

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 May 2021

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested from Sheffield City Council (“the Council”) records of environmental health officers’ visits, fields notes and records of acoustic results relating to a specific property. The Council refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable).
2. The Commissioner’s decision is that the requested information is personal data and therefore should have been withheld under regulation 13(1) of the EIR.
3. The Commissioner also finds that the Council did not comply with its obligation under regulation 5(2) of the EIR (time for compliance).
4. The Commissioner does not require the Council to take any steps as a result of this notice.

Request and response

5. On 13 August 2020 the complainant wrote to the Council and requested information in the following terms:

"Please disclose all records of environmental health officers' visits, field notes and records of acoustic results obtained in relation to the piano playing in the home of [name redacted], who was served a noise abatement notice on 12th July 2019.

[Name redacted] has spoken to the national press and therefore his personal data in relation to the noise abatement notice is already in the public domain. Any personal data not in the public domain can be redacted.

[link redacted]

Under EIR 2004 the public interest requires disclosure of this information."

6. The Council responded on 25 September 2020. It refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable). It stated that it had previously complied with a substantially similar request for information in 2019 and that, in the Council's view, dealing with repeated requests which have already been answered creates a disproportionate burden on the Council.
7. In its response to the complainant the Council also stated that, if it were reasonable for it to respond to the request, it would maintain the position it took in its response to the previous, similar request. In response to the previous request the Council stated that the requested information consists of personal data and is therefore exempt from disclosure under regulation 12(3) and 13(1) of the EIR. The Council stated that this is because the requested information consists of both the personal data of the named individual and the personal data of third parties.
8. On 28 September 2020 the complainant requested an internal review. She expressed dissatisfaction with the Council's use of regulation 12(4)(b) and stated it did not apply because, in her view, *"the request must be considered on its own merits"*. She added, *"this request is more specific and narrow than the request made twelve months ago - officers' field notes and records of acoustic recordings only"*.
9. In response to the Council's reference to regulation 13, the complainant stated that she did not agree that the information could not be separated by redaction. She stated, *"the field notes are about "noise", clearly an environmental matter and the presumption is in favour of disclosure."* She also stated that the personal data is very limited and that, *"many such officer field notes are disclosed on the whatdotheyknow website and personal data, names, addresses etc are redacted."*

10. On 18 November 2020 the Council provided its internal review decision. It maintained its original position regarding regulation 12(4)(b) and regulation 13(1).

Scope of the case

11. The complainant contacted the Commissioner on 25 November 2020 to complain about the way her request for information had been handled. In bringing this to the ICO, the complainant expressed that in her view the Council had not approached her request correctly. She stated, *"the Council makes reference to the EIR request submitted in 2019. The Council did not at that time rely on the manifestly unreasonable exception to disclosure, but chooses to do so now when the information requested in this request is vastly more limited and refined than that requested in 2019."* She said that this request is not similar to the one submitted in 2019 as it is considerably refined and reduced in scope.
12. The complainant also raised concerns that the Council has incorrectly applied regulation 13(1). She said that the subject of the noise abatement notice has, *"spoken openly and candidly about the noise abatement served on him, his personal data is already in the public domain"*. The complainant said that in order to resolve this complaint, the Council could provide the information with names, addresses and other personal data redacted.
13. The complainant asked the Commissioner to also consider, *"the Council's reliance on Regulation 12(3) and Regulation 13(1)"*. She stated, *"personal data on officers' field notes can easily be redacted and is not a reason to refuse disclosure of purely factual information."*
14. The Commissioner remained unclear whether the Council was relying on regulation 13 as well as regulation 12(4)(b), but has in any event exercised her discretion to consider regulation 13. The scope of this notice is to determine whether the Council was entitled to withhold the requested information under regulation 13(1) of the EIR (personal data).
15. It will also consider the timeliness of the Council's response.

Background

16. The request in this case relates to an abatement notice. These notice types are defined as follows:

"Councils must serve an abatement notice on people responsible for statutory nuisances, or on a premises owner or occupier if this is not possible. This may require whoever's responsible to stop the activity or limit it to certain times to avoid causing a nuisance and can include specific actions to reduce the problem".¹

Reasons for decision

Regulation 2(1) – is the requested information environmental?

17. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."

18. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing
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¹ <https://www.gov.uk/guidance/statutory-nuisances-how-councils-deal-with-complaints>

to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

19. The requested information in this case consists of records of environmental health officers' visits, field notes and records of acoustic results relating to a noise abatement notice issued to a named individual.
20. Regulation 2(1)(c) of the EIR states that "environmental information" constitutes any information on measures such as policies, plans and activities which are likely to affect environmental elements and factors.
21. The Commissioner considers that the noise abatement notice is a measure under regulation 2(1)(c). As the notice is related to noise which is a factor under 2(1)(b), she considers that the request falls within the remit of the EIR.
22. Therefore the Commissioner considers that the information is environmental in nature and the Council was correct to handle the request under the EIR.

Regulation 5(2)

23. Regulation 5(1) requires a public authority that holds environmental information to make it available on request.
24. Regulation 5(2) of the EIR requires this information to be provided to the requester within 20 working days following receipt of the request.
25. The request was submitted on 13 August 2020 however the Council did not issue its response until 25 September 2020. Therefore, the Council breached the statutory timeframe under the EIR by not providing a response within 20 working days.

Regulation 13 - Personal Information

26. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
27. In this case the relevant condition is contained in regulation 13(2A). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing

of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").

28. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then regulation 13(1) of the EIR cannot apply.
29. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

30. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
33. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
34. In this case, the Commissioner notes that the request relates to the noise abatement notice issued to a specific individual. In particular, the request is for, *"environmental health officers' visits, field notes and records of acoustic results obtained in relation to the piano playing in the home of [name redacted]"*.
35. In response to this request, the Council told the complainant:
"The information consists of both the personal data of [name redacted] and the personal data of third parties."
36. In its internal review response, the Council explained to the complainant:
"I cannot concur that the field notes and recordings you are requesting are abstract data about "noise" and to that extent pertain only to the environment and not to an individual. In your original request you

specifically asked for data "in relation to the piano playing in the home of [name redacted], who was served a noise abatement notice on 12th July 2019"

Article 4 (1) of the General Data Protection Regulation (GDPR) states that "personal data means any information relating to an identified .. natural person ... in particular by reference to ... one or more factors specific to the ...cultural or social identify of that natural person".

By this definition, the information that you are requesting is the personal data of one or other of the occupants in the home of the third party who is the subject of your request. It is therefore exempt from disclosure under the EIR."

37. The Commissioner acknowledges that the complainant disputes that the requested information is personal data. In her internal review request the complainant stated that the field notes are about "noise" and that the personal data is very limited. The complainant has suggested to the Council and the Commissioner that the personal data could be redacted and the remaining information disclosed. In relation to redaction, the Council told the complainant, *"the information requested does include personal data of third parties which could not be separated by redaction."*
38. The Commissioner has not considered a copy of the withheld information in this case as she did not deem it necessary in light of a previous, similar decision notice which she issued. That decision notice considered a substantially similar information request regarding a noise abatement notice and related records and determined that this information would constitute personal data.²
39. Therefore, in the circumstances of this case, the Commissioner is satisfied that the information requested as a whole relates to the individual named in the request. She is satisfied that this information both relates to and identifies the individual concerned. An individual is named in the request and, as such, that named individual is undoubtedly the main focus of all the withheld information. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617663/fer0885458.pdf>

40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

43. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

45. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

46. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article

47. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
48. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

49. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
50. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
51. Neither party has identified any legitimate interests in disclosure. The Commissioner has previously considered the legitimate interest test in relation to a similar information request regarding a noise abatement order⁴. In that previous decision notice she determined that the legitimate interest is in the transparency of the Council decision to serve a noise abatement notice.
52. Therefore, in this case, the Commissioner considers there to be a legitimate interest in the transparency of the Council's decision making

5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615630/fer0806658-1.pdf>

process regarding the decision making and issuing of a noise abatement notice.

Is disclosure necessary?

53. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
54. The Council have not commented on whether disclosure would be necessary. However, the Commissioner notes her finding in a previous decision notice, concerning the same parties, and a substantially similar information request regarding a noise abatement notice. In that decision notice, she stated,

"The Commissioner has already outlined that interests can be the requester's own interests or the interests of third parties. The Commissioner does not have a view of alternative measures for realising the interest of transparency in the Council's decision regarding the noise abatement notice, and therefore has conducted the balancing test."

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

55. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
56. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

57. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
59. The Council explained its position to the complainant as follows:

"The fact that [name redacted] has spoken to the national press does not mean that he has given consent for us to disclose his personal data and so we still do not have a lawful basis under Article 6(1) GDPR to disclose this information."
60. In her internal review request the complainant made the point that where data subjects have put some of the requested information into the public domain, it may be considered to weaken the argument that disclosure would be unfair. She quoted a point made by the Commissioner in a previous decision notice to support her view: *"where the data subjects have put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair."* In response, the Council stated that it had carefully read the press article provided by the complainant and that it did not uncover any instances of self-disclosure. The Council explained that the news article, *"sets out the educational and emotional consequences the data subject claims that their family has encountered as a result of receiving the noise abatement order, followed by the Council's response in which it explains the purpose and extent of the order."* It said that no reference to field recordings or other acoustic data are made in the article.
61. The Commissioner acknowledges that the complainant considers some of the information to be in the public domain. The Commissioner has reviewed the content of the article and does not accept that the requested information is already in the public domain. In particular, the article does not contain the *"records of environmental health officers' visits, field notes and records of acoustic results"* which form the basis of this request.
62. The complainant has argued that many officer field notes are disclosed on the whatdotheyknow website with personal data redacted. The Council explained that it had considered the request on its own merits, and it did not take into account the release of other field recordings in

the public domain, as it stated these were not relevant to the specific facts of this case.

63. The Council also explained to the complainant:

"Disclosure of the personal information of third parties would contravene the first principle relating to processing of personal data under Article 5(1)(a) GDPR, which is that 'personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'. It would not be fair or transparent for us to disclose the personal data of third parties to the world in response to a request under EIR, and, in addition, there is no lawful basis under Article 6(1) GDPR for us to process the personal data of third parties in such a manner."

64. Ultimately, the Commissioner considers that it is a reasonable expectation of the data subjects concerned that information about them and their property consisting of *"records of environmental health officers' visits, field notes and records of acoustic results"* would not be disclosed into the public domain. The Commissioner agrees with the Council's point that, although the data subject has chosen to contact the national press, the data subject has not given the Council consent to disclose their personal data.

65. In light of the above, the Commissioner does not consider that there are any legitimate interests which outweigh the data subject's fundamental rights and freedoms. In arriving at this decision, she has taken direction from the previous decision on a substantially similar complaint with the same parties which also upheld the Council's position regarding regulation 13 of the EIR.

66. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

67. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Right of appeal

68. 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

69. 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.
70. 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

**Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**