

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

**Decision notice**

**Date:** 13 August 2014

**Public Authority:** Kirklees Council

**Address:** 2nd Floor  
Civic Centre 3  
Market Street  
Huddersfield  
HD1 2YZ

**Decision (including any steps ordered)**

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1. The complainants submitted a request to Kirklees Council (the Council) for information it held about complaints they had made about the excessive noise of exercise classes at a particular sports centre. The Council provided some information and initially sought to withhold the remainder under regulations 12(4)(d) and 12(4)(e) of the EIR. During the course of the Commissioner's investigation, the Council reviewed its position and provided the complainants with the information it had initially sought to withhold. In doing so, it accepted the Commissioner's view that some of this information was the complainants' own personal data. The complainants remained concerned that the Council held further information falling within the scope of their request, along with a number of other concerns in relation to how their request was handled.
2. The Commissioner has concluded that:
  - On the balance of the probabilities, the Council does not hold any further information – beyond that now disclosed to the complainants – which falls within the scope their request.

- Any information falling within the scope of request which constitutes the complainants' personal data is exempt from disclosure under the EIR by virtue of regulation 5(3).
- The Council did not need to categorise its response to the request by reference to the various bullet points listed in the complainants' email of 13 March 2013 in order to comply with the EIR.
- The Council did not breach regulation 9 of the EIR by failing to provide the complainants with advice and assistance in relation to their request.
- However, the Council did breach regulation 5(2) by not providing the complainants with all parts of requested information (of the non-first party personal data falling within the scope of their request) within 20 working days.

## Request and response

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3. The complainants submitted the following request to the Council on 13 March 2013:

*'In the context of our/others complaints about the effect of excessive noise from Exercise to Music classes in Huddersfield Sports Centre and the Council's involvement with KAL's response to and handling of those complaints, we wish to make a FoI Act request for all the material held by Kirklees Council not previously disclosed in response to earlier requests. On this, pasted in below is a list of emails and other documents in our possession.*

*To help you identify and retrieve the relevant papers and electronic records we have prepared the following, but please do not hesitate to get in touch if anything requires clarification.*

- *The findings of Ms Redfern's investigation into the matters we raised with her in our letter of 28/5/12 and the subsequent email updates of 1/10/12, 3/11/12 and 19/12/12.*

*If not covered by that request, please also provide:*

- *What the Council has identified as the legal and other rights of sports centre users in Kirklees.*
- *The material drawn on by Mr Read to support the statement (in his email of 27/10/09 to the LGO) ...I can*

*confirm the complaint has completed our internal complaints procedure.*

- *The material drawn on by Mr Read, other Council Officers and Kirklees Councillors which informed their view that HSBC's concerns about being treated unequally, unfairly and inappropriately were fully investigated and found to be groundless.*
- *Details of the support provided to KAL by Kirklees Council Officers/Elected Members. This incorporates Mr Brown's and Mr Heddon's statements of 13/7/12 and 9/10/12 to the ICO:*

*A range of agencies have been involved in this ongoing (sic) matter, including: Kirklees Council, including both their Chief Executive and Leader of the Council, as well as their Corporate Customer Standards Officer... and a range of other Members and officers.*

- *The Legal and/or other advice provided by Kirklees Council's Legal Services to KAL's Chief Executive and Trustees in respect of their handling of our complaint, including Mr Brown's letters of 4/3/11 and KAL's response to our SAR's of Jan 2012.*
- *In respect of the Council's obligations and responsibilities in this matter, the Legal and other advice provided by Kirklees Council's Legal Services to the Leader, other Councillors, its Chief Executive and other Officers.*
- *What Mr Read/others in the Council did to investigate Mr Brown's claims: If anything, it is the ETM customers who are the victims of discrimination. And KAL have always tried to provide a balanced view and a compromise if at all possible.*
- *With reference to Mr Read's Investigation into Noise... report for Mr Brown, details of who else in the Council was provided with a copy, when and what was done with it.*
- *With reference to Mr Read's note of 17/2/10: The Council Standing Order and/or other formally adopted protocol or decision relating to Mr Read's and Ms Rickett's decision that KAL's failure to comply with its statutory/other obligations and to allow KAL to treat customers unequally could be regarded by the Council as an operational issue.*

- *Details of the Government's performance indicators Mr Read refers to in his note of 17/2/10, as well as how KAL scored against the Government criteria.*
  - *Evidence of what the Council has done to enforce the terms of the Statement of Understanding.'*
4. The Council responded on 12 April 2013. It provided the complainants with a number of emails which fell within the scope of the request, approximately 400 documents. It explained that the remainder of the information it held which fell within the scope of the request was being withheld on the basis of regulation 12(4)(e) of the EIR, the internal communications exception. The response also explained that the Council had concluded that the public interest favoured maintaining the exception.
  5. The complainants contacted the Council on 14 May 2013 in order to complain about its handling of the request. They complained about the manner in which the Council had responded to the request, ie they could not establish to which part of the request the disclosed documentation related to nor could they establish to which parts of the request the withheld information related. They also disputed the Council's decision to withhold the remaining information. Finally, they queried the Council's decision to deal with this request under the EIR rather than under FOIA.
  6. The Council informed the complainants of the outcome of the internal review on 16 August 2013. The review reached the following findings:
    - The Council was correct to deal with the request under the EIR as it sought information defined as 'environmental informational' under regulation 2(1) of the EIR;
    - In the Council's opinion the request simply sought 'all material held by Kirklees Council not previously disclosed in response to your earlier requests' concerning your complaints. In its view the bullet points included in the request simply sought to specify the types of information that the complainants anticipated falling within the scope of the request. Consequently, the Council concluded that in responding to the request in the manner it did it had complied with the requirements of the EIR even though it did not categorise the information with reference to the specific bullet points;
    - The remaining information was exempt under a combination of the exceptions contained at regulations 12(4)(d) and 12(4)(e) of the EIR, the former providing an exception in relation to unfinished documents. The Council explained that it was satisfied that the public interest favoured maintaining these exceptions;

- Finally, the Council concluded that some of the requested information constituted one of the complainants' own personal data and thus this information was considered for disclosure under the Data Protection Act 1998 (DPA). The Council disclosed one document to this complainant under the DPA.

## **Scope of the case**

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7. The complainants contacted the Commissioner on 29 November 2013 to complain about the way their request for information had been handled.
8. They asked the Commissioner to consider the following points of complaint in relation to how their request had been handled:
  - (a) The complainants disputed the Council's decision to deal with this request under the EIR rather than under FOIA.
  - (b) They disputed the Council's decision to withhold information on the basis of regulations 12(4)(d) and 12(4)(e). They argued that there is a compelling public interest in the disclosure of the withheld information.
  - (c) They were dissatisfied with the Council's failure to respond the request without taking into account the various bullet points listed in the request itself. That is to say, they argued that the Council should have identified, by reference to the bullet points, the information that had been disclosed; the information that had been withheld; and the information that was not actually held.
  - (d) They argued that the Council failed to provide them with advice and assistance in line with its duty under section 16 of FOIA.
9. During the Commissioner's consideration of this complaint he reached the provisional view that all of the withheld information (which consisted of 6 documents, which for ease of reference are referred to from herein as numbers 1 to 6) constituted the personal data of the complainants. Consequently, the Commissioner asked the Council to reconsider this

information and determine whether the complainants had a right of access to it under the subject access provisions of the DPA.<sup>1</sup>

10. In response the Council explained that it had reviewed its position and accepted that the majority (but not all) of the withheld information constituted the complainants' personal data. Consequently, it had considered whether they had a right of access to this information under the subject access provisions contained at section 7 of the DPA and having done so provided the complainants with some information on 14 May 2014, withholding the remainder on the basis of an exemption contained in the DPA. During the course of the Commissioner's investigation, on 25 July 2014, the Council provided the complainants with the remainder of the information contained in documents 1 to 6.
11. Therefore, at the point this decision notice is being issued, the Council is not seeking to withhold any of the information which was previously withheld.
12. With regard to whether the information contained documents 1 to 6 is in fact the complainants' personal data, the Commissioner agrees with the Council that a small part of the information contained in document 3 is not the complainants' personal data.<sup>2</sup> The Commissioner remains of the view that the remainder of the information contained in documents 1 to 6 is the complainants' personal data.
13. The role of the decision notice is simply to consider the Council's compliance with the requirements of the EIR when dealing with the complainants' request. That is to say, the decision notice only considers the information falling within the scope of the request that does not constitute the complainants' own personal data. This is because the complainants' personal data is exempt from disclosure under the EIR in relation to any request they make for it. The decision notice does not – and cannot – consider whether the Council has complied with the subject access requirements of DPA in respect of the complainants' rights under that legislation.<sup>3</sup>

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<sup>1</sup> Under the EIR, a requestor's own personal data is exempt from disclosure on the basis of regulation 5(3).

<sup>2</sup> This consists of the information contained under the heading 'Notes on the Material' at bullets 1, 5 (except for the first sentence), 6, 7, 9, and 15.

<sup>3</sup> The Commissioner has completed an assessment under section 42 of the DPA as to whether it is likely or unlikely that the Council has complied with the requirements of that

14. In scenarios such as this where information previously withheld under the EIR is disclosed during the course of Commissioner's investigation, he will not consider a public authority's original view that the information was exempt from disclosure. Rather, the Commissioner will simply find that the information which does not consist of the complainants' personal data was not disclosed with the statutory time period required by the legislation.
15. Consequently, this decision notice does not consider the Council's original application of regulations 12(4)(d) and 12(4)(e).
16. However, the decision notice does consider points of complaint (a), (c) and (d). Furthermore, during the course of the Commissioner's investigation the complainants also emphasised their concern that they had not been provided with all of the information which the Council's holds which falls within the scope of the request. The Commissioner has considered this point of complaint - complaint (e) - as well.

## **Reasons for decision**

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### **Complaint (a) - the applicable access regime – the EIR**

17. The complainants disputed the Council's decision to respond to the request under the EIR despite submitting the request under FOIA. They argued that it seemed a perverse approach to interpret this matter as one concerning noise levels when their request sought information about a complaint they have made regarding the conduct of Councillors and Council officers.
18. For the reasons discussed above, in the Commissioner's view the majority of the requested information, including documents 1 to 6, constitutes the complainants' personal data and thus this information should actually have been considered for disclosure under the DPA rather than under the EIR or FOIA.
19. In relation to the information contained in document 3 which the Commissioner accepts is not the complainants' personal data, the Commissioner is satisfied that this falls within the definition of 'environmental information' as defined by the EIR and thus should be

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legislation in relation to the parts of the request that constitute the complainants' own personal data.

considered for disclosure under that access regime rather than under FOIA.

20. The Commissioner's reasoning for this is as follows:

21. Regulation 2(1) of the EIR provides a definition of environmental information. Regulations 2(1)(a) to (c) state that 'environmental information' is information 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;'*

22. The Commissioner's view the phrase 'information on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information. If information is about, relates to or concerns any of the following definitions, it is environmental information.

23. The information focuses on issues concerning the volume of exercise classes. In the Commissioner's opinion this information is clearly information on a factor in (b), namely noise, which is likely to affect an element in (a). The Commissioner is therefore satisfied that this information constitutes environmental information.

### **Complaint (c)**

24. As explained above, the complainants were dissatisfied with the Council's failure to respond the request without taking into account the various bullet points listed in the request itself. In the complainants' view the Council should have identified, by reference to the bullet points, the information that had been disclosed; the information that had been withheld; and the information that was not actually held. The complainants were also dissatisfied with the fact the information that



was disclosed was not done so in a structured way, ie it was simply a bundle of papers which contained numerous duplicates.

25. For its part the Council argued that complainants' request was, put simply, for *'all material held by Kirklees Council not previously disclosed in response to our [previous] requests'* relating their complaints. In the Council's view the complainants then went on to set out a series of bullet points to *'help you identify and retrieve papers and electronic records'*. The Council argued that these points simply served to specify the types of information that the complainants anticipated may be held by the Council. The Council explained that in its view it complied with the requirements of the EIR even though it did not categorise the information with reference to the specific points. It explained that if the complainants' felt that information had not been provided in relation to a particular point, this was because either no information was held relating to that point or because the information was (initially) considered to be exempt from disclosure.
26. Under regulation 5(1) of the EIR a public authority is under a duty to provide information sought by a request. If that information is not held, or if it is held but considered to be exempt from disclosure, then the public authority must state that fact to the complainants.
27. Therefore, the question for the Commissioner to determine is essentially whether the series of bullet points included in the complainants' email of 13 March 2014 constituted various separate requests for information or whether, as the Council argues, the request was simply for all information not previously provided, and the bullet points only indicated the type of information the complainants anticipated would be held. The Commissioner has considered this issue carefully, including taking into consideration the wording of the complainants' email of 13 March 2013. Having done so the Commissioner favours the Council's interpretation; in his view it is reasonable for the Council to interpret the email of 13 March 2013 as containing one broad and overarching request. Furthermore, whilst it may well be considered to be a best practice to provide disclosed information in a structured manner with any duplicates removed, the failure to do so does not constitute a breach of the legislation.

#### **Complaint (d)**

28. The complainants argued that the Council failed to provide them with advice and assistance in line with its duty under section 16 of FOIA. Under the EIR the equivalent provision is contained at regulation 9(1) which requires that a public authority provides advice and assistance so far as it would be reasonable to expect a public authority to do so. Regulation 9(3) states that where a public authority conforms to the

Code of Practice in relation to the provision of advice and assistance it will have complied with regulation 9(1).<sup>4</sup> The Code of Practice does not include an exhaustive list of the types of advice and assistance that could be provided. Having considered the correspondence between the Council and the complainants, along with the Code of Practice<sup>5</sup> on the provision of advice and assistance, the Commissioner is satisfied that the Council has, as far as is necessary and appropriate, assisted the complainants and thus it has not breached regulation 9(1) of the EIR.

### **Complaint (e)**

29. The complainants alleged that the Council held further information falling within the scope of their requests beyond that originally disclosed to them and beyond documents 1 and 6 which were initially withheld.
30. In order to support this particular point of complaint, the complainants referred to the following examples of further information which they believed the Council may hold:

(i) They highlighted the part of their request that sought '*the Legal and/or other advice provided by Kirklees Council's Legal Services to KAL's Chief Executive and Trustees in respect of their handling of our complaint....*'

They accepted that some information relating to this topic has been provided in response to earlier FOI/DP requests but given the limited amount of information disclosed they believed that further information was likely to be held given their understanding that Officers and/or Councillors were advising KAL about how to respond to their complaint.

(ii) They have specifically noted that they had not received any information regarding the following bullet points that were listed in their request:

- '*What the Council has identified as the legal and other rights of sports centre users in Kirklees.*'

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<sup>4</sup> <http://archive.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

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[http://ico.org.uk/~/media/documents/library/environmental\\_info\\_reg/detailed\\_specialist\\_guides/environmental\\_information\\_regulations\\_code\\_of\\_practice.ashx](http://ico.org.uk/~/media/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.ashx)

- *'Details of the Government's performance indicators Mr Read refers to in his note of 17/2/10...'*
- *'Evidence of what the Council has done to enforce the terms of the Statement of Understanding etc?'*

(iii) With regard to document 1 the complainants noted that the email the sender was presumably responding to had not been disclosed.

31. The Commissioner should emphasise that the complainants considered the above to simply be illustrative examples to support their view that the Council held more information than previously disclosed to them rather than an exhaustive list of the information which they consider to be missing.
32. In scenarios such as this where there is some dispute between the amount of information located by an organisation and the amount of information that a complainant believes may be held the Commissioner applies the civil standard of the balance of probabilities.
33. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities an organisation holds any information which falls within the scope of the request (or was held at the time of the request).
34. In applying this test the ICO will consider:
  - The scope, quality, thoroughness and results of the searches; and/or
  - Other explanations offered as to why information is not held, or why no further information is held.
35. In order to assist the Commissioner with his consideration of this complaint he asked the Council to explain the nature of searches undertaken in order to respond to this request. The Commissioner has summarised the Council's response below:
36. The Council explained that much of the information falling within the scope of the request was held by one particular officer, officer A.
37. Given the nature of the complainants' engagement with the Council information about this issue to date, this officer had stored all information relevant to this matter in electronic folders bearing the surnames of the one of the complainants. Officer A undertook searches of these files in response to this request. The officer also conducted searches of his email files stored under the complainants' names.

38. The Council explained that staff in the Legal Services department also searched emails they held in response to the complainants' previous requests.
39. The Council noted that this request specifically stated that it did not seek to cover any information other than that not previously disclosed. It explained that it therefore created a summary of information that had been disclosed in response to the previous requests. The Council explained that in dealing with each of these previous requests, relevant staff had been contacted and searches were carried out for all of the information falling within the scope of each request.
40. The Council explained that searches across the Council were undertaken using the complainants' surnames and the reference numbers allocated to their previous information requests.
41. The Council explained that the complainants had corresponded with it via email, and this is how it had responded to them and how the vast majority of its internal communications about this matter had been undertaken. The vast majority of information was therefore held electronically.
42. The Council also explained that some information that would have fallen within the scope of the request would have been destroyed at an earlier date by the Council. In part this was as a result of the frequency and length of the correspondence sent by the complainants. This was also because at the point of one of the complainants' first information access request, his case had completed the Local Government Ombudsman investigation process; it could not be revisited or reopened and therefore it was only appropriate to retain records relating to the original complaint, final decision and some clear information relating to the decision making process. Therefore there would have been many hundreds of emails and records that would not require retaining which were deleted.
43. The Council explained that it had no business purpose to retain records on exhausted complaint cases beyond the conclusion and scope of the original complaint.
44. The Council explained that it was confident that it had responded in full to the information requests received by the complainants over the last four requests, either providing the information or issuing an appropriate refusal notice. Each request was passed onto co-ordinators in the appropriate service who liaised with colleagues in order to search for and collate the information required.

45. With regard the information described at the second bullet point of (ii), the Council explained that these were government return documents and it was not necessary for it to retain a copy of these. In terms of the email referred to at (iii) it explained that a copy of this was no longer held.
46. In the Commissioner's opinion the searches undertaken by the Council were sufficiently thorough and detailed to ensure that any information it held falling within the scope of this request was located and provided to the complainants. In reaching this opinion, the Commissioner has taken into account the logical and organised way in which the information relating to this matter was stored by the Council and furthermore the clear and understandable reasons why the Council has deleted information which could have fallen within the scope of the request. The Commissioner is therefore satisfied that on the balance of probabilities the Council does not hold any further information relevant to this request beyond that previously disclosed.

#### **Regulation 5(2) – time to respond to a request**

47. Regulation 5(2) requires a public authority to make requested information available within 20 working days of a request.
48. In the circumstances of this case Council responded to the request within 20 working days. However it subsequently disclosed further environmental information to the complainants during the course of the Commissioner's investigation, i.e. the information contained in document 3 which the Commissioner accepts is not the complainants' personal data. In not providing this information within 20 working days, the Commissioner finds that the Council breached regulation 5(2) of the EIR.

## Right of appeal

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49. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**