

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

Date: 11 January 2021

Public Authority: Lancashire County Council

Address: PO Box 78
County Hall
Fishergate
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant requested noise monitoring data in relation to the construction of a road near their property. Lancashire County Council initially stated that it did not hold the data requested however it subsequently changed the response to cite regulation 12(4)(b) to withhold the information.
2. The Commissioner's decision is that Lancashire County Council is entitled to rely upon regulation 12(4)(b) and that the public interest rests in maintaining this exception. However the Commissioner finds that the council breached regulation 14(2) in its handling of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 13 January 2020, the complainant requested information from Lancashire County Council ('the council') in the following terms. The request was made in two emails, (numbering added to highlight the information requested):

"You have furnished me with the Jacobs ['the Contractor'] report in the past and I also have a copy of the LCC ['the council'] rebuttal from the public enquiry. I have been asked, and need to ask you, for [1] the specific locations where noise data was taken and indeed where the modelling figures exactly relate to. For example reports mention testing was undertaken at [two locations, redacted]. [2] I need to understand the specific location of each site instead of a very general description and any others in the near vicinity of ['the Complainants Property'] where data may have been collected or modelling applied. Ideally this will be by way of an 8 digit grid reference or indeed a marked plan/map. I am told this would be the normal practise.

While asking it might be also efficient to ask for [3] the underlying raw data.

When replying to my earlier email [4] please provide details around the properties affected by vibration and the impact. Whilst the report is also described as a "vibration assessment" it does have very little detail as to the vibration impact on [the Complainant's Property]. It is only notes that there are fewer properties impacted by vibration issues, but does not identify the properties on the magnitude of the vibration issue."

5. The council's response of 31 January 2020 stated that it does not hold any further information in scope of the request other than the information that had already been identified to the complainant:

"You have emailed on the 13th January 2020 requesting information in relation to specific locations where noise data was taken/where modelling figures relate to, underlying raw data, noise calculations relating to on [the Complainant's Property], and details around the properties affected by vibration and the impact.

The published information accompanying the planning application, specifically Chapter 9 to the environmental Statement and appendix G, along with the information you refer to in your email ['the Jacobs Report'] is I understand the sum total of information currently held by the County Council. Noise and Vibration assessments, and the methodology employed, is described in the main body of these reports

in more detail ay Appendix G, and conforms to national guidance on this matter and this is listed towards the beginning of Chapter 9."

6. The complainant emailed the council a number of times in February 2020 requesting that the council obtain the information directly from the Contractor.
7. The council responded on 28 February 2020 upholding its position that the council does not hold the requested information. It also advised that the information was not held on the council's behalf by the Contractor.
8. On 31 March 2020 the council provided the following response to the complainant (numbering added)

[1] *"Published information (Environmental Statement Volume 2 Part 2 Chapter 9 and Appendix G) explains that baseline noise measurements were conducted at 8 locations, including 15 minute rotational noise monitoring on 26 June 2013 at [two locations]. All measurements were undertaken with class 1 precision instrumentation. Measurements were all undertaken in free field locations with the microphone at a height of approximately 1.5 m above ground level. To explain, the term "free-field" refers to noise levels that have been measured or predicted in the absence of any influence of reflections from nearby surfaces. In practice, a measurement is considered to be free-field if it was taken at a distance of over 3.5 m from any reflecting surfaces.*

[2] *The published information does identify OS grid references for these properties which would correspond to nearest facades to the Bypass. These OS grid references are: [Eastings and Northings provided for the two locations].*

[4] *These noise monitoring results (noise sources noted included distant road traffic, birdsong and aircraft) were [results provided for two locations]. ...The calculation of noise levels for your property, similar to other properties, is detailed in the published information (Environmental Statement Volume 2 Part 2 Chapter 9 and Appendix G). Noise levels have been predicted at a distance of 1 m from the most exposed façade and include a 2.5 dB façade correction. I can offer no further information at this time to that in the published information in respect of vibration assessment."*

9. On 1 October 2020 the council revised its position to determine that the information held by the Contractor is held on behalf of the council. However, it stated that the underlying raw data [3] is withheld on the basis of regulation 12(4)(b) (cost of compliance). The council stated:

"please note that the report that was produced covered a wide area, of which your property was situated, as such it was not a report specifically in relation to your property. Under the Environmental Information Regulations 2004 ('the Regulations') we are not obliged to create information in order to respond to a request; the Regulations apply only to information that is held...

In terms of any raw data that is held that may relate specifically to your property, locating, extracting and collating any information would require a manual trawl of a vast amount of retained data to identify any that does, or may, apply to your property...

Whilst we have a duty to provide advice and assistance in order to help you amend your request to bring it within reasonable limits, given the way in which any information you are seeking may be held, it is difficult to suggest a way in which the scope of your request can be narrowed, as any search for information is going to require a large manual trawl of data to find anything of relevance to your property."

Scope of the case

10. The complainant contacted the Commissioner on 6 March 2020 to complain about the way his request for information had been handled. Initially to dispute the council's internal review response, which stated that it did not hold the requested information. However, further questions and responses were exchanged following that date, with the council answering some questions but relying on regulation 12(4)(b) for withholding information in scope of request item [3].
11. The complainant has disputes regarding other information requests on similar items with the council however they do not fall within the scope of the requests made on 13 January 2020. The complainant therefore reached an agreement with the Commissioner that the remaining aspect of this complaint was regarding council's position to refuse request item [3] on the basis of regulation 12(4)(b).
12. The Commissioner considers that the scope of the case is to establish whether the council has correctly engaged the exception at regulation 12(4)(b). If it has, then she will consider where the balance of public interest lies. She will also consider whether the council made any procedural breaches of the EIR in its handling of the request.

Reasons for decision

Regulation 12(4)(b)

13. Regulation of the EIR 12(4)(b) provides that

“(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;”

14. The council's position is that the request is manifestly unreasonable because it would impose a significant burden on the council in terms of cost.

15. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.

16. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that is provided by section 12 of the FOIA.

17. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR because the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.

18. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per

¹ <https://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.

19. The Commissioner is satisfied that regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly unreasonable', rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.
20. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.
21. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:
 - proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
 - the nature of the request and any wider value in the requested information being made publicly available;
 - the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
 - the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requestor;
 - the presumption in favour of disclosure under Regulation 12(2);
 - the requirement to interpret the exceptions restrictively.

The council's position

22. The council advised that the Contractor would need to provide 23 hours of work in order to locate the information in scope of [3]. It confirmed that the approach for locating the information, described below, is the only way of ascertaining what relevant information is held.
23. The council advised that the estimate is not based upon a sampling exercise, because to do so would essentially be carrying out the work that the exemption is claimed for. However, the estimate is based on the Contractor's experience of similar activities. The Contractor provided the council with a time and cost estimate for the work.

24. The Contractor advised the council that the following factors contributed to the time estimate used in its quote:

- The older a project is, the more difficult it can be to access the required data. In this instance the project is over six years old;
- Some of the senior staff who were leading on the project have left;
- The work was completed from an office that is now closed, adding to the complexity of finding data in the archives;
- An element of familiarisation is required for the team to go through the various files and determine what is relevant.

25. The Contractor provided the following details:

- Four hours are required to retrieve data from the archive. The team has relocated to a new office with a new server and different IT staff since the completion of the project. It will therefore be more difficult to retrieve the electronically archived project data than would usually be the case.
- Four hours are required to review all project data to identify the information relevant to the request including documents and spreadsheets. For this project, the acoustics team project folder contains 1,484 files in 259 folders with a total storage size of 10.5 GB. All of the information would need to be reviewed in order to identify those files which may be relevant. Due to the time since completion it would be undertaken by someone without working knowledge of the project
- Five hours are required to review all the noise monitoring data obtained, by extracting information relevant to surveys taken near to the Complainant's Property. The contractor states that the noise monitoring for this scheme was extensive, therefore there is a high volume of data to review in this regard:
 - In terms of baseline noise data alone, there are 164 files in 11 folders with a total size of 80.8 MB;
 - In terms of the results, there are a number of raw data spreadsheets that detailed the measured noise levels, however not all of this information is relevant to the request. Therefore, time for understanding the data to identify and extract the correct data would be required;
 - Much of the data is contained in three separate spreadsheets, which would have needed to be cross checked against the details

- provided in the published Environmental Statement to ensure that the correct data was being provided;
- Time would be required by another person to ensure compliance with the Contractor's quality control processes in order to validate that the data being provided was relevant, correct and in an understandable format.
- Three hours are required to review noise modelling outputs and extract relevant predictions for the Complainant's Property from hundreds of different receptors:
 - The total outputs of the noise model and assessment were reported in the Environmental Statement;
 - The noise modelling data is output from the noise model and processed/analysed in the Contractor's data processing spreadsheets, which they state are their own intellectual property and contain information not held on behalf of the council. This means that they cannot be issued directly to others;
 - Each of these spreadsheets are around 80MB in size, containing 15 different tabulated sheets each with different data analysis, for around 1,750 different properties. Additionally, for each property, there are 8 different noise level predictions (from which noise and vibration nuisance levels are derived) for various scenarios (Do Minimum Opening Year, Do Minimum Future Assessment Year, Do Something Opening Year and Do Something Future Assessment Year, each for a "motorway" and "non motorway" scenario);
 - In order to provide this data, the Contractor would have to identify the relevant spreadsheet, then the relevant property and data associated with this property, and cross check against the information provided in the Environmental Statement to ensure the correct data has been found;
 - In addition time would be required to carry out a quality checking review.
 - Seven hours are required to review the noise modelling outputs and provide details of the predicted noise, nuisance and vibration levels and how they were derived and used in the assessment:
 - The data is stored in large detailed spreadsheets, which would be difficult to understand by anybody not involved in their development;
 - Time would be required to identify the correct data from the spreadsheets, then to extract it and provide some information regarding how the noise/vibration and nuisance levels were derived and what they mean;
 - In addition time would also be required for review to carry out a quality checking review.

- In addition to the 23 hours work identified above for locating information, an additional 12 hours would be required by the Contractor to supply it in a way that is meaningful and understandable:
 - Seven hours to provide the data in suitable format for ease of understanding by others not involved in assessment process
 - Five hours to complete further quality checking by a more senior team member to ensure relevant, correct and understandable. This time is required due to sensitivities regarding the information and the threat of legal action.
26. The total time therefore estimated for the Contractor to respond to the request is 35 hours.
 27. The council estimates that around three hours would be required by the council officers to manage the collation of the response and liaise with the Contractor. Therefore the total time estimated to comply with the request is 38 hours. It advised that there would also be some further time required by other departments in the council to commission the work to the Contractor and to process the payment for it.
 28. The council confirmed it would have to pay the Contractor additional charges for the hours worked in answering the request. It advised that the Contractor's consultancy rate is considerably higher than £25 per hour as set out in the Fees Regulations.
 29. The council advised that the additional cost burden would divert funds from other important council services. It stated that the council is already suffering from unexpected additional financial burden due to the impact of the Covid-19 pandemic.
 30. The council advised that the Contractor has limited resources therefore other projects it is undertaking for the council would need to be paused in order to respond to the request.
 31. The council considers that sufficient data in planning documents is available to the requestor, and has been provided already. It argues that data already available was sufficiently robust and detailed to satisfy the planning process and a full public inquiry.
 32. The council considers that it has tried to be as helpful as possible to the complainant, including providing a dedicated mailbox to deal with questions and responses and six weekly updates from a senior planning manager. The council claims that the complainant has been making requests for many years on the same subject matter.

33. The council states that the complainant's persistent requests are taking up a disproportionate amount of time and impacting on its ability to deal with other requestors.
34. The council states that it acknowledges the general public interest in public authorities being as open and transparent as possible. However, in this case, it asserts that there is no wider public interest in diverting crucial resources from other critical functions to respond to the further to the complainant's request.

The complainant's position

35. The complainant explained the reason for requesting the raw data. A bypass has been built next to their property and they are entitled to explore the potential for compensation with council. Part of the compensation process involves proving the impact of noise and vibration on the property. The complainant engaged a specialist who raised concerns regarding the information published by the council in this respect.
36. The complainant advises that initially the Contractor had agreed to supply the information. However subsequently the Contractor changed its position and advised that all requests should be made through the council.
37. The complainant does not consider that responding to the request should be unduly onerous as the data requested must have been presented to and considered by the author of the published Noise and Vibration Assessment report.
38. The complainant considers that the information should be easily available. They advise that arguments which state that the information in the report covers a wide area are immaterial as the report focusses on specific properties. To focus on individual and specific properties the data should be known and therefore be available.
39. The complainant raises that by not having access to the requested information, their ability to provide the proof required for a compensation claim are limited. They contend that this potentially could be a motivation for the council to withhold the information.

Is the exception engaged?

40. The Commissioner appreciates that the issue underlying the information request is of extreme importance to the complainant, given the negative impact they consider has been incurred on the Property due to the building of a bypass.

41. The Commissioner also understands that the data is sought in order to test the reliability of the published information which the council advised had already been made available.
42. The Commissioner has considered the complainants arguments that the data should be easily available for the Contractor to locate, and the council's case in terms of the detailed cost and time estimates.
43. The council has provided a comprehensive breakdown of the time it would take the Contractor to fulfil the request and this is clearly in opposition to the complainants view that it should be easily available.
44. The Commissioner has considered both positions and she finds that there is little basis upon which to argue with cost and time assessments given. The Commissioner therefore accepts the estimates that have been provided.
45. The Commissioner must now assess whether the burden of dealing with the request is proportional to the value of the information requested.
46. The Commissioner does not doubt the importance of the information to the complainant, however she considers that it is unlikely to be of significant interest to the broader community. Beyond the transparency aspect, she has not been able to identify a wider value in making the information publicly available.
47. Conversely the Commissioner considers that the burden on the council is significant and would require a disproportionate diversion of resources.
48. Having considered the council's response, its arguments and the Contractor's explanations provided in respect of how the relevant data would be obtained Commissioner is of the view that complying with the complainant's request would incur excessive costs.
49. In addition, the Commissioner considers that significant resources would be diverted from other services to fulfil the request. She believes that complying with the complainant's information request would impose an unreasonable burden on the council. Therefore, the Commissioner's conclusion is that regulation 12(4)(b) is engaged in this case.
50. Following the above, the Commissioner has continued to consider public interest factors relevant to the information request in question.

Public interest in favour of disclosure

51. Regulation 12(4)(b) is a qualified exception, meaning that a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public

interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure. This means that exempt information must still be disclosed unless there is an overriding public interest in maintaining any exceptions applied.

52. The Commissioner appreciates that the request relates to an issue that is of concern to the complainant. The disclosure of the requested information may assist the complainant to resolve the issue to some degree and this would potentially have an impact in their lives and wellbeing.
53. The council acknowledges that there is a general public interest in public authorities being as open and transparent as possible.

The public interest in the exception being maintained

54. The council referred the Commissioner to the considerable burden and diversion of resources that would be imposed on it in order to respond to the request. It also referred to previous requests made by the complainant.
55. The council stated that it believes there is no wider public interest in diverting resources from other critical functions to respond to this request. It highlighted that this is exacerbated even further as resources are strained in the current ongoing health pandemic.

Balance of the public interest

56. The Commissioner recognises the importance of accountability and transparency in decision-making within public authorities, and the necessity of a public authority bearing some costs when complying with a request for information. However, in considering the public interest test for this matter, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.
57. The Commissioner is mindful that there is information in the public domain which was sufficient to satisfy the planning process, including a public inquiry, and thus goes a considerable way towards meeting any public interest on the matter regarding information access. She also considers that the specific data that is in scope of this request is of limited wider public interest and does not alter in any significant way the sum of knowledge that would increase the public's understanding of the noise monitoring results.
58. The Commissioner's position is that the public interest in this case lies in ensuring that the council's resources are used effectively and are not diverted from its other core services. The Commissioner, therefore,

considers that dealing with the request does not best serve the public interest.

59. Whilst the Commissioner accepts the purpose and value of the request to the complainant, she nevertheless considers the burden imposed by the request to be manifestly excessive and that it would impact on other services. It is, therefore, the Commissioner's decision that the public interest lies in maintaining the exception.

Presumption in favour of disclosure

60. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
61. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Procedural Matters.

62. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time
63. In regard to the communication plan set up by the council, the complainant asserts that the council have not been responding to questions sent to the specified mailbox. In some cases, the complainant states that four months or longer have passed without acknowledgment of or reply to emails.
64. Conversely the council advise that the communications plan has been set up at the request of the complainant and also in order to help it to deal effectively with the very high volume of requests which are often overlapping.

65. The Commissioner is only able to make a decision regarding this aspect of the complaint in relation to a specific request. In this case the request was made on 13 January 2020. The council responded on 31 January 2020 and stated that the information was not held. It provided an internal review response on 28 February 2020 in which it upheld that position, stating that the information held by the Contractor was not held on the council's behalf.
66. Following the commencement of the Commissioners investigation the council revised the position and provided a refusal notice on 1 October 2020 on the basis of regulation 12(4)(b).
67. In providing this reconsidered response over 8 months after the original request, the Commissioner must conclude that the council failed to issue its refusal notice within the stipulated timescales and thus breached Regulation 14 of the EIR.
68. As the refusal notice has been issued, no further steps are required from the council.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk

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

70. 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.

71. 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

Andrew White
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