IN THE FIRST-TIER TRIBUNAL **Appeal No EA/2017/0010**

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ANNETTE CARRABINO

Appellant

And

THE INFORMATION COMMISSIONER

First Respondent

And

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Second Respondent

Hearing

Held on: 25 May 2017 and 29 August 2017 in Field House.

Before: Henry Fitzhugh, Marion Saunders and Judge Taylor.

Decision

We dismiss the appeal for the reasons set out below.

Cases

Apger v IC and FCO [2015] UKUT 377 (AAC). ('*Apger*').
Department for Communities and Local Government v IC & WR [2012] UKUT 103 (AAC) ('*DCLG*').
Dr Ian Jackson v IC (EA/2012/0263) ('*Jackson*')
McCullough v IC (EA/2012/0082) ('*McCullough*')
Holland v IC and University of Cambridge [2016] UKUT 260 (AAC) *('Holland')*
Kennedy v Charity Commission (Secretary of State for Justice and others intervening) [2015] AC ('*Kennedy*')
Soh v IC [2016] UKUT 249 (AAC) ('*Soh'*)

Background

1. Between 2014 and early 2015, the Appellant's neighbours[1] made a number of complaints to the Royal Borough of Kensington and Chelsea (the 'Council' or 'RBKC') about noise levels at the Appellant's residence. The Council undertook investigations and decided the noise constituted a statutory nuisance. On 7 April 2015, the RBKC issued the Appellant with an abatement notice under section 80 of the Environmental Protection Act 1990 ('EPA'). This imposed restrictions on the Appellant's family in using their piano. The Appellant appealed to the Magistrates' Court under section 80(3) EPA.

2. On 17 and 18 February 2016, the Magistrates' Court heard the Appellant's appeal. In April 2016, District Judge Roscoe supported the decision to serve a notice. However, she varied the terms, such that the restrictions imposed on the Appellant were to be lessened. She ordered RBKC to pay the Appellant's costs of appeal.

3. The Council has since withdrawn the noise abatement notice.

The Request

4. On 20 November 2015, the Appellant requested from RBKC information under the Environmental Information Regulations 2004 (EIR):

> "(i) All communications from [Mrs X] to the Council in relation to the Property;
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> (ii) All communication from Council to [Mrs X] in relation to the Property;
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> (iii) All records and records of communication from Mrs X to the Council, and from the Council to [Mrs X], in relation to the Property;
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> (iv) All communication from [Mr X] to the Council in relation to the Property;
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> (v) All communication from Council to [Mr X] in relation to the Property;
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> (vi) All records and records of communication from [Mr X] to the Council, and from the Council to Mr X, in relation to the Property;
>
> (vii) All communications, records and records of communications between elected members, officers and/or employees (current or former) of the Council in relation to the Property; and
>
> (viii) All communications, records and records of communications between elected members, officers and/or employees (current or former) of the Council in relation to the Notice; and
>
> (ix) All records held by the Council in relation to the Notice.
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> *(Together, the 'requested information').*

5. On 24 November 2015, the Council refused to provide the information relying on regulation 12(5)(b) *(course of justice)*. Following its internal review of 25 January 2016, the RBKC additionally relied on regulation 13 *(personal data)*.

6. On 18 March 2016, the Appellant progressed the matter with a complaint to the Commissioner. The Commissioner's subsequent Decision Notice concluded:

   (a) *Regulation 5(3)(requester's personal data):*
   Some of the information was the Appellant's own personal data and thus non-disclosable. The Council had breached regulation 9 *(advice and assistance),* in failing to explain the application of regulation 5(3) and the

[1] (Referred to here as Mr or Mrs X, or the Xs.)

Appellant's rights to submit a subject access request for personal data under the Data Protection Act 1998 ('SAR').

(b) *Regulation 13 (personal data):*
Some of the information was the personal data of others, and should not be disclosed. Reasons included:

i. Disclosure would be unfair because the data subjects had not consented;
ii. The Commissioner had not seen evidence that any of the data subjects had actively put some or all of the requested information into the public domain
iii. Disclosing the information would very likely cause distress;
iv. That as the request had been made during the on-going investigation about noise.

(c) *Regulation 12(5)(b) (course of justice):*
None of the requested information should be disclosed as regulation 12(5)(b) applied. Reasons included that all of the information formed part of a confidential enforcement case. She decided that the material would form part of the evidence that the Council would rely on where the enquiry was still on-going. Whilst the disclosure could help reassure the public that RBKC dealt with cases appropriately; there was a clear public interest in ensuring the Council was able to take effective enforcement action in cases of statutory nuisance and given that the investigation was on-going, there was the public interest in ensuring that RBKC had the thinking space needed to take decisions in respect of the enforcement case.

The Task of the Tribunal

7. The Tribunal's remit is governed by s.58 FOIA.[2] This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

8. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. In this case, our remit is limited to considering whether the Council correctly relied on exceptions under the EIR in responding to the Appellant's request.

9. We have received large Open and Closed Bundles and very detailed open submissions as well as closed submissions, all of which we have considered even if not specifically referred to below. We have issued various directions in the management of this case. It has not been necessary for us to set out any part of our decision on a closed basis.

10. We have had the benefit of an oral hearing where all three parties attended. Both the Council and Appellant gave witness testimony. A closed session was held where the Tribunal considered in detail the closed material and fully probed the Council as to its reliance of the exceptions with reference to the material before it.

[2] This is by virtue of regulation 18 EIR.

After the closed session, a summary of the matters discussed was provided to the Appellant, providing as much detail as was possible. It was explained that the Tribunal had asked whether the Council had provided the complete information that was within the scope of the request and probed the Council's position in relation to the list of categories of information that the Appellant had expected ought be included. Of note, the Council had confirmed that handwritten notes made by the officers that it held had not been provided as these had been summarised in the Closed Bundle. By direction of the Tribunal, these notes were subsequently provided to the Tribunal. As regards any material or communications concerning elected members that were raised in the request, the Council stated that it considered that these were not held for the purpose of the EIR. We gave directions for the Council to properly address this matter. The hearing was adjourned and the parties submitted closing submissions and responses in accordance with our directions. The panel reconvened to consider the remaining matters on the papers.

11. The parties agree that the requested information is 'environmental information' for the purposes of EIR, and therefore the relevant regime for us to consider is the EIR. The information centres around a noise complaint emanating from a property and the measures taken by the Council in its regard. The Commissioner explained that the abatement notice is a 'measure' likely to affect environmental elements and factors under regulation 2(1)(c). We accept that the EIR is the appropriate legislation to consider in this appeal.

Issues

12. The issues now before us are:

Issue 1: Held: Does the Closed Bundle constitute all of the requested information held by the Council?

Issue 2: Course of justice: Is regulation 12(5)(b) EIR correctly relied upon for all of the information? In particular, (a) is the exception engaged? (b) If so, does the public interest in maintaining the exception outweigh the public interest in disclosure?

Issue 3: Is regulation 13 correctly relied upon for part of the information?

Issue 4: Is regulation 12(4)(e) correctly relied upon for part of the information?[3]

13. Public authorities are under a general duty under the EIR to disclose environmental information where it is requested under regulation 5:

> **"Duty to make available environmental information on request**
> 5.(1) …a public authority that holds environmental information shall make it available on request..."

14. As to whether material is 'held', regulation 3(2) makes clear

> "(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –
> (a) is in the authority's possession and has been produced or received by the authority; or (b) is held by another person on behalf of the authority."

15. The EIR provides exceptions to the duty to disclose.

[3] (The Council additionally relied on this regulation during the course of this appeal.)

> "12(1) … a public authority may refuse to disclose environmental information requested if
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure."

16. Regulation 12(5)(b) is one exception claimed to be of relevance to this appeal. It provides:

> "(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; "

17. In determining whether the exception is engaged, decisions from higher courts confirm that at the material time, the adverse effect must be more probable than not.[4]

18. For our purposes, case-law indicates that the relevant time for assessing the application of the exception is the time of the public authority's response to the request, which would be at latest the date of the internal review.[5] (Accordingly, many matters raised in submissions - such as, the outcome of the s.80 EPA appeal; the noise abatement notice having subsequently been withdrawn; or the Appellant seeking to challenge aspects of the Magistrates' Court decision in the High Court - are not be factors to consider in applying the regulation.) Even if we are wrong on this point, we did not in any event consider these factors would have been material to our decision.

Evidence

19. Mrs Carrabino gave evidence that included, in her words:

(1) The piano had been played regularly in our home since 2002 without complaint by any of our neighbours until April 2014 when the [*neighbours*] first complained to the Council.

(2) The restrictions of the Notice were such that our sons were only allowed to play for a total between them of one hour per day separated into three separate twenty-minute segments (i.e. each boy was allowed twenty minutes and then ten minutes each day) and this had to be completed by 7pm. With their after-school activities and commitments to school as music scholars, and their attendance at the Junior Academy … from 9am until 5pm every Saturday during the school term, they were usually out all day and not home until 7pm six days of the week, and so the Notice was essentially a complete ban.

(3) Ten months after having been served the Notice we finally had our case heard in Court in February 2016. During those ten months that we waited for our hearing, our sons were suffering, and we felt that the Council treated us appallingly. For reasons we still don't understand the Council appeared to be acting as the [Xs'] agent, taking instructions from the [Xs] in the appeal proceedings. When finally our case was

[4] Para.54, *DCLG.*
[5] See para.s 60 to 70 of *Soh* and *Apger.*

heard, we won the right for our sons to play the piano for reasonable periods of time and during sensible times such that they could actually play the piano when they arrived home from school."

(4) After considering the evidence before making her decision, DJ Roscoe was satisfied that the Council's behaviour had been unreasonable and that we were entitled to have our full costs of c. £62,000 awarded to us.…

(5) The Council has also appealed this judgement on costs. It is estimated that including the payment of our costs in full, the Council has to date spent in excess of £100,000 prosecuting this case, and is preparing to spend a considerable sum more to appeal the judgements and to prevent us from receiving any evidence relating to this case.

(6) Our circumstances and the circumstances of our neighbours, the [Xs], have changed significantly since April 2015… and still the Council appears determined to allocate a substantial amount of public funds to prosecute this case. On its face, this behaviour does not seem to be reasonable. We wish to understand in full the background to the service of the Notice, including the way in which the Council's decision was influenced by the complaints received by the [Xs].

(7) "Our legal representatives have been asking the Council for information it holds about our case for two years now, from the time it first served the Notice on us in April 2015... In view of the Council's refusal to offer any response whatsoever even to our legal representatives, I submitted in November 2015 a formal request for information under Environmental Information Regulations 2004…

(8) We are making this request for information because we want to understand why the Council has behaved, and continues to behave so appallingly to my family…

(9) In our very first contact with the Council in April 2014 we asked him for council support in our dealings with the [Xs] and we explained that we had a terrible relationship with the [Xs] and that Mr [X] had assaulted my husband in 2002… yet neither he, nor anyone within the Council ever sought to help us in this situation with our neighbours... no one throughout the entire Council was willing or able to help us resolve this situation.

(10) To this day we don't know why the Council took this action against us in April 2015 to essentially ban my sons from playing the piano. Was it the onslaught of complaints, emails and letters from the [Xs] that compelled the Council to take action on their behalf? Were the complaints (which were known to have been made) factually accurate? Did someone (whether the [Xs] or others), manage to persuade a person of influence to act in this way? … I consider that it is fair for me and for tax-paying residents of RBKC to understand the full facts behind the decision to serve the Notice…

(11) I have learnt throughout this ordeal that my family's experience is not an isolated incident, but most citizens do not have the means with which to challenge a local authority replete with public funds...

(12) There has been widespread national publicity about our case. The [Xs] took advantage of the national interest in our case to discuss the dispute with the press and on social media … and to publicly mock our sons' piano playing…

(13) It is clear that the Council holds a great deal more information about us than it has given under the Data Protection Regulations…

(14) In summary the Council accepted the [Xs'] refusal to negotiate or submit to mediation despite our requests… When this approach to the Council was unsuccessful my husband sought the advice of a ward councillor.. and following a dinner he had attended an evening before with our own ward councillor …during which our case was discussed, he warned my husband against pursuing an appeal of the Notice. His comment was: "Just remember, you are spending your money and the Council is spending taxpayer money." We understood this to be a warning. As the events of the following two years unfolded, and as they continue to unfold, this warning was

ominously prescient. Cllr Taylor-Smith's implied advice was that we should let it go. But it was our sons' futures and their wellbeing at stake. We could not let it go.

(15)We sought the assistance of the Leader of the Council, Nicholas Paget-Brown, our ward councillors..., the Chief Executive of the Council…, and our Member of Parliament, Victoria Borwick. All of them were either unwilling or unable to help us, and their responses to us were dismissive and disdainful…

(16)We want to understand if there was wrongdoing or incompetence within the Council, …the Council should be called to account. We hope to understand what instructions were being issued that caused the councillors, Leader of the Council, the Chief Executive, and our Member of Parliament to respond to us as they did. Our current information request, if successful, will offer us and the public significant insight into the workings of a powerful local authority, perhaps even an insight into the influences on the Council and the actions it took after the Notice was served.

(17)DJ Roscoe did not order disclosure of any other field notes because, she says in her case stated "I did not order disclosure as in my view it was a matter for RBKC what evidence they adduced to support their case and if there was evidence of visits where no nuisance was found this would not really assist the Appellants. I formed this view on the basis that if there is a statutory nuisance the fact that there may not be such a nuisance on some days does not take the case further here.

(18)Simply because DJ Roscoe was not concerned about whether or not other EHOs visited the [Xs'] house, does not diminish our right, and the public's right to know about such visits and what the EHOs reported.

(19)Our solicitor had asked the Council at the time we appealed the Notice in April 2015, if they had acoustic recordings .. and if so could we also have access to them. The Council ignored this request. Two days before the Court hearing and nearly one year after we first asked the Council if it had acoustic recordings, the Council was forced to acknowledge the existence of recordings ... Our barrister requested the recordings from the Council and was told that they were "corrupted". Mr Turney suggested that the Council hand these recordings over to our acoustics expert for analysis, in order that he might be able to determine what the problem might be… DJ Roscoe knew about the acoustic recordings in Court but accepted the Council's claim that they were corrupted and so did not rely on them to form her judgement…

(20)We also know from the [Xs'] witness statements and testimony in Court that they have written extensively to very many people within the Council. It is possible that many of these people to whom the [Xs] wrote are public-facing officers, or could have exerted influence on public-facing officers. For example, Mr [X] had been on the Board of the Trustees of [*name redacted]* for 4 years, alongside Mr [Y] ... Mr [Y's] brother is RBKC Councillor [Z] who is the ward councillor for Brompton and Hans Town ward, the same ward as Cllr Nicholas Paget-Brown, the Leader of the Council who has authorised the Council's continued prosecution of this case…

(21)Likewise, records and minutes of all meetings at which our case was discussed and decisions made, should be disclosed. These will also likely reveal sources of influence, and, if there was no undue influence, then these records and minutes of meetings will demonstrate to the public how the Council reached its conclusions that classical piano playing in excess of twenty minutes three times per day and after 7pm in the evening could justifiably lead to prosecution as a criminal activity…

(22)I had also written a brief letter to all of the Council's councillors … Cllr Paget-Brown responded..., explaining that "as the Council remains committed to protecting all residents from noise nuisance, after very careful consideration of the judgement by senior officers and following consultation with Members, the Council decided to lodge an appeal against the court's decision to increase the number of hours that the piano can be played." It was apparent from Cllr Paget-Brown's response that the Council's appeal of the judgement had the approval of the elected officers of the Council.

(23)I wrote again to Cllr Paget-Brown … and he responded with another letter … declining to comment except to say that he and Councillor Ahern, … had been fully briefed by Council officers on these proceedings and that the Council ".... has not taken the decisions to appeal lightly and has only done so after carefully considering Leading Counsel's advice". Clearly he and Cllr Ahern are fully supportive of the Council's continued actions against my family.

(24) T
he Council was ordered to pay our costs in full, £61,509.86. But this sum significantly understates the true cost of this ordeal to my family. The Council answers to nobody it seems and neither does it respect a Court judgement With seemingly unlimited access to public funds, the Council's actions have taken over our lives for the past two years. The financial costs of defending ourselves against the Council's actions were, and continue to be, substantial, but they are in actual fact considerably lower than they would be if we also had to engage a solicitor on our behalf. We were able to engage Mr Turney on a Direct Access basis and so keep our financial costs down. This meant however that my husband and I had to bear a significant amount of the workload. We estimate this to have been somewhere between 500 and 1000 hours of work over the past two years, defending our sons' rights to play the piano. The personal costs have been far greater. The Council's behaviour has made this an all-consuming ordeal for my husband and me over the entire past two years. We still have no idea how this all happened and the Council appears determined to ensure that we never find out.

20. Mr Mehaffy, an Area Senior Environmental Health Officer in the Noise and Nuisance Team, gave evidence on behalf of the Council that included, in his words:

(1) On 25 March 2014, RBKC's Environmental Health Line received a complaint from a resident concerning noise from a piano being played ... In response to the complaint and further to officers speaking with the complainant, a letter was sent to Mr and Mrs Carrabino … The letter informed the Carrabinos of the complaint and gave them an opportunity to respond. RBKC engaged in correspondence with the Carrabinos, and on 17 April 2014 RBKC's Noise and Nuisance Officer [officer 1] spoke to Mr Carrabino to discuss practical steps that might be taken to lessen the noise of piano playing. Mr Carrabino indicated to [officer 1] that he did not accept the suggestions.

(2) Meanwhile the Council had received further complaints on 12, 13 and 14 April 2014. Between 14 April and 8 December 2014, approximately 35 complaints were received by RBKC's Noise and Nuisance team in relation to loud piano music being played; and that loud piano music was reported playing at different times of the day and night, between 09:56 hours and 21:18 hours.

(3) On 9 December 2014 at 21:20 hours a further complaint was received by the Noise and Nuisance service, concerning constant piano playing ... Following that complaint, [officer 1] RBKC's Noise and Nuisance officer, and [officer 2], an RBKC Environmental Health assistant, visited the complainant at 21:47 hours and at which attendance the officers witnessed the disturbance. [Officer 1] formed the view that the disturbance constituted a statutory nuisance.

(4) On 12 December 2014, following a further complaint, [officer 3], RBKC's Noise and Nuisance officer, and [officer 2], RBKC Environmental Health assistant visited the complainant at 1855 hours and at which attendance the officers witnessed the disturbance. [Officer 3] also formed the view that the disturbance constituted a statutory nuisance.

(5) On 13 December 2014, following a further complaint, [officer 4], RBKC's Noise and Nuisance officer, and [officer 5], RBKC Environmental Health officer, visited the complainant at 16:42 hours and at which attendance the officers witnessed the disturbance. [Officer 4] was of the opinion that the level of noise from the piano playing was at a level at which peaceful enjoyment in the complainant's study would not be possible...

(6) As a result of these incidents, a warning letter was sent to the Carrabinos on 17 December 2014.

(7) Following a telephone call from the Carrabinos on 7 January 2015, I met with Mrs Carrabino at the Council's offices on 9 January 2015, in an effort to resolve matters with suggested proposals as to sound insulation; practicing the piano elsewhere, suitable timings for practicing the piano. I asked Mrs Carrabino to put forward her proposals to RBKC as soon as possible. I would advise that no proposals were received from Mr and Mrs Carabino.

(8) Further complaints were received thereafter in January and February 2015. On 8 March 2015, a complaint was received at 20:28 hours by the Noise and Nuisance service regarding loud piano ... RBKC's Noise and Nuisance officers, [officer 1] and [officer 6], visited the complainant at 21:47 hours and at which attendance the officers witnessed the disturbance. The officers were of the opinion that the disturbance constituted a statutory nuisance.

(9) The case was then reviewed by myself, my colleague Georgina Seraphim, Bi Borough Area Senior Officer, and our manager, Mr Tim Davis. We took into account that:

(10) The complaints had been received over a considerable period; there had been a total of 67 complaints logged by telephone from the complainants; and the Council had written to the Carrabinos on three occasions.

(11) Each of the Council's officers who had attended the premises (as above) witnessed the noise arising from the piano playing and had formed the view that this noise constituted a statutory nuisance which was in existence at the time.

(12) Once we had determined that there was a statutory nuisance, we considered that it was appropriate to serve an Abatement Notice upon those causing the statutory nuisance.

(13) The Council served Abatement Notices on each of Mr Carrabino and Mrs Carrabino dated 7 April 2015 asking them to abate the noise nuisance by restricting the recurrence of the same. The Abatement Notice required them to restrict the piano/keyboard/live music practising (i) to between the hours of 09:00 to 19:00 Monday to Saturday, and 10:00 to 19:00 on Sunday, and (ii) for a maximum period of 20 minutes at any one time, for a total of 60 minutes per day…

(14) DJ Roscoe found that a Statutory Nuisance existed and that the Council was correct to have served the Abatement Notices. However … DJ Roscoe found that the requirements of the Abatement Notices were unreasonable. DJ Roscoe varied the terms of the Notice to:

(a) 5 hours per day Monday to Saturday
(b) Not before 9am or later than 9pm
(c) Only 2 of the 5 hours can be after 5pm
(d) On Sundays a maximum of 3 hours which must finish at 5pm
(e) On no more than 6 days per year the restrictions will be loosened to allow 5 hours of playing at any time after 9am and before 10.30pm (to allow for family and friends to gather and enjoy "family concerts")…

Adverse Effects on the Course of Justice

(15)… Mrs Carrabino's request was sent in late November 2015, after the Council and the Carrabinos had put in extensive evidence. It appears that during that time the Carrabinos were preparing the further statements in the EPA appeal, which they filed in December 2015.

(16)… On average we generally receive approximately one appeal against these notices per year. … I have defended a number of Abatement Notices against such appeals. I

have prepared statement and worked closely with our legal department to have them either withdrawn informally or determined through the Court process. I have given evidence in court on a number of occasions on appeals.

(17) As I understand matters, it is up to the District Judge in the Magistrates' Court to form his or her view on the material before them, and to decide whether he or she has sufficient information. If the District Judge in the Magistrates' Court had required this information to be disclosed, we would have complied with this order. However the District Judge did not make any such order, and found the information provided by myself and the other RBKC Officers, together with the other evidence in the case, sufficient to determine the matter.

(18) I do not consider that it would be fair for the requested information to be disclosed in this case, when the Carrabinos would not be under any similar obligation (although personally I do not see how the information could have assisted their case). Both RBKC and the Carrabinos had a full opportunity to put in evidence which each party wanted to include to support its position. As I explained above, both RBKC and the Carrabinos put in evidence (and, in the case of the Carrabinos, reply evidence), to do that.

(19) I would also add that if this information would be disclosed, it would significantly discourage residents making complaints to the Council as a whole, as we could no longer hold their details confidential, and discourage them from assisting the Council when the complaints are challenged in court. This is particularly the case because, as I understand matters, disclosure under the EIR would be to everyone, rather than just to the Carrabinos. Disclosure would therefore diminish RBKC's ability to safeguard residents' interests and fulfil its statutory duties, as well as harming our ability to defend our decisions in legal proceedings. It is important to note that RBKC has received in excess of 15,000 complaints to the Noise and Nuisance service in a 12-month period and the majority of these residents would not wish to have their details shared with the person they are complaining about. Although, as I have explained above, there are not many appeals against our decisions, some decisions are appealed and, when that happens, it is sometimes necessary for us to obtain the help of the complainants, whether as witnesses or in other ways. I would be very concerned that, if the whole background to an abatement notice was disclosed in an appeal against the notice, this would prevent the Council from being able to prepare properly for appeals against its decisions.

(20) I understand that the Appellant has suggested that it would be in the public interest for this information to be disclosed and, in particular, that the Carrabinos think that there may have been wrongdoing by RBKC. … I do not understand the suggestion that there has been wrongdoing by RBKC. It is not true, and the Carrabinos should know that it is not true. The decision taken by the Council that the noise from the playing of the piano by the Carrabinos constituted a statutory nuisance, after which we then served an Abatement Notice, was only reached after a number of our officers had attended and witnessed the noise for themselves. This was all fully documented within the officers' witness statements provided during the Magistrates' Court proceedings. I therefore cannot see how the Appellant can claim there was wrongdoing.

Internal Communications

(21) … In my experience, when RBKC officers and employees are investigating a noise complaint it is inevitable and right, in order to ensure that the complaint is properly investigated, that officers and employees communicate with each other. Those communications are free and frank, and can involve matters such as decisions in relation to the investigation, the lines of enquiry that need to be pursued, and assessment by the investigating officers of where the investigation stands and what more, if any, may be needed. It is important, in my view, that officers and employees are allowed a private thinking space in relation to such matters, without the concern that our deliberations will be revealed to all thereafter. If those deliberations were

revealed, in my view officers would become more guarded and the quality of the Council's investigations would suffer.

(22)… RBKC provided the Carrabinos with a substantial amount of information about the progress of the investigation. We were transparent in our contact with the Carrabinos: we informed them at each step of the complaints made, the investigations by our officers, the views of our officers that the noise constituted a statutory nuisance, we sought to reach a resolution with the Carrabinos to restrict the noise, and we sent them warning letters before we served the Abatement Notice upon them. The Carrabinos were fully informed via telephone calls email, letters, a meeting at the Council Offices on 9th January 2016 and attendance by a council officer at their property. The Carrabinos were informed that upon the noise witnessed by our officers being a statutory nuisance, that an Abatement Notice would then be served upon them as the Carrabinos had not taken steps to restrict the noise…

21. Mr Mehaffy's statement also set out the 17 witness statements that had been served in the proceedings before the Magistrates' Court. At the oral hearing, Mr Mehaffy stated:

(1) The Closed Bundle contained the print out from the Council's 'Acolaid system'. A record of the Council's decision-making was in the Acolaid system.

(2) The acoustic recording that the Council had made had been corrupted such that Ms Seraphim had found nothing recorded of any significance. This sometimes happened. As it was thought to be of no value it had been reformatted and this was normal practice. The finding that a nuisance existed was based on the judgment of the Council's officers and their notes that were recorded on the Acolaid system. The officers were trained to assess noise. When the officers are satisfied that a nuisance exists, the Council is required to serve an abatement notice. Considerable information was provided in the process before the Magistrates' Court and the response to the SAR request.

(3) As to the question of whether involvement from a councillor would be recorded on the Acolaid system, he replied that there had never been a councillor involved in any action.

(4) As to the question of whether he could see that the Council completely refusing to disclose information might increase concern of potential wrongdoing, he replied that what could and could not be disclosed was governed by law and dealt with by the Council's legal department.

Issue 1: Held

22. The Appellant set out in Annex 1 of the closing submissions the information she believed fell within the scope of the request. The Council had previously provided a response to this by letter of 11 May 2017. This stated that all information held by the Council in relation to Annex 1 was: (a) stored on the Acolaid database and/or in email correspondence; or (b) on any handwritten field notes.

23. The Appellant maintained that it was unclear whether internal communications between officers, minutes of meetings, communications with councillors and communications with third parties had been provided to the Tribunal. Having probed the matter, we accept Mr Mehaffy's evidence that all internal communications and minutes of meetings that existed were held on

the Acolaid system and provided to us.[6] We also accept as compelling the Mr Mehaffy's evidence set out in para. 21 above.

24. The Appellant did not accept that elected members' communications would not be held by the public authority. In the Appellant's view:

    (1) If a councillor expressed a view to an officer about an investigation, or relayed a complaint, that correspondence would be held by RBKC in respect of its environmental health functions.

    (2) Elected members' communications was contained on RBKC's computer server since the email addresses of councillors are provided by RBKC as part of their public functions.

25. The Council's response includes:

    (1) It accepted that if councillors communicated with Council officers, the records of their communications are, if held in the physical sense, held by RBKC. However, Mr Mehaffy had made clear in his oral evidence that any such communications would have been recorded in Acolaid and provided in the Closed Bundle. He also stated that in 25 years working for RBKC, he had "*never had a councillor involved in action taken from a statutory perspective*" or offering a view on what action should be taken, and so such had never needed to be recorded.

    (2) Communications between councillors (save for in respect of performing functions on behalf of RBKC), or between councillors and their constituents, are not 'held' by RBKC for the purposes of regulation 3(2). Councillors are not public authorities for the purposes of the EIR. When acting in their personal or political capacities, (for instance in relation to constituency issues), they do not perform functions on behalf of RBKC. Therefore, even if information from those communications were in RBKC's physical possession - for instance, by virtue of councillors' email addresses being hosted on RBKC systems - that information is not held.

    (3) This accords with the Upper Tribunal decision in *Holland*. This held that under regulation 3(2), the information must be both "in the authority's possession" and "produced or received by the authority":

> "[a] factual determination is required as to how the information has come to be in the possession of the authority. The question is whether the information was produced or received by means which were unconnected with the authority, for example by an individual in their personal or other independent capacity; or whether it was produced or received by means which were connected with the authority, for example by someone acting in their professional capacity in relation to the authority (such as an employee of the authority). The connection must be such that it can be said that the production or receipt of the information is attributable to ("by") the authority."

(Emphasis added. See para.s 45 to 48 of *Holland)*

    (4) This also accords with the Commissioner's guidance "Information Held By A Public Authority For The Purposes Of The EIR" (Regulation 3(2))".[7]

[6] See also para. 11 above.

[7] https://ico.org.uk/media/fororganisations/documents/1640/information_held_for_the_purposes_of_eir.pdf. (See pages 3 to 5.)

26. The Appellant did not provide any response to address points made in para. 25 above. On the basis of the arguments before us, we accept the Council's reasoning. If the officials had produced or received the information from councillors, these would have been in the Closed Bundle. If there had been information held by councillors where they were performing functions for the Council, these would also have been 'held' and provided in the Closed Bundle.

27. To the extent elected members had communicated other than to officials and they were not performing a function for the authority (as opposed to performing a function as an elected member), these would not be held. Any communications concerning councillors that were in the possession of the Council purely by it hosting councillors' emails on the RBKC system, would not be 'held' because the councillors would not be performing functions for the Council.

28. The Appellant argued that as RBKC had reformatted the memory card that contained the only acoustic recordings, it had destroyed information, and this undermines her confidence that the full extent of the information covered by the request was before the Tribunal. We do not agree. It was the Council's evidence that the acoustic recording system had malfunctioned, and nothing of significance had ever been recorded. The Council's letter of 11 May 2017 explained that (a) the SD card was automatically reformatted for reuse by deleting the corrupted recording; (b) this was normal practice and enabled reuse of the card for other investigations; and (c) this deletion would have taken place shortly after it was realised that the recordings were corrupted and well before the date of the request. We find no compelling reason not to accept the Council's explanation. Had an acoustic recording existed at the time of the request, this would have fallen within the scope of part (ix) of the request. However the reformatted disc does not because it did not hold a recording and as such did not constitute material that was held within the scope of the request.

Issue 2a) Is Regulation 12(5)(b) Engaged?

29. The Appellant maintains that regulation 12(5)(b) was not engaged. Her submissions include the following:

    (1) Regulation 12(5)(b) is derived from the Aarhus Convention which in Article 4(4) notes that the exceptions "*shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment*". Most if not all information relates to noise and thus "emissions", such that there is a particularly strong presumption in favour of disclosure.

    (2) There is no evidence that the disclosure would be likely to harm the course of justice. To find accordingly would be breaking new ground and substantially increasing the scope of the exception.

    (3) *McCullough* was relevant as it similarly concerned information obtained by the public authority in the course of its own investigations. The Tribunal found:

> "any adverse affect which must be proven at least on the balance of probabilities. … the Tribunal are not persuaded that purely factual information such as this could ever adversely affect the course of Justice… Access to such information can only assist the parties in identifying any issues between them and provide an early opportunity for expeditious resolution of such issues. This would save time and costs in any such potential litigation and would therefore be in the public interest. Further this Tribunal do not accept that early disclosure of this technical information would prejudice NI Water in any way that they would not be prejudiced in the normal course of discovery in litigation by such information. For example if the information led an independent expert to form a view on liability in a civil action then it would be to the Public Authorities advantage to address that view at the earliest possible stage. This too, for the reasons we have stated above, would be in the public interest… the Tribunal expresses concern about the position ... of the Decision Notice which … appears to suggest that it would be in the public interest to withhold any information that might prejudice the Public Authorities position in potential legal proceedings. The implications of implementing such a policy could, in some circumstances amount to a cover up, and in our view would be contrary to the spirit and intent of the FOIA and EIR legislation and further, contrary to the Public Interest..."

(4) The Council's reliance on *Kennedy* is misconceived. The passages relied upon from Lord Toulson's judgment were dealing with section 32 Freedom of Information Act 2000 ('FOIA'), which provides an exemption for court documents. The information here is not contained in court documents and there is no corollary to s.32 FOIA in play here.

(5) The requested information was relevant to the Appellant's appeal, but was not disclosed in the course of it. The Respondents argue that it should be entitled to withhold environmental information because it may assist an appeal against it on environmental matters. This runs counter to both the EIR and to basic principles of fairness.

(6) The Commissioner assumes that the Council has a duty to disclose relevant information, and the Magistrates' Court has a power to require it. This is a false assumption, the Commissioner provides no authority for it.

(7) If there were a disclosure obligation or power in the litigation, it would be wrong to elide it with the EIR tests. Whether more or less information is obtainable through other disclosure obligations is irrelevant to the assessment of whether there is harm to the course of justice in disclosing the information requested.

(8) If there is no power to order disclosure, it cannot be read as undermining the scope of the EIR. Disclosure obligations may overlap with EIR/FOIA obligations. The EIR sets a very specific test.

(9) Disclosure would further the course of justice by ensuring that Appellant has all relevant information available to her in making her case in the appeal, and no harm could be caused to the course of justice. It can scarcely be said to harm the course of justice that relevant material is made available to another party. If the records disclosed say more than the Council would have wished to be known in Court – so be it. Conversely, irrelevant material or material which is not necessary to the determination of an appeal cannot be said to harm the course of justice through its disclosure.

(10) So far as it was suggested that the disclosure of the material would have meant that the Magistrates' court would be flooded with information, that court can manage its own process. Again, such information would either be relevant, and welcomed by the court, or irrelevant and inadmissible. The idea that disclosure would increase the burden on the Magistrates' Court is incorrect. If relevant, it would be heard, if not, it would be excluded. The burden would not arise from the operation of EIR but from the improper conduct by the party to litigation. The argument resembles closely that pursued and rejected by *Kennedy*.

(11) The Magistrate has no power to order disclosure of material that is not necessary to the determination of an appeal.

(12) To rely on this exception it is necessary to show that the disclosure of each and every piece of information would harm the course of justice. The Tribunal was invited to scrutinise the Closed Bundle with this in mind.

30. The Appellant's response to the Respondents' arguments, included:

(1) The Respondents wrongly characterised the request as seeking to undermine a court process, or obtain information for collateral purposes. These assertions are baseless. (See for example the Appellant's Request for Internal Review, which refers expressly to the need for accountability of RBKC to the public). In any case, it is irrelevant to the Tribunal's determination since a request under EIR is motive blind.

(2) The argument that the Council's conduct in serving the notice was vindicated before the Magistrates' Court, is false. The notice was substantially varied and there is public interest in understanding what lay behind it. Additionally, the Court awarded the Appellant full costs on the basis that the RBKC had acted unreasonably in serving the notice, and the Appellant sought to challenge the propriety of the notice in the High Court.

(3) Heavy reliance on DJ Roscoe's reasoning is contrary to the Respondents' insistence that the exceptions should be applied as at the date of the request.

(4) The idea that disclosure would be unfair to the Council is without merit. The Council determined to serve a notice that in practise prevented the Appellant's children from playing the piano in their home. The Appellant is not a public authority and therefore not subject to EIR.

(5) Even if someone were dissuaded from complaining about noise due to disclosure of complaints this would not be adverse to the course of justice and exceptions should be construed narrowly.

(6) The Respondents' submission would mean a situation where if the Appellant chose not to litigate and exercise her appeal rights, she would obtain the information she seeks. She may only know the strength of her case if she decides not to litigate.

31. The Council's submissions include the following:

(1) The regulation is relied on for all of the disputed information. To require the Council to disclose the requested information would have adversely affected the course of justice, namely the course of the on-going appeal.

(2) First, disclosure would have circumvented and undermined the legislative process applicable to EPA appeals and the control of the Magistrates' Court over its process.

(3) This would have interfered with the separation of powers where the Commissioner, who would rule on the request, is an executive officer. The Supreme Court in *Kennedy* considered that FOIA should not be construed so as to overlap the courts' power to control their own proceedings, as a result of the Commissioner's executive function. (*See Kennedy at para.s 111 to 123).* The circumstances are not identical, but the principle is applicable.

(4) It would have weakened confidence in the capacity and effectiveness of the courts to control their own proceedings.

(5) The ambit of the evidence and of disclosure in the Magistrates' Court proceedings were matters for the judge in the Magistrates' Court, subject to rules established by Parliament and secondary legislator [8] and considered to provide an appropriate balance of formality, complexity, fairness and flexibility in the particular circumstances of Magistrates' Court proceedings.

(6) The Commissioner and Tribunal should not permit those proceedings to be circumvented by the use of the EIR as a disclosure mechanism, where no such disclosure was required or needed in the Magistrates' Court proceedings.

(7) As regards whether the Magistrates' Court had the power to order disclosure, the Tribunal asked the parties to consider whether that question was relevant, given that, whatever the scope of DJ Roscoe's powers, those were the powers that the Magistrates' Court had been determined to have. The Council regards this as the correct approach. DJ Roscoe had wide powers to make procedural orders if such were warranted, and those powers are those which legislation has provided for as being appropriate to the determination of appeals in the Magistrates' Court.

(8) Second, disclosure would have been unfair and unequal to the Council, in breach of the basic principle of equality of arms. A substantial amount of information held by it would have been disclosed to the Appellant. Given their approach to litigation, the Appellant would undoubtedly have sought to deploy it in those proceedings, notwithstanding that the Council do not admit its relevance in circumstances. Yet there would have been no corresponding or reciprocal access to documentation held by the Carrabinos available to the Council, and no tenable advantage to the Court.

(9) The disclosure would have been to all the world, without any possibility of proportionate restriction upon the uses to which the documents could be put (as is available in court proceedings).

[8] Part II Magistrates' Courts Act 1980 A further provision of relevance is s. 97 of the Act, which provides for a power to make a witness summons *inter alia* to any person "*likely to be able to … produce any document or thing likely to be material evidence*", to require them to "*produce the document or thing*" and Magistrates' Courts Rules 1981

(10) Third, Mr Mehaffy has described on-going adverse effects on the course of justice because if the entire background of complaints from the neighbours and discussions with the Council were disclosed with no limitation on the use to which the documentation could be put, this would significantly discourage residents making complaints to the Council as a whole, as their details could no longer be held as confidential.

(11) Noise nuisance complaints frequently relate to matters where feelings are running high on all sides, and often complainants live cheek-by-jowl with those about whom they are complaining. Frequently the complainants will be known to those about whom they are complaining, so personal data redaction (eg. of names) would be of limited significance.

(12) The Appellant's assertion that this approach is 'unprecedented' is wrong. In *DCLG*, it was stated that:

> *"[T]he IC or tribunal is not limited to considering the effect (if any) on the course of justice in the particular case in which disclosure is sought. The IC or tribunal can and must take into account the general effect which a direction to disclose in the particular case would be likely to have in weakening the confidence of public authorities generally"*
> *"[W]hether there would be an adverse effect on the course of justice must be determined by reference to the features of the national justice system".*
> *(See para.s 45, 46 of the Decision.)*

Plainly, this includes the division of responsibilities between the Tribunal and the Magistrates' Court. *DCLG* further stated:

> *"one must take into account all the circumstances of the particular case in which disclosure is sought";*
> *"It is in our judgment clear that the factors which can be taken into account in determining whether the course of justice would be adversely affected by disclosure include adverse effects on the course of justice in the particular case, such as that it would be unfair to give the requester access to the public authority's legal advice, without the public authority having the corresponding benefit": (See para.s 53 and 54 of DCLG.).*
>
> (Emphasis added.)

(13) *DCLG* concerned regulation 12(5)(b), which concerns any matter adversely affecting the course of justice, and is not limited to legal professional privilege. This was made clear in *Jackson*, which was concerned with confidentiality.

(14) The *McCullough case* is a first-tier decision that is not binding upon or even persuasive for this Tribunal.

32. The Commissioner maintains:

(1) In *McCullough*, where there was no on-going litigation and the Tribunal had emphasised that the requested information would be discoverable in litigation. In contrast, in this case, (a) the request was made during the course of the EPA appeal and following the exchange of witness evidence; (b) the requester made clear that it was connected with her EPA appeal; and (c) the Appellant expressly sought the information to use it in the course of legal proceedings. The request was a transparent attempt by the Appellant to get more information from the Council than

she was entitled to receive under the rules of procedure as applied by DJ Roscoe.

(2) The Appellant says that the Magistrates' Court has no power to require a party in proceedings before it to disclose documents. The Magistrates' Court has a power to order disclosure, under both section 97 (1) Magistrates Court Act 1980 ('MCA') and rule 3A of the Magistrates Court Rules 1981:

> Para. 1(2) of Sch. 3 EPA provides that an appeal to the Magistrates' Court under section 80(3) is by way of complaint for an order and that the MCA applies.
>
> Section 97 MCA provides:
>
> *" Where a justice of the peace[9] is satisfied that -*
>
> *(a) any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at the summary trial of an information[10] or hearing of a complaint…by a magistrates' court, and (b) it is in the interests of justice to issue a summons under this subsection to secure the attendance of that person to give evidence or produce that document or thing,* the justice shall issue a summons directed to that person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing" (Emphasis added).

(3) Under rule 3A of the Magistrates' Courts Rules 1981, the Court must:

> *"[ensure] that evidence, whether disputed or not, is presented in the shortest and clearest way". (Sub-para.s (1)(e))*
>
> "… actively manage the case by giving any direction appropriate to the needs of that case as early as possible" *(Sub-para (2))*
>
> *"..In fulfilling its duty under paragraph (2) actively to manage the case the court may give any direction and take any step unless that direction or step would be inconsistent with legislation, including these Rules…" (Sub-para (7)).*

(4) There is nothing in the Magistrates' Courts Rules, or in any other legislative provision of which the Commissioner is aware, which precludes the Court from ordering disclosure pursuant to its general duty of active case management.

(5) At the hearing, the Council argued that the Appellant sought to play down the affect of the nuisance by referring to it as merely piano-playing. The issue of whether anyone could consider it 'extraordinary' to issue a notice in those circumstances was discussed at the Magistrates' court and the judge found it was correct to issue a notice.

33. The Commissioner argues that within the context of para. 32 above, disclosure would have an adverse effect. This is because:

[9] (District Judge Roscoe is a justice of the peace By s. 25 of the Courts Act 2003.)

[10] (An "information" is the means by which criminal proceedings in the magistrates' court are initiated and a complaint, is the means by civil proceedings in the magistrates' court are initiated. See section 50 MCA.)

(1) It would have undermined DJ Roscoe in her management of the EPA appeal. It would have removed or reduced her control over disclosure and the management of evidence generally in the EPA appeal. It would have required her to undertake further case management to determine whether to admit or reject any additional evidence which the Appellant would presumably have sought to adduce, and/or, at the least to listen to and consider evidence which she did not feel was particularly helpful to her in determining the issues. That additional burden would have been detrimental to the management of the EPA appeal and thus to the course of justice.

(2) Second, disclosure would have been to the whole world. Any rules or limitations on the collateral use of documents disclosed during the s.80(3) Appeal would be inapplicable. Equally, DJ Roscoe would have had no basis for making any order limiting the use to which such information could have been used. This would result in a loss of confidence on the part of the Council and other public bodies in the fairness of such appeals and in their ability to determine the evidence which they will produce. The confidence of public authorities in the course of justice was a factor which loomed large in the Upper Tribunal's judgment in *DCLG*.

(3) Third, disclosure under the EIR would have created an inequality of arms between the Council and the Appellant. The Appellant would have been provided with a means of discovery unavailable to the Council. That would both have been unfair to it, but also have reduced its confidence in the section 80 appeal system.

34. The Commissioner did not argue that disclosure under the EIR is impossible once court proceedings were underway. It argued that regulation 12(5)(b) would be *engaged* where proceedings were underway and the EIR request was essentially an attempt to seek specific disclosure for those proceedings, where the court seized of the matter has decided not to order it (or, if the Appellant was right, where the court's specific procedural rules did not make allowance for it to do so). It would be determined in each case whether or not the information requested ought to be disclosed in any event on the balance of public interests.

Finding on Issue 2a)

35. We find that the exception is engaged for all of the requested information. This is because we agree with the arguments in para.s 31(2), and 31(4) to (6) and 32(1) above. The parameters for disclosure of evidence in the case before DJ Roscoe was a matter for that court and the broader framework of relevant legislation. A disclosure under EIR would have adversely affected the course of justice by disrupting the court's effective management of the case relating to whether to issue directions for disclosure. This would have undermined that court's control of its processes and procedures, which the request effectively sought to circumvent. We consider this to be sufficient reason to find that an adverse effect would, on the balance of probabilities, occur.

36. As stated by the Upper Tribunal in DCLG: "*[W]hether there would be an adverse effect on the course of justice must be determined by reference to*

the features of the national justice system.."[11] In this regards, in observing the division of responsibilities between the Magistrates' Court and Tribunal, we recognise the importance of the court controlling the documents before it where it is best placed to ensure convenience, fairness, focus and efficiency in its proceedings. We accept the Commissioner's arguments in para.s 33 (1) and (2) above. Contrary to the Appellant's submissions, efficiency and proportionality may well be considered important factors that the Magistrates' Court takes into account in managing a case. A party providing substantial amounts of irrelevant information and arguments can unnecessarily increase the burden for the other parties and the court.

37. The parties made much of whether the Magistrates' Court has power to order disclosure. We do not find this strictly relevant. The parameters of its power are matters that have been determined as appropriate by legislation or court rules and a disclosure under EIR would interfere with that determination. Even if we are wrong about this, that the judge had such powers to order disclosure was consistent with the Appellant's own witness statement at para. 19(17) above which demonstrated that DJ Roscoe considered that she had such power. We accept the arguments presented by the Commissioner and Council on this point - there seem to be wide powers to manage a case in the Magistrates' Court.[12] Further, the Appellant has failed to provide compelling reasons or evidence to show that the Magistrates' Courts does not have such powers.

38. On the facts, we find the Appellant's intention for her request relevant to consideration of the adverse effect of a disclosure in this case. It was clear that the Appellant's primary intention was to use the EIR as a disclosure mechanism for use of the documents in the section 80(3) appeal. This is evidenced by the timing of the request and its contents, which refers to the background of the request being the section 80(3) appeal. Whilst the request for an internal review mentions the right to the public understanding of how the Council took action against the Appellant, this was not the sole or primary focus, and nor was it mentioned in the four pages of the Appellant's request. The request for an internal review refers in other places to the request being in order to have a 'fair trial', to 'defend [themselves] in the trial'. The Appellant appears to be arguing that the purpose for the request is irrelevant, as she argues that the EIR is 'motive blind'. The legislation makes no reference to being 'motive blind', and the Appellant provides no justification for her reasoning.

39. We found other arguments advanced by the Respondents less compelling.

    (1) We do not agree that disclosure would be unfair to the Council simply because there was no corresponding requirement on the Appellant. It is difficult to envisage what material the Appellant could usefully disclose to the Council. As the Appellant rightly says, the information rights legislation applies to public authorities and not to individuals. We would understand the reasoning if this had been a case where the Council were being required to hand over legal advice in litigation, without a corresponding right to see the opponent's legal advice.

[11] See *DCLG*, para.50.
[12] See in particular rules 3A (2); (7) and (17) Magistrates' Courts Rules 1981/552.

(2) The Respondents argued that the Tribunal must take into account the future effect on the course of justice that disclosure would have, which they identified as the stifling of other nuisance cases being pursued. They relied on the Upper Tribunal in *DCLG* which found that regulation 12(5)(b) required consideration of both the adverse effect on the course of justice in the particular case, and the effects on the course of justice more generally.

(3) The emphasis in *DCLG* was on regulation 12(5)(b) in the context of legal professional privilege. The issue was therefore raised as to whether the *DCLG* finding has broader significance for cases that do not concern legal professional privilege. However, this is not a question we need to address. This is because we were not persuaded by the underlying proposition that disclosure would in fact stifle future nuisance complaints. Regulation 13 (personal data) provides a mechanism for withholding personal data of residents to the extent they are identifiable, within the terms of the information rights legislation. Despite this having been alluded to by the Appellant, we received no arguments as to why this mechanism would not be sufficient, and it is not evident to us.

(4) The closed witness statement identified particular examples that the Council had specific concerns about disclosing. In the absence of any compelling explanations, we were not persuaded by these concerns.

40. We were not persuaded by the rebuttal from the Appellant that our finding would establish a "class defence" for requests during on-going legal proceedings. Nor were we persuaded that this finding "*would be breaking new ground in a manner which would substantially increase the scope of the primary exception relied upon, and substantially curtail the information rights provided for in the EIR*". This overstates the role of this Tribunal. We simply consider that regulation 12(5)(b) is engaged based on the facts of this case, evidence and legal arguments before us. The First-tier Tribunal does not make decisions that are binding on any another appeal. Further, we are not persuaded that our decision runs counter to any of the cases we have been referred to, none of which have seemed strictly relevant to this appeal that concerned information that was not covered by legal professional privilege and was requested for use in on-going proceedings in another court.

41. In particular, the Council argued that in view of *DCLG, McCullough* made an incorrect finding. Regardless of whether this is so, the facts of this case differ from the non-binding decision of *McCullough* for the reasons given by the Commissioner. We note that the information requested there was also strictly factual – concerning, for instance, the exact locations, numbers and types of vibrometers in relation to sewers.

42. We note the Council's reliance on certain paragraphs in *Kennedy*.[13] The paragraphs we were directed to (when read in the context of the full judgment that was not provided in the Bundle) did not seem to justify the loose interpretation and reliance that the Council gave it.[14]

[13] See paragraph 31(3) above.

[14] When referencing the separation of powers, Lord Toulson in *Kennedy* was addressing a wholly different issue. It concerned the court's jurisdiction under the principle of open justice to determine which documents should be disclosed to non-parties and decided that this was not affected by the absolute exemption in section 32 FOIA.

Issue 2b) Weight Of Public Interest

43. The Appellant's submissions include:

(1) The requested information contains reports and professional judgments that caused a public authority to take a very draconian step of issuing a notice which prevented children from playing a piano in their own home. The extraordinary nature of the subject matter, confirmed by the press attention the case received, justifies the disclosure of the information that underpinned the decision-making.

(2) There is public interest in understanding why this public authority considered it necessary to spend vast amounts of public money pursuing this action, through repeated visits by Environmental Health Officers since 2014 and ultimately through legal proceedings in respect of which it was ordered to pay the Appellant's full costs (over £60,000). The overall cost to the public purse of pursuing what was in essence a neighbour dispute about the timing of children's piano practice is well in excess of £100,000.

(3) The public interest in disclosure goes beyond the Appellant's own proceedings in the Magistrates' Court. She is interested as a taxpayer to know why the Council chose to spend its resources on this dispute. Without the requested information, the triggers for the Council's action and their decision-making process are completely unknown.

(4) Whether a nuisance exists is a subjective judgment, and accordingly the basis upon which that conclusion has been reached cannot be scrutinised without the full facts (e.g. as to who made the judgment, when, and why). The Council's power under the EPA is draconian and attracts criminal consequences for non-compliance. Accordingly there is a strong public interest in understanding how the conclusion that there is a nuisance is reached particularly where the activity concerned is a normal domestic activity of piano playing and why such draconian measures were taken to address a minor neighbour dispute.

(5) The noise in question was not considered to be a nuisance at other times. This is confirmed by the fact that complaints were received in 2014 but no action taken. The piano in question had been played for 12 years without complaint.

(6) Preventing disclosure in this context would permit a "black hole" of decision-making. The arguments raised in this case would apply with equal force to any record relating to nuisance investigations, since the information would bear the same relationship to any notice and subsequent appeal as it did here. In short, public authorities would never have to disclose their reasoning for reaching subjective judgments that a noise constituted a nuisance.

(7) To say it is only on the facts of this case that such records should be withheld would be nonsensical. It would mean that those who question decisions to serve abatement notices would be in a worse position in terms of understanding the reasons for them than those who accept them without question.

(8) This was not a low level decision within RBKC. As the Appellant's witness evidence confirms, the matter was considered at the highest level within RBKC, by the former leader and former Chief Executive. The fact that the matter was escalated confirms the public interest in disclosure.

(9) The public interest would further be heightened if the information requested discloses any wrongdoing. There is also a public interest in ensuring that the field notes accord with the evidence given to the magistrates.

(10) There is a public interest in the Appellant knowing why they have been subject to this interference with their lives. RBKC did nothing to ease the pain and indeed sought to delay the disposal of the appeal through applying for an unmerited adjournment. They had to choose between continuing to nurture their children's talents away from home, or living a normal family life in the family home. The effects included the Appellant's younger son having to stay late at school on an almost daily basis to practice (or to practice during lunchtime rather than spend time with friends), and her older son having to play at a nearby music college. It is desperately sad that a formative year in these boys' lives had to be lived in part out of the family home.

(11) It is contrary to the course of justice for the Appellant to be denied the full content of the complaints against her that precipitated RBKC's actions.

(12) RBKC contends that there is a limited "environmental" character to the dispute. That is obviously wrong, since noise is a key environmental characteristic, and the EPA is the key statutory regime for controlling noise. It is difficult to conceive of information, which has greater environmental character.

44. The Council's submissions include the following:

(1) The public interests favouring disclosure are (i) general public interests in accountability and transparency, including in relation to environmental information; and (ii) a specific transparency interest in relation to how RBKC investigates environmental noise complaints. These are of limited weight in this case.

(2) The Appellant's arguments as to public interest repeat matters properly before DJ Roscoe in the Magistrates' Court proceedings: "*[w]hether a nuisance exists*", "*how the conclusion that there is a nuisance is reached*", "*the activity concerned is a normal domestic activity of piano playing*". As to the fact that "*complaints were received in 2014 but no action taken*", this was exhaustively explained in RBKC's witness evidence before DJ Roscoe – there was a process of investigation through 2014 and into 2015 before the Notice was issued. The assertion that there is a public interest in these matters, as opposed to a private desire of the Appellant to obtain the information, is weak indeed.

(3) There was very substantial disclosure to the Appellant in preparation for the EPA appeal. Ms Seraphim and Mr Mehaffy gave extensive evidence to the Magistrates' Court on *inter alia* the reasons why the abatement notice was served supported by a number of individual statements from officers. Any reasonable person reading the witness statements

(accepted by the Magistrates' Court following oral evidence), would have ample explanation of why the abatement notice was made. The actual relevance of the requested information to the Magistrate Court proceedings is not admitted.

(4) The underlying issue is a domestic one, of a dispute between neighbours, and the 'environmental' character of the dispute - noise resulting from piano playing - is limited. The Appellant appears to accept this was a "*minor neighbour dispute*". It was of no wide public interest.

(5) The Appellant's asserted at the hearing that it was "*extraordinary"* to have issued an abatement notice for piano-playing and there was an interest in knowing why. It is clear the notice was served and the decision defended because its qualified Environmental Health Officers concluded there was a statutory nuisance. RBKC investigated the nuisance because complaints were made to it, and issued an abatement notice only because, having determined on investigation that a statutory nuisance existed, it was required pursuant to its statutory duties to issue an abatement notice. It was not open to the officers, contrary to the Appellant's assertions, to "*tell the complainants to pursue their grievance privately.* The Magistrates' Court upheld the existence of a nuisance. The fact that the Appellant refuses to accept those explanations and persists in her allegations of impropriety, is a matter for the Appellant only.

(6) The Appellant's assertion that finding for the Respondents would "*permit a "black hole" of decision-making in respect of one of the fundamental powers for environmental regulation in domestic environmental law*" is incorrect. All requests for information under the EIR are fact-sensitive. Here, the Appellant has appealed RBKC's decision to the Magistrates' Court and sought to use the EIR to obtain disclosure in a manner that circumvents the Magistrates' Court processes and creates unfairness to RBKC.

(7) The Appellant makes dark accusations against RBKC of collusion or influence from 'influential persons'. No factual basis for this has been supplied by the Appellant, and there is none. The Appellant asserted that such influence would be evident from the requested information (*See page 437 of the open bundle*). The Appellant cannot create a public interest in disclosure by making baseless allegations.

(8) The assertion that the decision to issue the abatement notice was "*not a low level decision within RBKC*" and may have emanated from Mr Paget-Brown and/or Mr Holgate is incorrect, misleading and lacks any evidential foundation. Mr Mehaffy was clear in his evidence that they had not influenced his decision. The Appellant had stated that Mr Holgate stated that he had no right or intention to interfere with the determinations of the Council's Environmental Health Officers.

(9) There are strong public interests in maintaining the exception:

a. The general public interest in protecting the integrity of the course of justice, and the ability of the courts to regulate their own procedures.

b. The public interest in protecting equality of position between parties to litigation and in not undermining the ability of public bodies to defend their decisions;
c. The adverse effect upon the course of justice that would result from the future reluctance of individuals to assist RBKC in defending noise nuisance decisions; and
d. The public interest in protecting the integrity of internal communications within public bodies, which incorporates the concern that, if such material is disclosed, communications within public bodies may be less free and frank than would otherwise be the case, i.e. a form of 'chilling effect'). The Tribunal requested an indication of the parties' positions on the question of a 'chilling effect'.

(10) In *DCLG*, the Upper Tribunal found that an adverse effect on the course of justice would "*generally*" deserve "*very considerable weight*".[15]

45. The Commissioner's submissions include:

(1) The request relates, at heart, to complaints made in the course of a longstanding neighbour dispute. There is very limited public interest in understanding the intricacies of that dispute, notwithstanding that the particular source of complaints (noise) brings them within the scope of the EIR.

(2) The interests in maintaining the exception significantly outweigh the interest in disclosure. They include preserving the confidence of RBKC and other local authorities in the fairness of appeals brought under s.80 (3) EPA; and ensuring that case management by the presiding judge in a case is not undermined or otherwise interfered with.

Finding on Issue 2b)

46. On the facts, we find the public interests in disclosure concern:

(1) Generic interests public interests in accountability and transparency, including in relation to its status as environmental information.

(2) Specific interest in the public understanding the actions of the Council including how it investigates nuisance complaints; how it investigated this complaint in particular; its decision-making process; and whether there was proper and objective handling of the matter. Additionally, specific public interest in the Appellant being given sufficient information to understand how nuisance complaints are investigated, as recipient of an abatement notice.

(3) Transparency on the basis of open justice, with the Appellant having all available potentially relevant material available to her. The power to issue an abatement notice is significant, and there is importance to being able to probe the Council and test its reasoning.

47. The weight of public interest in disclosure is very limited. This is because:

(1) There existed an appeal process to the Magistrates' Court that the Appellant was able to access. The court's processes would ensure it had

[15] See para 72(a) of that decision.

the relevant and sufficient information before it to probe and test its reasoning, and establish the veracity of the evidence and properly and proportionately determine the matter. This fully satisfies all public interest in ensuring the decision to issue a notice was appropriately and fairly made. It satisfied interests in accountability and transparency. The large number of detailed witness statements from RBKC officers provided prior to the request provided sufficient information to understand how complaints were investigated and why the Council decided to take the course it did, and whether their of the matter was objective and proper.

(2) There is minimal public interest in understanding the intricacies of the dispute at the granular level of the requested information. Whilst there was press attention, this does not equate to public interest in the requested material. Whilst issues concerning noise brings it within the scope of the EIR, any suggestion that the 'environmental character' of the request in this case necessitates a particularly strong interest in disclosure, and that it is difficult to conceive of information which has a greater environmental character, loses all sense of proportionality.

(3) The Appellant appeared to argue for disclosure due to the Council having spent vast amount of officer time and incurring £100,000 of public money in the appeal process. Notwithstanding that this was not strictly relevant given that it was after the time of the review, it also seems somewhat tongue in cheek given that the larger proportion of expenditure relates to the Appellant's own legal fees. In any event, it is important that a council acts in relation to nuisances, that the complainant has a right to bring an appeal against notices, and that the Council is able to defend them. This is part of ensuring that the Council is able to fairly safeguard the borough for the enjoyment of the borough.

(4) We have not seen or heard anything that supports allegations made by the Appellant of any form of untoward acts, inaction, behaviour or influences within the Council that might support any disclosure. We prefer Mr Mehaffy's testimony as more compelling in this regard.

(5) In view of these reasons, and having carefully considered all of the material, we find minimal potential value in the material itself in actually advancing any public interest.

48. The public interest in withholding the information concerns the adverse effect upon the course of justice as set out in Issue 2a) above. (This might be summarised as, ensuring the ability of the Magistrates' court to be able to fully manage its case and control its proceedings. We additionally accept the summary set out in para.45(2) above.)

49. For the reasons already dealt with in this decision, we do not accept the other public interests advanced by the Respondents.[16] We have not found it necessary to consider the public interest in maintaining the exception set out in regulation 12(4)(e), which in any event the Respondents rely on for only part of the requested information.

50. Having carefully considered the actual contents of the requested information, we consider the weight of interest in maintaining the exception considerably outweighs the cumulative weight of public interest in disclosure.

[16] We do not accept, for instance para, 44(9)(b) and (c).

51. We found little merit in other arguments raised in submissions or evidence by the Appellants. For instance, it is simply not true to state that without the requested information, the triggers for the Council's action and their decision-making process are completely unknown.

52. It was not clear why the Appellant asserted that this finding would mean those who question decisions to serve abatement notices would be in a worse position in terms of understanding the reasons for them than those who accept them without question. Clearly, the Appellant had already had the benefit of scrutiny from the Magistrates' Court to inform her of the reasons. In any event, we are required to take into account the relevant factors in play in this case, and this includes that at the time of the request, an appeal was on-going in another court and that this triggered a public interest in withholding the information under regulation 12(5)(b).

Issue 2: Conclusion

53. We have taken into account the presumption in favour of disclosure. Nonetheless we find that the exception is engaged and that the public interest in maintaining it vastly outweighs the counter-veiling public interests, which on the facts are extremely limited.

54. We have considered in detail whether any part of the requested information was incorrectly withheld. We consider that all the information falls within the exception. This is because the Appellant clearly requested all the information in relation to the on-going proceedings. The principles of ensuring the Magistrates' Court controls its proceedings and observing the division of responsibilities between it and the Tribunal, and of maintaining confidence in such a system applies to all of the information. Disclosing any part under EIR would, on the balance of probabilities, have an adverse affect on the course of justice. Conversely, we have found that any form of partial disclosure would serve little or no public interest, and in every form of potential disclosure there would be a greater weight in the public interest in maintaining the exception.

Issues 3 and 4

55. In view of our finding that regulation 12(5)(b) has been properly relied on so as to withhold all of the requested information, we do not find it proportionate - within the meaning of rule 2 of *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 No. 1976 (L. 20)* ('the Rules') - to set out our finding in relation to Issues 3 and 4.

56. Our decision is unanimous.

Other

57. The Commissioner helpfully summarised in her closing submissions at footnote 1 her understanding that the Appellant no longer sought to challenge

the application of regulation 5(3) (*requester's personal data).* The Appellant has not disputed this.

58. The Appellant explained in the closing submissions that the Council had confirmed that the information withheld under regulation 5(3) was the same as that provided to her under the SAR. The Appellant informed the Tribunal that there was nothing for the Tribunal to rule on save to confirm that the material was identical. Shortly before the second hearing, she later provided the large amount of SAR material that she had received, without an application to the Tribunal for permission to submit it. Having taken into account rule 2 of the Rules and the need to deal with a case fairly and justly, and proportionately, we do not allow this material as admissible. This is particularly given the late stage, unnecessarily large open bundle already provided, and lack of strict relevance to the case. The Appellant asserts in footnote 1 of its closing submissions that RBKC has taken an inconsistent approach, but does not explain in what way. In any event, as the Appellant will know, matters concerning the SAR are outside the Tribunal's remit, as is the role the Appellant envisages for us in comparing material.

59. We would note that we found cause to draw the parties' attention to rule 2(4)(a) and (b) of the Rules.[17] This was due to the late service of bundles; those bundles being very large – the open containing material not all clearly relevant to the appeal and without a meaningful index or order to be able to readily locate key documents such as the request; the Closed Bundle also being unnecessarily large containing duplication. There were a number of very lengthy submissions and additionally skeleton arguments submitted at the last minute. Notwithstanding directions, the further submissions and replies after the oral hearing still seemed unnecessarily lengthy. This unnecessarily increased the burden for the Court.

Judge Taylor

Date of Decision: 21 November 2017

Date Promulgated: 27 November 2017

[17] This states "Parties must - (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally."