

Decision Notice

Decision 144/2014 Mr Derek Bull and Renfrewshire Council

Noise level report

Reference No: 201400746

Decision Date: 1 July 2014



Scottish Information
Commissioner

Summary

On 10 February 2014, Mr Bull asked Renfrewshire Council (the Council) for a report on noise levels taken within his home. After an investigation, the Commissioner refused to accept the Council's argument that it did not hold the information. The relevant information was provided to Mr Bull during the investigation, so the Commissioner did not require the Council to take any further action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (definitions (a), (b) and (c) of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1) and (4)(a) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 10 February 2014, Mr Bull wrote to the Council requesting the following information:
“... a copy of Renfrewshire Council's Environmental Services Noise Enforcement Team's report showing the noise levels taken from within my home on 13 September 2011 ...”
2. This arose from a complaint made by Mr Bull regarding noise from a neighbouring property.
3. The Council responded on 13 February 2014 and provided Mr Bull with a summary of the findings from the visit in question.
4. On 3 March 2014, Mr Bull wrote to the Council requesting a review of its decision.
5. The Council notified Mr Bull of the outcome of its review on 28 March 2014. The Council stated that it did not hold a formal report showing the noise levels taken and cited regulation 10(4)(a) of the EIRs (information not held).
6. On 1 April 2014, Mr Bull wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
7. The application was validated by establishing that Mr Bull made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. The investigating officer contacted the Council, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. The Council was asked to give details of any searches carried out for the information requested and to explain how officers of the Council recorded information of the kind requested by Mr Bull.
9. The Council provided comments to the Commissioner. During the investigation, Mr Bull was provided with copies of an email and a database printout, both of which contained information related to the visit in question.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to her by both Mr Bull and the Council. She is satisfied that no matter of relevance has been overlooked.

Handling of request under the EIRs

11. The Council dealt with the request under the EIRs. Having considered the subject matter of the request, the Commissioner accepts that this was the correct approach. The request seeks information on a factor (noise) affecting or likely to affect the elements of the environment and on related action taken by the Council, and therefore falls within paragraphs (b) and (c) of the definition of environmental information in regulation 2(1) of the EIRs (see Appendix). Mr Bull has not disputed the Council's handling of the request under the EIRs and the Commissioner will consider the request in what follows solely in terms of the EIRs.
12. Regulation 5(1) of the EIRs (subject to various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. It is important to bear in mind that this obligation relates to information actually held by an authority when it receives the request (as opposed to information an applicant believes the authority should hold, but which is not in fact held).
13. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply and, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweigh(s) the public interest in making the information available. In this case, the outcome of the Council's review was that the exception in regulation 10(4)(a) applied.

Regulation 10(4)(a) (information not held)

14. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
15. In his submissions to the Commissioner, Mr Bull referred to the existence of a "brief summary" of the noise officers' findings. Noting that this contained some more information than had been provided to him, he believed it likely there would be a fuller report from which all the information had been taken.

16. The Council described the searches carried out in its electronic and manual records. It explained that it used a variety of search terms, including Mr Bull's name and the property addresses.
17. A further search was undertaken of the Council's Flare electronic database, where all domestic noise investigation visits are recorded, again using a variety of search terms (as above). One record relating to the visit was identified: a copy was provided to the investigating officer.
18. The Council explained that a Domestic Noise Investigation Form would have been created in relation to the visit to Mr Bull's property, in line with practice in respect of all noise complaints. All the information from that form would be transferred to the Flare database and the form itself subsequently destroyed, in line with the Council's retention policy (a copy of which was also provided to the investigating officer).
19. The Council also searched its email system (Lotus Notes) for records of the visit. One relevant email was identified.
20. Although it did not consider either of the records identified to be a "report" of the visit in question, the Council had no objection to their disclosure to Mr Bull. They were supplied to him during the investigation. Mr Bull sought clarification on aspects of the information: not all of these fell within the Commissioner's remit, but the clarification was provided by the Council. On the basis of the information in the "brief summary" referred to above, Mr Bull was still not satisfied that he had received all the information he was looking for.
21. The Council attempted to distinguish the information it held on the visit to Mr Bull's house from a "formal report", such as would be prepared when enforcement action was being contemplated. A "formal report" was not required in this case, the Council submitted, nor would it be required in the majority of cases. As indicated above, however, a Domestic Noise Investigation Form would be created for every noise complaint, and the details subsequently transferred to Flare.
22. While the above approach may be intelligible to the Council, with its detailed understanding of the statutory procedures under which it operates, the Commissioner would suggest that it is unlikely to be intelligible to the average member of the public. On an ordinary interpretation of the word, the Commissioner believes it would have been reasonable to treat the Flare record as a "report", that is an account of the action taken by the Council in response to this particular noise complaint. Thus, the Flare record should have been found to fall within the scope of the request.
23. That said, the Commissioner has considered the submissions received from both parties and is satisfied that the Council took steps which should, in the circumstances, have identified and located all of the information it held and which fell within the scope of Mr Bull's request. The Flare record was identified, but not considered relevant. In all the circumstances, the Commissioner accepts that the Council carried out adequate, proportionate searches for the information and is satisfied, on the balance of probabilities, that the Council held no further information which would fulfil Mr Bull's request.
24. In all the circumstances, therefore, the Commissioner finds that that the Council was not entitled to refuse Mr Bull's request under regulation 10(4)(a) of the EIRs. In doing so, the Council failed to comply with regulation 5(1) of the EIRs. However, the Flare record has now

been supplied to Mr Bull, so the Commissioner does not require the Council to take any further action in response to this decision.

Decision

The Commissioner finds that Renfrewshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Bull. While the Council's searches were adequate to identify and locate the information Mr Bull was seeking, its interpretation of the request was too restrictive, with the result that he was not provided with that information. Consequently, the Council failed to comply with regulation 5(1) of the EIRs.

Appeal

Should either Mr Bull or Renfrewshire Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement
1 July 2014

Appendix

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations -

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

10 Exceptions from duty to make environmental information available-

(1) A Scottish public authority may refuse a request to make environmental information available if-

(a) there is an exception to disclosure under paragraphs (4) or (5); and

(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
 - (a) it does not hold that information when an applicant's request is received;
 - ...

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