

**Freedom of Information Act 2000 (FOI)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 8 August 2013

Public Authority: Your Homes Newcastle
Address: YHN House
Benton Park Road
Newcastle upon Tyne
NE7 7LX

Decision (including any steps ordered)

1. The complainant has made three requests for information from Your Homes Newcastle ("YHN") about the existence and details of any noise, anti-social, and harassment complaints that have originated from his current address up to 28 October 2012. YHN relied upon section 40(5) of the Freedom of Information Act 2000 ("the FOIA") to refuse the first request, claiming it was unable to confirm or deny if it held the information. YHN subsequently cited section 40(2) of the FOIA to refuse the following two requests, and explained that any disclosure it could provide would represent the personal data of third parties.
2. The Commissioner's decision is that YHN correctly identified that the requested disclosure would be personal data, and was correct to rely upon section 40(5) of the FOIA in refusing the first request. YHN incorrectly cited section 40(2) of the FOIA to refuse the following two requests, but the Commissioner is satisfied that no disclosure occurred despite this. The Commissioner also identified that YHN should have cited 13(5) of the Environmental Information Regulations 2004 ("the EIR") in their refusal of all three requests, as part of the requested disclosure relates to environmental information.
3. The Commissioner does not require YHN to take any steps.

Request and response

4. On 7 January 2013 the complainant requested the following:

"I would be very grateful if you could supply me with information regarding noise/nuisance, anti-social behaviour or harassment that has been reported by previous occupants of [specified property] up till 28th October 2012.

Please include copies of materials that you hold in the form of paper and electronic records including emails."

5. YHN responded to the complainant on 8 January 2013, and explained that it could neither confirm nor deny if it held the requested information, as any such disclosure would represent the personal data of third parties.

6. On 17 January 2013 the complainant submitted a second request:

"I would be very grateful if you could supply me with information regarding noise/nuisance, anti-social behaviour or harassment that has been reported in the past six years at [specified property] up till 28th October 2012.

I would like to stress that I am not interested in any details of the complainants or the incidences reported. I would be very grateful to know only the number of occurrence of noise/nuisance, anti-social behaviour or harassment that have been reported. For example, there have been ten (10) reported incidences of noise/nuisance from January 2006."

7. On 10 February 2013 the complainant submitted a third request:

"I would be very grateful if you could supply me with information regarding noise/nuisance, anti-social behaviour or harassment that has been reported previously at [specified property] up till 28th October 2012.

Please include copies of materials that you hold in the form of paper and electronic records including emails. I would like to stress that I am not interested in any personal details of the complainants."

8. YHN responded to the complainant on 4 March 2013, and stated that the requested disclosure would be exempt under section 40(2) of the FOIA, and was therefore being refused.

9. The complainant subsequently wrote to Newcastle City Council to complain about YHN's refusal to provide information in response to his requests. This complaint was received by Newcastle City Council on 21 March 2013, and was subsequently relayed to YHN in order to be treated as a request for an internal review.

10. YHN provided an internal review on 10 April 2013 for the two refusal notices it had issued. YHN maintained its position that any disclosure would be exempt under the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 22 April 2013 to complain about YHN's refusal of his three requests.
12. The Commissioner considers the scope of the case to be whether YHN was correct to refuse the complainant's three requests.
13. For clarity, during the Commissioner's investigation, YHN confirmed that its intention had been to neither confirm nor deny whether recorded information was held in relation to both the second and the third request. The Commissioner noted that YHN incorrectly cited section 40(2) of the FOIA to refuse the second and third requests, and should have continued to rely upon 40(5) of the FOIA in order to neither confirm nor deny if it held the requested information. The Commissioner will therefore consider whether YHN's refusal of all three requests was correct under section 40(5) of the FOIA.

Appropriate legislation

14. The Commissioner also considers that the part of each information request that relates to noise complaints should be considered under the terms of the EIR rather than the FOIA. Regulation 2(1)(c) of the EIR provides that any information on activities affecting or likely to affect the elements and factors of the environment will be environmental information. One of the factors listed in regulation 2(1)(b) of the EIR is noise. Information about noise complaints is therefore environmental information for the purposes of the EIR. Part of each of the complainant's three requests should therefore have been considered under the EIR, and the remaining part under the FOIA.

Reasons for decision

Section 40(5) of the FOIA and regulation 13(5) of the EIR – The right to neither confirm nor deny

15. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. Section 1(1)(a) of the FOIA states that public authorities should confirm or deny whether the requested information is held. Similarly, regulation 5(1) of the EIR obliges public authorities to provide recorded information that is held or, under regulation 14(1), issue a refusal notice citing the exception under regulation 12(4)(a) confirming that the information is not held.
16. However, there are some circumstances where public authorities do not have to comply with the general duty to confirm or deny whether information is held because to do so would in itself reveal information exempt information eg the disclosure of that information would breach the Data Protection Principles set out in schedule 1 of the Data Protection Act 1998 ("the DPA"). Where this is the case, public authorities should rely on section 40(5) of the FOIA or regulation 13(5) of the EIR as appropriate.

Is the withheld information personal data?

17. Personal data is defined by the DPA as:

"data which relate to a living individual who can be identified –

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."

18. In their requests the complainant has asked YHN to confirm whether it holds complaints deriving from a specified residential address before 28 October 2012, in addition to any related documents. The Commissioner considers that if YHN confirmed or denied holding this information, it would represent the disclosure of a third party's personal data. This is because the very act of stating that the requested information is or is not held would disclose to the requester whether or not any complaints have been made by residents of the specified property.

Would disclosure breach the data protection principles?

19. The data protection principles are set out in schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

20. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances. In this case, YHN has explained that if it confirmed or denied holding the requested information, it would break the confidentially expected of YHN by its tenants; who would not expect information pertaining to complaints to be placed in the public domain. This expectation is supported by YHN's own complaints submission facility on its webpages, where individuals seeking to make a complaint are advised that YHN will strive to treat provided information as confidential.

Consequences of disclosure

21. YHN has noted that should it confirm or deny holding the requested information, it would have the potential to cause damage to the reputations of individuals, as well as cause serious personal embarrassment. In addition, it would have the potential to damage the relationships between neighbouring tenants. This is because the requested disclosure would be directly identifiable with the previous tenants of the complainant's property, as well as the present and former tenants of neighbouring properties.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

22. The complainant's requests derive from his concern that he has been provided with a residential property that has a history of complaints regarding noise, anti-social behaviour, and harassment. The complainant has indicated that he accepted the property on the basis that YHN had confirmed there was no such previous history.

23. YHN has informed the Commissioner that it recognises the legitimate interest of prospective tenants to information relating to the property they are offered. YHN has also confirmed that in specific circumstances, such as where the behaviour of other tenants in close proximity to property are a cause of concern, then it may sometimes disclose selected information directly and in confidence to a prospective tenant. YHN has stated that it believes there is no public interest served by disclosing the existence of the requested information into the public domain. In relation to this, YHN has informed the Commissioner that it has made attempts to coordinate a meeting with the complainant so as to resolve his grievance by other means.

Conclusion

24. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes. However, having considered the circumstances of this case, the Commissioner's view is that the right to privacy outweighs the legitimate public interest in confirming or denying whether the requested information was held.
25. The Commissioner has noted that the complainant has a highly personal reason for making his requests, as he believes that he has been misadvised by YHN. As a result, the complainant appears to have requested information in order to support his grievance against YHN. However, it is worth highlighting that the aim of the FOIA and the EIR is to disclose information that is in the wider public interest as opposed to the private interests of individuals. While the Commissioner can appreciate the particular concerns that the complainant has in this case, it is nonetheless a personal issue, and there is limited wider public interest in the disclosure of the information requested. It is not the Commissioner's view that public disclosure of this information would be a proportionate response to the complainant's concerns.
26. The Commissioner has considered that the confirmation or denial of the requested information being held would disclose the personal data of third parties. Furthermore, this disclosure would not be within the reasonable expectations of those data subjects, who would expect the existence of complaints to be treated as confidential. The Commissioner also accepts that stating whether or not the information was held could cause distress, particularly in the absence of any proper context, and that reputational damage could occur if the information was held. It could also have an impact on the willingness of individuals to engage

with YHN in the future should it be perceived that the existence of complaints was not treated as a confidential matter.

27. In view of the above, the Commissioner finds that confirming or denying whether YHN holds information within the scope of the request would contravene the first data protection principal because it would be unfair. YHN was therefore correct to refuse all three requests, but should have cited section 40(5) of the FOIA and regulation 13(5) of the EIR in their refusal of each request.

Right of appeal

28. If 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

29. 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.
30. 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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