

Environmental Information Regulations 2004 Decision Notice

Date 21 November 2006

Public Authority: Doncaster Metropolitan Borough Council
Address: The Council House
College Road
Doncaster
DN1 3XS

Summary

Between 25 September and 30 November 2005 the complainant made four requests for information to Doncaster Metropolitan Borough Council ("DMBC") relating to aircraft noise resulting from aircraft movements at Robin Hood Airport Doncaster Sheffield ("RHADS") recorded by the fixed Noise Monitoring Terminal ("NMT") at Bawtry. DMBC refused the complainant's requests, stating that it did not hold the requested information, because it could "only be accessed by a phone line to a third party's computer". The Information Commissioner's decision is that at the time the requests were made, DMBC "held" the requested information under regulation 3(2)(a) of the Environmental Information Regulations 2004 (the "EIR") and that DMBC failed to comply with regulation 5(1) and (2), regulation 9 and regulation 14. The Commissioner requires DMBC to disclose to the complainant the relevant sections of a detailed noise report relating to November 2005.

The Commissioner's Role

1. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 are imported into the EIR.

The Request

2. The complainant made to DMBC four requests for information together with subsequent clarifications. On 25 September 2005 the complainant made the following request to DMBC:

"Could you let me have details of the maximum and minimum readings from the fixed noise monitor at Bawtry, please?"

- 2.1 DMBC responded on 10 October 2005 as follows:

“Although we have access to the noise readings from the fixed noise monitoring terminals (NMT), this information is used to identify specific aircraft that have flown over the terminals. The Environmental Health Department does not have the facility to run a report which would identify the maximum noise readings taken. Therefore I have forwarded your request to the airport for a Response to be provided”.

2.2 On 10 October 2005 the complainant made a further request: “What records do you have of noise levels please?”

2.3 On 11 October 2005, DMBC responded:

“We have the raw data for all the noise events above 65dB that have been recorded at the Noise Monitoring Terminals since the airport opened. However, there is no way of filtering out from that data the noisiest/quietest events. The airport may be able to provide you with an answer as they may have other methods of requesting information from the terminals”.

2.4 On 17 and 18 October 2005 the complainant provided DMBC with further clarification of his requests, including: “I would be pleased to receive anything you have”. In his email dated 17 October, the complainant also stated that the airport had refused his request.

2.5 On 18 October 2005 DMBC responded to the complainant as follows:

“I hope you can appreciate that sending out raw data does not achieve anything because the data needs analysing and interpretation. Confusion would soon set in if raw data noise levels were sent out on a (sic) irregular basis to whoever (sic) requested them.”

2.6 The complainant sent two emails on 18 October seeking a response from DMBC.

2.7 On 10 November the complainant issued a further reminder and made the following new request:

“Would you please let me have details of the noise recordings at fixed (sic) Monitoring Point at Green Park, Bawtry for the week commencing 7th November 2005”.

2.8 On 21 and 27 November 2005 the complainant issued further reminders to DMBC. On 30 November the complainant sent the following email to DMBC clarifying an earlier request and making a new request:

“Shortly all I want is the readings from the Fixed Noise Monitor at Green Park, Bawtry for the weeks 7 to 14 Nov and 20 to 26th Nov. Originally I asked for the max/min readings but [name] said he could not do that and referred me to RHA. They have refused to give me anything. I look forward to any readings you can give me please.”

2.9 On 16 December 2005 DMBC sent a holding reply to the complainant, stating that

the matter had been referred to its Legal Services Department.

- 2.10 On 13 and 19 January 2006 the complainant emailed further reminders to DMBC.
- 2.11 On 25 January 2006 DMBC wrote to the complainant, apologising for the delay in responding to him and explaining that the matter had been investigated, with the complainant's requests for information considered under the EIR. In this letter DMBC stated that it did not hold the information requested by the complainant and also claimed: "The council have no access to data about aircraft noise specifically". DMBC also sought to explain to the complainant that the noise data recorded by the NMTs, as he had requested, bore no correlation to aircraft movement and simply recorded any noise events. The DMBC also explained that it did not hold the noise data because this could only be accessed by a phone line to a third party's computer. DMBC also stated that RHADS had not given permission to provide the data to the complainant. DMBC also specified the complainant's right to appeal to the Information Commissioner.

The Investigation

Scope of the case

- 3.1 On 20 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant explained the background and the sequence of correspondence, and stated that:
- "In short I wish to receive details of noise readings taken by a fixed noise monitor of aircraft passing over Bawtry. I am aware that the Council has access to the readings but in the first place it referred my request to Doncaster Robin Hood Airport".
- 3.2 Following receipt of DMBC's response dated 25 January 2006, which the Commissioner considered to be DMBC's internal review, the complainant again wrote to the Commissioner and specifically referred to the following matters:
- the refusal of DMBC to provide him with the information requested
 - failure of DMBC to respond to his precise requests
 - the complainant argued that on the basis of the obligations imposed by an agreement between DMBC and the developer of RHADS under section 106 of the Town and Country Planning Act 1990 ("the s106 Agreement"), DMBC required the information he had requested in order to "carry out its duty and therefore holds the information".
- 3.3 The Commissioner understands that the obligations are contained in the Third Schedule to the s106 Agreement. The relevant obligations are as follows:
- "3.2 The Noise Monitoring System shall provide for the following measures:
- 3.21 the provision of a minimum of two and up to four fixed noise monitoring terminals (NMTs) at appropriate locations to be

agreed in writing between the Developer and the Council.
The fixed NMTs will be used to check actual noise from all
departing and arriving aircraft”

and:

“3.2.4 The fixed NMTs shall include a direct link to the office of the
Environmental Health Officer and access to outputs shall
include software accessibility.”

3.2.5 Outputs from the NMTs shall be provided to the
Environmental Health Officer at the expiration of each month.
The Environmental Health Officer shall be afforded access to
the noise monitoring and data systems to allow for audit of
the accuracy of the systems and the results of such audits
together with any recommendations shall be issued to the
Developer and the Noise Manager and they shall report the
recommendations to the Noise Monitoring Sub-Committee.”

3.4 The Commissioner considered that a significant part of the complaint depended on whether or not the requested information was “held” by DMBC and therefore this was an issue to which the Commissioner’s investigation devoted particular attention.

Chronology

3.5 The Information Commissioner’s Office (the “ICO”) acknowledged the complainant’s letters in writing on 2 February 2006 and informed DMBC that the complaint had been made.

3.6 On 24 July 2006 the ICO case officer, accompanied by an IT specialist from the ICO’s IT service provider, visited DMBC’s Environmental Health Department by prior arrangement. The IT specialist was in attendance since part of the information requested by the complainant was accessed on a computer within DMBC’s Environmental Health Department and it was felt that his expertise would be of benefit in investigating the technical elements of DMBC’s computer system.

3.7 The ICO case officer and IT specialist met with members of DMBC. During the visit the parties discussed the operation of the computer link between DMBC and the noise monitoring data. The ICO case officer and IT specialist viewed the actual operation of the system and the IT specialist dialled up the link and undertook a number of exercises to access data.

Findings of fact

3.8.1 The ICO visit to DMBC’s office on 24 July established the following facts:

- a) the computer link between DMBC and the noise monitoring data is operated by telephone link to Liverpool John Lennon Airport (“Liverpool Airport”) which is under the same ownership as RHADS

- b) IT support for the link is also based at Liverpool Airport and any queries by DMBC regarding the operation of the link have to be made to staff there
- c) the link is dialled up by following cumbersome printed instructions. DMBC informed ICO that the link operates very slowly. This was found to be so during the visit and indeed the link was only successfully dialled up after several attempts and after DMBC contacted IT staff at Liverpool Airport for assistance
- d) if another person at RHADS or at Liverpool Airport was accessing the noise data, the system's link with DMBC would disconnect
- e) the data accessible to DMBC on the computer link were for viewing only
- f) DMBC officers stated that they had never saved or printed off any noise data they had viewed via the computer link
- g) the ICO's IT specialist demonstrated that it is possible to save and print off noise data from the system, albeit by means of a slow, cumbersome process. He also confirmed that the computer terminal in DMBC's offices used for accessing the noise data was not linked to a printer within DMBC premises
- h) during this visit the ICO found that on 24 July 2006, noise data could only be viewed back to 19 November 2005. The ICO subsequently investigated this and has been informed by RHADS that on 18 and 19 November 2005, changes were made to the computer system through which the noise data could be accessed by DMBC. This meant that until 18/19 November 2005 any noise data relating to dates between April and 18 November 2005 could have been viewed by DMBC using the computer link, but from 18/19 November 2005 this was no longer possible. RHADS have informed the ICO that the data relating to the period from April – 18 November 2005 are archived elsewhere. All relevant noise data from 19 November 2005 can be viewed by DMBC using the computer link.
- i) the NMTs recorded all noises above a certain level without any reference to the source of the noise
- j) DMBC stated its view that the noise data would be of more relevance once the noises could be correlated with specific aircraft movements. It was envisaged that a "tracking" system facilitating this correlation would be introduced in the coming months

3.8.2 In the meantime, and subsequent to the requests for information made by the complainant, detailed hard copy reports analysing the noise report data were produced by a firm of acoustic consultants appointed by the owner of RHADS, for each of the months from May 2005 to April 2006. DMBC stated that it had received a sample report in May 2006, with all the reports arriving on 10 July 2006. The new noise reports correlated the noise information with actual aircraft movements. The purpose of these reports is to satisfy the obligations of the developers of RHADS under s.3.2.5 of the Third Schedule to the s106 Agreement.

3.8.3 a hard copy of a detailed noise report as mentioned above is thus now available for November 2005, although it was not available when the complainant made his requests.

3.8.4 the Commissioner also found that at the time of DMBC's response to the complainant dated 25 January 2006, DMBC had ceased to have access on its premises to the noise data relating to any period before 19 November 2005.

- 3.8.5 The Commissioner notes that DMBC staff appeared to be unaware of the changes made in November 2005 to the computer link and were hence unclear about the dates of noise monitoring data accessible via the link.

Analysis

Procedural Matters

4. The relevant legal obligations of the EIR are stated in full in the Legal Annex at the end of this Decision Notice.

Regulation 3(2)

- 4.1 Regulation 3(2) of the EIR states that information is held by a public authority if that information is “in the authority’s possession and has been produced or received by the authority”. DMBC asserted in its letter dated 25 January 2006 that, based on advice from its legal department, it did not “hold” the requested information regarding noise data within the terms of the EIR since the data could “only be accessed by a phone line to a third party’s computer”. In particular, DMBC asserted that it did not hold specific data on aircraft noise. However the complainant’s actual requests referred to “minimum and maximum readings from the fixed noise monitor at Bawtry”, “records of noise levels”, “noise levels”, “raw data”, “noise recordings” and “any readings you can give me please” rather than information specifically about aircraft noise. Therefore in the Commissioner’s view it is clear that responding to the complainant’s request would not have required DMBC to separate out aircraft noise from the noise data it held.
- 4.2 The ICO has given careful consideration to the issue of whether DMBC held the requested information. At the time of the requests, the developer of RHADS had a contractual obligation under paragraph 3.2.5 of the Third Schedule to the s106 Agreement to provide monthly noise data reports. Such monthly reports would have provided an analysis of the noise data, in particular correlating noise events to aircraft movements. The Commissioner understands that such reports were not held at the time the requests were made. In any event this is an entirely separate obligation from that contained in section 3.2.4, which requires DMBC to have a direct computer link to the NMTs.
- 4.3 Whilst the Commissioner acknowledges that access to the data via the computer link to the noise monitoring system was slow and cumbersome, he also considers that the data were available to DMBC on demand as a contractual right under section 3.2.4 of the s106 Agreement and therefore at the time the requests were made the information was “held” by DMBC within the definition contained in regulation 3(2)(a) of the EIR.
- 4.4 DMBC has separately expressed to the ICO its concern about the time and cost implications of complying with requests of this kind, although it did not explain to the complainant that this was a reason for refusing his requests. It is possible that obtaining the information requested by the complainant could have proved time consuming and hence expensive. However the charging provisions of regulation

8 of the EIR address precisely these concerns and it would therefore have been open to DMBC to consider how these might have applied to the complainant's requests, rather than refusing to disclose the information on the basis that it is not held.

- 4.5 The Commissioner considered that the Information Tribunal, in the case of Glen Marlow and the Information Commissioner (appeal number EA/2005/0031), outlined which facts to take into account when determining whether or not the information requested from an online database is "held" by a public authority. The Commissioner considered that DMBC's access to the information was not limited by contractual restrictions. Further, in the circumstances of this case, since DMBC had a contractual right to (i) have continuous access to the noise data via a computer link and (ii) receive monthly noise data reports the Commissioner considered that DMBC held the requested information.
- 4.6 The ICO has therefore reached the conclusion that the information requested, and as subsequently clarified, was "held" by DMBC within the terms of regulation 3 of the EIR.

Regulation 5

- 4.7 Regulation 5(1) of the EIR places DMBC under a duty to "make available on request" environmental information that it holds, and regulation 5(2) requires this to be done as soon as possible and in any event within 20 working days from receipt of the request.
- Whilst the Commissioner accepts that it may have been time consuming to "filter out" reports of different levels of noise, in his view it would have been possible to do so. Therefore DMBC failed to comply with its obligations under regulation 5(1) of the EIR.
- 4.8 The complainant's new requests dated 10 and 30 November 2005 did not receive a substantive response from DMBC until 25 January 2006 and as such failed to comply with its obligations under regulation 5(2) of the EIR.

Regulation 9

- 4.9 Under regulation 9 of the EIR, DMBC is obliged to provide the requester with advice and assistance. DMBC failed to comply with regulation 9, in that it did not assist the complainant to clarify his request. In particular, the Commissioner took account of the fact that on 17 October 2005 the complainant specifically asked DMBC for assistance in clarifying his request and that this was not provided.
- 4.10 Further reference to the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 ("the Code") provides guidance to public authorities in relation to advice and assistance. In particular the Code provides illustrative examples, including: "providing a general response to the request setting out options for further information that could be provided upon request". In the context of this case, in specifying that it could not separate aircraft noise from the noise data it held, DMBC should have explained to the complainant the information could readily

give to him, and clarified the practical limitations of the computer link to the noise monitoring data. DMBC did not adhere to the Code and failed to comply with its obligations under regulation 9 of the EIR.

Regulation 14

- 4.11 Under regulation 14 of the EIR, on refusal of a request DMBC is obliged to provide a refusal notice to the requester stating reasons and informing him of his rights of appeal to DMBC and to the Commissioner.
- 4.12 DMBC issued a refusal notice dated 10 October 2005 in response to the complainant's first request dated 25 September 2005. This refusal did not state his right to appeal to DMBC and as such DMBC did not comply with its obligations under regulation 14.
- 4.13 The response provided by DMBC to the complainant's new requests dated 10 and 30 November dated 25 January 2006 also failed to inform the complainant of his right to appeal to DMBC under regulation 11.
- 4.14 On 10 October the complainant made a further request for information. Again the response by DMBC dated 11 October 2005 did not state the complainant's rights of appeal to either DMBC or the Commissioner.

The Decision

5. The Commissioner's decision is that the public authority has not dealt with the following elements of the request in accordance with the requirements of the Act:
- In response to requests dated 25 September 2005, 10 October 2005, and 21 and 30 November 2005 made by the complainant, DMBC failed to provide information which it held. Therefore DMBC failed to comply with its obligations under regulation 5(1) of the EIR.
 - DMBC failed to respond to the request dated 21 November 2005 within 20 working days, in breach of regulation 5(2) of the EIR.
 - DMBC failed to provide adequate advice and assistance to the complainant in accordance with its obligations under regulation 9 of the EIR.
 - DMBC's responses failed to provide the complainant with details of his rights of appeal to DMBC. DMBC's responses dated 10 and 11 October did not specify the complainant's right of appeal to the Commissioner. In these respects DMBC did not comply with its obligations under regulation 14.

Step Required

- 6.1 The Commissioner requires the public authority to take the following step to ensure compliance with the Act:

DMBC shall provide the complainant with a copy of the sections of the report, provided in hard copy format to DMBC by the owner of RHADS, for November 2005 relating to the NMT at Bawtry, together with any explanatory sections of that report required for the complainant's comprehension of the data.

- 6.2 The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

Other matters

7. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight the following matters. The Commissioner wishes to recognise the assistance provided by DMBC to ICO staff in investigating this complaint and the openness it displayed during the Commissioner's investigation.

Failure to comply

8. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

9. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 21st day of November 2006

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Environmental Information Regulations 2004 impose the following requirements:

3(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"

5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including-

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).....

and

(5) The refusal shall inform the applicant-

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.