

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

Date: 26 September 2011

Public Authority: Blackburn with Darwen Borough Council
Address: King William Street
Town Hall
Blackburn
BB1 7DY

Decision (including any steps ordered)

1. The complainant has requested information principally arising from a noise complaint made to Blackburn with Darwen Borough Council (the "Council"). This included a request to inspect his property file.
2. The Commissioner's decision is that the Council has correctly claimed that it does not hold some of the information specified by the complainant as falling within the scope of his request. However, the Commissioner considers that the Council failed to respond to the complainant's request to inspect his property file in accordance with regulation 6 of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information on the property file to the complainant in an alternative format, such as a print-out or electronically, subject to any relevant disbursement costs that accord with regulation 8(8) of the EIR.

If and where the Council considers that any or all of the information is exempt information, the Council should issue a refusal notice that specifies the exception(s) in the EIR it is seeking to rely on and includes an explanation demonstrating why the exception(s) applies.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 May 2010 the complainant wrote to the Council and requested information in the following terms:
 1. "Please confirm what actions were taken to investigate my complaint of 2005."
 2. "Please provide details of your professional assessment of my complaints (2005, 2008 & 2009) of loud music, low frequency noise, vibration and washing machine noise."
 3. "A copy of your internal guidelines dealing with statutory nuisances."
 4. "Please forward a copy of any minutes, reports, papers or internal correspondence dealing with my complaints of 2005, 2008 and 2009."
 5. "How many complaints did the Council receive for vibration during the period 2006-2009 and of those how many were investigated."
 6. "I would also like to make an appointment to view the property file and would be grateful if you could arrange for this at your earliest convenience."
6. The complainant clarified on 16 June 2011 that, with respect to item 6 of the request, the property file in question was the one held by the Council's Environmental Health department.
7. Following the intervention of the Commissioner, the Council provided a substantive response to the request on 10 September 2010. This enclosed information that the Council considered was covered by the scope of the request or, alternatively, explained why it did not hold the requested information. It also stated that the Council had already spoken to the complainant about his request to view the property file.
8. The Council wrote to the complainant again on 7 October 2010, which in effect provided the outcome of the Council's internal review. This stated that the Council had fully complied with all parts of the complainant's request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. During the Commissioner's investigation he has agreed with the complainant the scope of the issues that should be considered in this Decision Notice. These are as follows:

Request 3

- Whether the Council holds:
 - A full copy of a policy entitled "ENV 4 – Control of Noise Nuisance"
 - A Neighbourhood/Public Protection Enforcement policy

Request 4

- Whether the Council holds:
 - An email requesting that two officers from Pendle Borough Council give statements in regards to the environmental complaint.

Request 6

- Whether the complainant was entitled to inspect the specified property file held by the Environmental Health Department.

11. The Commissioner addresses each of these issues below.

Reasons for decision

12. The Commissioner has initially considered whether the relevant access-regime for the requests that form the focus of this notice should be the EIR or FOIA.

Is any of the requested information, if held, "environmental"?

13. "Environmental Information" is defined at regulation 2 of the EIR. In order for it to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) to (f) of the EIR – constituting "information on" any of the subjects covered by those six sub-sections.
14. The Commissioner has concluded that all the requested information would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR.

15. In making this finding, the Commissioner notes that he has not seen all the information contained on the property file referred to in request 6 or, for the other requests, the Council claims it does not hold information. However, the Commissioner is satisfied on the balance of probabilities that the information, if and where held, would be on a measure likely to affect the elements and factors cited in regulation 2(1)(a) and 2(1)(b) of the EIR, most notably the "noise" factor.

Regulation 5 – Duty to make environmental information available

16. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. A claim that information is not held is covered by an exception under regulation 12(4)(a) of the EIR and therefore requires a formal refusal notice.
17. Where there is any contention about whether or information is held by a public authority, the Commissioner considers that the test to be applied is not one of certainty but rather is the civil standard of the balance of probabilities.

ENV 4 – Control of Noise Nuisance Policy

18. The Council has provided the complainant with a copy of section 12 (Environmental Protection & Improvement) of the Council's Local Plan¹. This chapter of the Local Plan sets out the policies of the Council to promote a "safe, clean and healthy environment" and ranges from policy ENV1 (Protection of water resources) to ENV10 (Air quality).
19. Under "POLICY ENV4" (Control of Noise Nuisance), the Local Plan states that:
- i. Noise generating development will not be permitted if it would be liable to increase unacceptably the noise experienced by the user of existing or proposed noise sensitive development nearby.
 - ii. Noise-sensitive development will not be permitted if its users would be unacceptably affected by noise from existing or proposed noise generating uses.
20. The complainant has argued that a more detailed policy bearing the title ENV4 must underlie this statement, which should have been provided to

¹ <http://blackburn.devplan.org.uk/document.aspx?document=17&display=chapter&id=146>

him in response to his request. However, the Council considers that it does not hold any further information of the nature described.

21. The Council has explained that the Local Plan was formally adopted in April 2002 to "set out the Council's intentions for the development and use of land within the Borough and forming the basis against which planning applications are assessed."
22. The Council has accepted that the heading "POLICY ENV4" could be misleading in that it may give the impression that the Council holds a document that is more substantial than the statement quoted at paragraph 18. However, the Council has clarified that POLICY ENV 4 of the Local Plan only refers to the Council's intentions in "relation to development and [is] not a Policy specifically designed for Noise Pollution".
23. The Commissioner is satisfied that this explanation is sufficient to find that the Council does not hold the recorded information identified by the complainant.

Neighbourhood / Public Protection Enforcement Policy

24. The Commissioner is aware that the Council has provided the complainant with a number of internal policies and guidelines in the course of dealing with the complainant. This included a copy of its Pollution Control Enforcement Policy. The Council has further clarified that while it holds other Public Protection Enforcement policies, such as a policy that covers Licensing, none of these relate to statutory nuisances.
25. In contrast, the complainant has insisted that the Council holds a policy entitled "Neighbourhood Enforcement" / "Public Protection Enforcement" or a policy of a similar description, which refers to statutory nuisances.
26. The Commissioner has been informed by the complainant that he has no evidence to suggest that a policy of this type is, or has been, held by the Council. He has though pointed to an investigation carried out by the Commissioner into a separate case, from which he has indirectly inferred the existence of such a policy. This investigation, it should be noted, did not result in the issuing of a decision notice.
27. The Council has explained that the absence of a Public Protection Enforcement Policy has been identified, with the resultant step that the Group Manager of Public Protection is currently in the process of drafting such a Notice. This will subsequently be issued to Members for Full Council approval. The Council has argued that it would not be required to carry out this process if a Policy already existed at the time of the request.

28. Drawing on the explanation of the Council, and in the absence of any evidence to the contrary, the Commissioner has decided on the balance of probabilities that the Council did not hold information of the type described at the time the request was made. This includes any draft forms of the policy.

Email requesting statements

29. The complainant has brought to the attention of the Commissioner the typed notes of the Council with respect to its handling of his noise complaints. Under an entry in March 2010 the notes state:

"JPA [officer x] and [officer y] from pendle contact me with regard to my email for them to provide statements."

30. The Council has provided the complainant with a copy of the statements referred to in the notes. However, the Council has asserted that it no longer holds a copy of the email that requested that a statement from the officers at Borough of Pendle Council was given in the first instance.
31. The Council is of the view that the email has been deleted, although it has no record of the deletion itself. In forming this view, the Council has contacted the Principal Officer from the Environmental Protection - the author of the email in question - in response to the Commissioner's investigation.
32. The Principal Officer used the search function associated with Outlook to ascertain whether any of their mail folders contained the relevant email. This included searching by addressee in an effort to return any email issued to an officer in respect of the request for the statement. For the sake of transparency, this search was witnessed by the Group Manager of Public Protection.
33. In regards to its policy on record keeping, the Council has informed the Commissioner that while an email archive function is available, staff are "advised to undertake a degree of general housekeeping in relation to their own email storage prior to deciding which emails should be retained in accordance with the Council's Retention Policy."
34. The Commissioner has further been notified that employees are reminded that emails, as written correspondence, can form part of evidence in court. As such, "individual judgement is taken as to whether an email needs to be retained. In this case it was perceived that the pertinent information to retain was the statement itself."
35. The Commissioner considers that the steps taken by the Council to locate the information were appropriate, especially bearing in mind that the author of the email in question has been approached. He has

therefore determined that the Council is no longer in possession of the email requesting the statements.

The public interest test

36. Regulation 12(1)(b) requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. It is patently difficult for the Commissioner to do this given his finding that the public authority does not hold the information outlined above to which the public interest could apply. However, while accepting the impracticality of carrying out such a test, he has concluded that the public interest favours maintaining the exception.

Regulation 6 – form and format of information

37. The complainant has asked the Council to allow him to inspect the property file held by its Environmental Health department.
38. The Council has confirmed that it has interpreted the property file as referring to the:

“...Flare system record relating to each complaint made to the Public Protection Service. This record will contain system entry journal notes along with scanned documents attachments, eg. Correspondence from the complainant.

The only evidence that could be construed as ‘not held electronically is the investigation officers’ handbook. These notebooks contain notes relating to numerous cases and are therefore treated as evidence. Once an officer has filed a notebook they are archived securely. All officers’ notes are routinely uploaded onto the Flare system in the form of a journal entry.”

39. Regulation 6(1) provides an applicant with the right to request that information be made available in a particular form or format.
40. As outlined in his decision on FER0354514 (Selby District Council), it is the Commissioner’s view that although regulation 6(1) may appear primarily to be concerned with the form or format that information is provided in, it should be interpreted broadly and does provide a right to request the inspection of environmental information. A public authority should comply with this preference unless, in accordance with regulation 6(1)(a), it is reasonable to make the information available in another format or, in accordance with regulation 6(1)(b), the information is already publicly available in another format.

Regulation 6(1)(a)

41. In this case the Council has argued that it would not be reasonable in the circumstances to allow a member of the public to inspect the property file.
42. The Council has explained that in order to view the information on the Flare system, an individual would firstly need access to the Council's corporate IT network. The Council has informed the Commissioner that an Audit stipulation for access to the Council's corporate network is that each user that logs in must be identifiable and adheres to its corporate policies. This adherence is evidenced by the signing of a Network Access Request Form (subject to manager approval) and an Acceptable Use Policy. No user is permitted to access the network without signing these forms and this level of access is, in any event, not available to the public.
43. A further obstacle to inspection lies with the need to enter the Flare system itself. This requires an individual to sign a FLARE System Access Request form that would be subject to manager approval. The security of Flare is important because information is stored on the system that was provided in confidence. This would include, the Commissioner anticipates, information given by the complainant himself.
44. The Commissioner therefore accepts that in this particular situation it would be reasonable for the Council to consider providing the information covered by the scope of the request in a format other than inspection. This is owing to the practical difficulties that allowing inspection would create, given that the property file can not be viewed on a public facing computer.
45. As the Commissioner has decided that regulation 6(1)(a) applies, he has concluded that the Council should consider releasing the information in an alternative format or, where appropriate, issuing an appropriate refusal notice.
46. The Commissioner notes that regulation 8 of the EIR provides a general right for public authorities to charge for making information available. However, that right is subject to a number of conditions. The Commissioner would therefore expect the Council to assess fully these conditions if it considers that making the information available should be subject to disbursement costs.

Procedural issues

47. The Commissioner is aware of the difficulties that have arisen in responding to the request because of the context and background in which the request was made. This is not least due to the overlap of information covered by separate requests made by the complainant.

48. Notwithstanding this point, the Commissioner finds that the Council breached regulation 5(2) by failing to respond to the request within the stipulated 20 working day timeframe.
49. The Commissioner has also found a breach of regulation 5(2) in respect of the Council's delay in making information available in an alternative form or format with regards to request 6 and/or refusing any of the information covered by this part of the request. Furthermore, the Commissioner has determined that the Council breached regulation 6(2) of the EIR by its failure to explain to the complainant that it was unable to accede to his request to inspect information within 20 working days.

Right of appeal

50. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. 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

Pamela Clements
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