Council's refusal notice stated that it had conducted searches but did not locate any information relating to parts 1, 2b and 3b of the complainant's request.
18. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.
19. The Commissioner asked the Council to explain how it was satisfied that it had conducted an adequate search for the requested information. With regard to part 1 of the request, the Council said it had consulted with relevant business areas, namely legal staff, and noise and nuisance officers. The legal department advised that it did not give written instructions to officers, and that if any relevant information had been held it would have been located when searching Acolaid, the environmental health database used by the Council.
20. With regard to part 2b of the request, the Council said it had conducted an e-discovery search using the complainant's surname, the surname of the person who complained about the noise, and the street name. The search was confined to the dates specified by the complainant. The Council's reasoning was that any information falling within the scope of the complainant's request would be likely to contain one or more of these search terms.
21. With regard to part 2b of the request, the complainant referred the Commissioner to correspondence dated 9 June 2016 from the then Leader of the Council. This correspondence said that councillors had

been “fully briefed by Council officers”. In the complainant’s opinion this suggested that the requested information was held by the Council.

22. The Commissioner understands why the complainant may believe that the Council ought to hold the information she has requested. However the Commissioner would stress that she can only investigate whether recorded information is actually held, not whether it ought to be held. A statement that councillors were briefed on an issue does not, in the Commissioner’s opinion, constitute evidence that recorded information is held in respect of such a briefing, and the Commissioner has seen no evidence to suggest that recorded information is in fact held. In the absence of evidence to the contrary, the Commissioner considers it reasonable to conclude that such a briefing is likely to have been verbal, and that records of a verbal briefing were unlikely to have been created.
23. With regard to parts 3a and 3b of the request, the Council said that it had undertaken a trawl of the case notes and had not located any relevant correspondence as described by the complainant. The Council also pointed out that previous e-discovery searches, undertaken in response to similar requests made by the complainant, had not located any relevant correspondence.
24. Again, the Commissioner acknowledges the complainant’s reasons for not accepting the Council’s position that it does not hold information. The complainant appears to assume that recorded information is held because she believes that communications took place. However, again the Commissioner has not seen any evidence to indicate that recorded information is held.
25. With regard to part 4c of the request, the Council initially indicated that it held relevant information, but subsequently clarified that it did not in fact hold any recorded information. The Council confirmed to the Commissioner that its legal staff had now undertaken a thorough search of its records and had not identified any information relevant to this part of the request.
26. The Commissioner is satisfied, on the basis of the explanation provided by the Council, that the Council has now conducted adequate searches for the requested information. The Commissioner accepts that the searches carried out would be likely to identify relevant information if it were held. In addition the Commissioner cannot identify any further searches which ought to have been conducted by the Council in order to locate relevant information.
27. The Commissioner acknowledges the complainant’s mistrust of the Council in the context of her dispute. However, the Commissioner has seen no evidence that the Council does hold further information. The

Commissioner cannot make a finding on whether the Council ought to hold the information. Nor can the Commissioner dismiss the Council's explanation of the searches it has carried out without good reason. The Commissioner expects that a public authority will engage with her case officers in good faith and be able to stand over its submissions.

28. In light of the above the Commissioner finds, on the balance of probabilities, that the Council does not hold information relevant to parts 1, 2b, 3a, 3b and 4c of the complainant's request.

Regulation 12(5)(b): the course of justice

29. Regulation 12(5)(b) provides an exception from disclosure where disclosure of the information in question 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.
30. The Council relied on the exception at regulation 12(5)(b) in respect of the information it held in respect of part 5a of the request, ie counsel's advice obtained by the Council. The Council claimed that regulation 12(5)(b) applied to this information on the basis that it attracted legal professional privilege (LPP). It further argued that to disclose the information would adversely affect the course of justice.

Would disclosure have an adverse effect on the course of justice?

31. The Commissioner has examined the information withheld under regulation 12(5)(b), and is satisfied that it comprises communications between the Council and its legal adviser, and internal discussion of that advice. She is further satisfied that all of the information in question was created for the purpose of providing and obtaining legal advice.
32. The Commissioner has seen no evidence to suggest that the information has been shared with a third party, which would cause it to lose its confidential nature. Therefore the Commissioner is satisfied that the information in question attracts LPP.
33. The Commissioner understands that LPP exists to protect the confidentiality of communications between a person and their legal adviser. This is a fundamental principle underpinning the English justice system and the Commissioner accepts that advice on the rights, obligations and liabilities of a public authority will be relevant to the course of justice. The Commissioner is further satisfied that the disclosure of information subject to LPP would result in a loss of confidentiality, which in turn would have a detrimental effect on the course of justice.

34. Consequently the Commissioner finds that the exception at regulation 12(5)(b) is engaged in respect of this information.

Public interest in favour of disclosure

35. The Council was unable to identify any public interest in disclosure of the information. It maintained that the request related to a neighbour dispute.
36. However the Commissioner is of the opinion that disclosure would enable the public to see that legal advice was sought and received. This would serve the public interest because it would demonstrate whether decisions were made on the basis of that advice, and that the advice was not misrepresented. The Commissioner is also mindful that regulation 12(2) requires the public authority to apply a presumption in favour of disclosure.
37. The complainant made several lengthy submissions to the Commissioner in support of her position. She argued that there was a strong public interest in the disclosure of information that would inform the public as to why the Council had appealed the Magistrates' Court judgment. In the complainant's opinion this decision had put at risk a large amount of public money.

Public interest in favour of maintaining the exception

38. The Council's public interest arguments focused on the importance of safeguarding openness in communications between a client and their lawyer in order to ensure access to full and frank legal advice. The Council argued that it would not serve the public interest to disclose communications where this would impair an authority's internal deliberation and decision making processes which were reliant on receiving good quality legal advice.

Balance of the public interest

39. The Commissioner's published guidance² on regulation 12(5)(b) states the following:

"In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

communications between client and lawyer to ensure access to full and frank legal advice."

40. In the Commissioner's opinion, there will usually be a strong argument in favour of maintaining LPP because of its very nature and the importance attached to it as a long-standing common law concept.
41. The Commissioner is assisted by the Upper Tribunal's comments in *DCLG v Information Commissioner & WR*.³ The Upper Tribunal accepted that the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of "very considerable weight" in favour of maintaining the exception. It added that there would have to be "special or unusual factors" in a particular case to justify not giving it this weight.
42. This does not mean that the arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that LPP is designed to protect as described above.
43. The Commissioner notes that the withheld information was less than four years old at the time of the request. The particular matter the advice relates to is no longer live, but the Commissioner does not consider it to be stale because the content of the advice is likely to be relevant to other cases involving the way the Council decides to handle noise complaints in the future.
44. The Commissioner recognises the importance of protecting an authority's ability to defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance. The Commissioner has consistently recognised the principle that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so, from the result of disclosure, could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
45. The Commissioner is persuaded that disclosure of the information in this case would be likely to affect the candour of future exchanges between the Council and its legal advisers. This could lead to advice that is not informed by all the relevant facts, which in turn would be likely to result in poorer decisions made by the Council because it would not have the benefit of thorough legal advice.

³ [2012] UKUT 103 (AAC)

46. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. She also accepts there is a clear public interest where those decisions concern activities that have a direct impact on individuals, such as the way noise complaints are dealt with.
47. However, having considered all the circumstances in this case the Commissioner is of the view that the Council's right to obtain legal advice in confidence outweighs the public interest in disclosure. The Commissioner has seen no evidence of wrongdoing, such as the Council misrepresenting the legal advice. Nor has she identified any significant factors that would counter the weighty public interest in protecting the principle of LPP.
48. The Commissioner acknowledges that the complainant remains unhappy about the way the Council pursued the noise complaint. However the Commissioner is not persuaded that the complainant's personal circumstances and reasons for wanting the information can be allowed significant weight in the public interest test, given that the underlying matter has been formally concluded for some time. The Commissioner is of the opinion that the wider public interest is better served by the Council being able to speak freely with its legal adviser and receive fully informed legal advice. The Commissioner has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.

Right of appeal

49. 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@justice.gov.uk

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

50. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
51. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF