

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 December 2016

Public Authority: The Royal Borough of Kensington and Chelsea
Address: The Town Hall
Hornston Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested information relating to the serving of a Noise Abatement Order served on her. The Royal Borough of Kensington and Chelsea withheld the information under regulations 12(5)(b) (the course of justice and inquiries) and 13(1) (personal data) of the EIR.
2. The Commissioner's decision is that the Royal Borough of Kensington and Chelsea have applied the exceptions appropriately. She also considers that regulation 5(3) (personal data of the applicant) of the EIR applies to some of the requested information. However, the Commissioner considers that the Royal Borough of Kensington and Chelsea have breached regulation 9(1) (advice and assistance) of the EIR.
3. The Commissioner does not require the Royal Borough of Kensington and Chelsea to take any steps as a result of this decision.

Request and response

4. On 20 November 2015, the complainant wrote to the Royal Borough of Kensington and Chelsea (RBKC) and requested information in the following terms:

“(i) All communication from [name redacted] to the Council in relation to the Property;

(ii) All communication from Council to [name redacted] in relation to the Property;

- (iii) All records and records of communication from [name redacted] to the Council, and from the Council to [name redacted] in relation to the Property;*
- (iv) All communication from [name redacted] in relation to the Property;*
- (v) All communication from Council to [name redacted] to the Council, and from the Council to [name redacted] in relation to the Property;*
- (vi) All records and records of communication from [name redacted] to the Council, and from the Council to [name redacted] in relation to the Property;*
- (vii) All communications, records and records of communications between elected members, officers and/or employees (current or former) of the Council in relation to the Property; and*
- (viii) All communications, records and records of communications between elected members, officers and/or employees (current or former) of the Council in relation to the Notice.*
- (ix) All records held by the Council in relation to the Notice."*

5. The RBKC responded on 24 November 2015. It stated that it was withholding the information under the regulation 12(5)(b) (course of justice) exception.
6. Following an internal review the RBKC wrote to the complainant on 25 January 2016. It upheld its application of regulation 12(5)(b) to parts vii – ix of the request and also applied the regulation 13(1) (personal information) exception to parts (i) – (vi) of the request.

Background

7. A Noise Abatement Order (NAO) was served on the complainant by the RBKC as a result of a complaint it had received regarding the level of noise made by piano playing on her premises.
8. The complainant subsequently contested this in court. During the Commissioner's investigation, the complainant brought her attention to the outcome of the court hearing. The Commissioner notes that although the NAO was varied, it was not overturned.

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2015 to complain about the way her request for information had been handled. However, the complainant had not requested an internal review. After the internal review was carried out, the complainant complained again to the Commissioner on 18 March 2016.

10. The complainant explained that she considered that RBKC should have disclosed the information as she needed it to contest the NAO. She also complained that by not disclosing the information, her right to a fair trial had been compromised.
11. During the Commissioner's investigation, the complainant clarified that she wanted the relevant information from 1 March 2014 - 22 April 2015, before the NAO was served. The Commissioner contacted the RBKC and explained this. The RBKC upheld its application of the exceptions it had already cited.
12. The RBKC also confirmed that at the time of the request, its investigation into the noise complaint was on-going.
13. The Commissioner will consider whether the RBKC has applied the exceptions appropriately.

Reasons for decision

Is the information environmental information?

14. The requested information relates to a NAO.
15. 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. These are listed in regulations 2(1)(a) and (b) and include noise.
16. The Commissioner considers that the NOA is a measure under regulation 2(1)(c). As the NAO is related to noise which is a factor under 2(1)(b), she considers that the request falls within the EIR.
17. The Commissioner has considered the withheld information. She notes that some of the information is the complainant's personal information, some of the information is the complainant's next door neighbours' personal information and some of the information is between staff of RBKC about the investigation into the complaint about noise from the complainant's next door neighbours.

Regulation 5(3) – The requester's own personal data

18. Regulation 5(3) provides that an applicant's own personal data is exempt information.

Is the information personal data?

19. The definition of personal data is set out in section 1 of the Data Protection Act 1998 (DPA):

“ ...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 intention of the data controller or any other person in respect of the individual.”

20. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

21. The Commissioner has considered the withheld information and is satisfied that some of it constitutes the complainant's own personal data, as it includes correspondence between her and RBKC about the noise complaint.

22. The Commissioner therefore considers that this information is exempt under regulation 5(3) and should be considered under the DPA.

23. The Commissioner notes that the RBKC did not explain this to the complainant or explain that she could submit a subject access request for her personal data.

24. The Commissioner will go on to consider whether regulations 13(1) and 12(5)(d) have been applied appropriately to the remainder of the withheld information.

Regulation 13 – personal data

25. Regulation 13(1) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the DPA.

26. The definition of personal data is set out in paragraph 18. The RBKC informed the complainant that it considered that as some of the requested information related to her next door neighbours' property, it was their personal data and that it would be unfair to disclose it.

27. The Commissioner has considered the withheld information. She is satisfied that some of the remaining information falls within the definition of 'personal data' as set out in section 1(1) of the DPA as it is personal data relating to other individuals.

Would disclosure breach one of the data protection principles?

28. RBKC informed the complainant that it considered that disclosure of the requested information would contravene the first data protection principle. The Commissioner agrees that the first data protection principle is relevant in this case.

Would disclosure contravene the first data protection principle?

29. The first data protection principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".

30. In the case of an EIR request, personal data is processed when it is disclosed in response to a request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions.

Would it be fair to disclose the requested information?

31. When considering whether disclosure of personal information is fair, the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

32. Under the first principle, the disclosure of the information must be fair to the data subject. Assessing fairness involves balancing the data subject's rights and freedoms against the legitimate interest in disclosure to the public.

33. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

Has the data subject consented to the disclosure?

34. The Commissioner is not aware of anything to suggest that consent has been given for disclosure of the requested information by any party concerned.

Has the data subject actively put some or all of the requested information into the public domain?

35. 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.
36. In this case the Commissioner has not seen any evidence that any of the data subjects has actively put some or all of the requested information into the public domain.

Reasonable expectations

37. In order to reach a view on whether the disclosure of this information would be fair, the Commissioner has placed specific emphasis on the nature of the information itself.
38. The requested information, if disclosed, would reveal information relating to the complainant's next door neighbours. The Commissioner does not accept that disclosing this information would be fair and considers that it would be very likely to cause distress to the individuals involved or have an unfair impact on them.

Consequences of disclosure

39. In looking at the consequences of disclosure on the data subject, the Commissioner has considered what they might be.
40. RBKC explained that it considered that disclosure of the information would have an impact on the complainant's next door neighbours as they would expect their personal information not to be placed in the public domain by RBKC.
41. The Commissioner considers that the public's legitimate interest must be weighed against the prejudice to the rights, freedoms or legitimate interests of the individual concerned. She has therefore considered

whether there is a legitimate interest in the public accessing the complainant.

42. The Commissioner acknowledges that the complainant has an interest in the requested information. She also notes that the complainant explained that she wanted the information as she was contesting the NAO through the courts.
43. However, the Commissioner notes that at the time of the request, there was an on-going investigation into the complainant's next door neighbours' complaint about the noise in question. The Commissioner considers this favours non-disclosure.
44. The Commissioner therefore considers that there is little public interest in disclosing the requested information, other than the interests of the complainant.
45. The Commissioner also finds that it would clearly be unfair to the complainant's neighbours to disclose information related to them and to do so would contravene the first principle.
46. She has therefore not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
47. The Commissioner considers that the regulation 13(1) exception is engaged in relation to the neighbours' personal information. She will go on to consider RBKC's application of regulation 12(5)(b) to the remaining information.

Regulation 12(5)(b) - the ability of a public authority to conduct an inquiry of a criminal matter

48. Regulation 12(5)(b) provides that a public authority may refuse to disclose information if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
49. In her guidance on regulation 12(5)(b)¹ the Commissioner explains that "Adversely affect " means there must be an identifiable harm to or negative

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

50. RBKC explained that at the time of the request, the information requested formed part of a confidential enforcement case regarding the noise complaint, which was approaching a conclusion following a long period of investigation.
51. With regard to the consequences of disclosure of the requested information, RBKC argued that disclosure of this information would adversely affect its ability to conduct an inquiry of a criminal nature. Specifically, it argued that disclosure of the information would adversely affect its ability to progress an investigation which might have led to the prosecution of those responsible for a breach of section 80 of the Environmental Protection Act 1990 (EPA).
52. In deciding whether this exception has been applied correctly, the Commissioner has considered whether the withheld information related to an inquiry or investigation conducted by RBKC is of a criminal or disciplinary nature. The Commissioner is satisfied that the information would form part of the evidence that RBKC would subsequently rely on, in the course of its criminal investigation into the complaint of excessive noise emanating from the complainant's property, in breach of section 80 EPA.
53. Having considered the information in question, the Commissioner is satisfied that the disclosure of the information between dates of 1 March 2014 – 22 April 2015 was part of a confidential enforcement file. She also accepts that at the time of the request, the inquiry was still on-going and therefore that disclosure of the information would adversely affect RBKC's ability to take any necessary action.
54. The Commissioner therefore considers that the exception is engaged and will go onto consider the public interest considerations.

Public interest arguments

55. Regulation 12(1) provides that a public authority can refuse to disclose requested environmental information if an exception applies and in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in maintaining the exception

56. RBKC argued that the public interest in maintaining regulation 12(5)(b) outweighed the public interest in disclosure. It explained that it considered that there was a significant public interest in protecting the integrity of its ongoing investigations so as not to compromise them or any future legal proceedings.
57. RBKC also argued that was in the public interest for enforcement investigations to be carried out with a degree of protection to ensure fairness to all of the parties involved.

Public interest arguments in favour of disclosing the information

58. RBKC acknowledged the public interest in transparency with regard to understanding how it investigates complaints about noise.
59. The complainant pointed out that regulation 12(2) provides that a public authority should apply a presumption in favour of disclosure.
60. The complainant also explained that she needed the requested information as the matter in question was listed for a hearing and she needed the information as RBKC had informed her that she would have to disprove the existence of a nuisance. She argued that non-disclosure meant that her (and her husband's) right to a fair trial was prejudiced.
61. The complainant also argued that she had the right to understand the full reasoning regarding how RBKC came to the conclusion that their enjoyment of their home constituted a statutory nuisance. The complainant explained that she had been given only a partial account of the RBKC's decision-making process.
62. Furthermore, the complainant explained that she considered that it would be in the public interest for the information to be disclosed if it turned out that RBKC had not carried out its duties properly.

Balance of the public interest arguments

63. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency. She accepts that disclosure of the information could help reassure the public the RBKC deal with such cases appropriately.
64. However, the Commissioner considers that there is a very clear public interest in ensuring that RBKC is able to take effective enforcement action in cases of statutory nuisance, in this case regarding noise.

65. Given that there was an ongoing investigation at the time of the request, the Commissioner believes that this significantly strengthens the public interest in maintaining the exception in order to ensure that the RBKC has the private thinking space it needs to take decisions in respect of this enforcement case.
66. The Commissioner considers that this outweighs the interest in disclosing the information and therefore she has concluded that the public interest favours maintaining the exception.

Procedural issues

Regulation 9 – advice and assistance

67. Regulation 9(1) provides that a public authority must provide advice and assistance, where reasonable, to applicants.
68. The Commissioner notes that RBKC did not explain to the complainant that some of the requested information would constitute her own personal information and therefore be exempt under the EIR.
69. In cases like this, the Commissioner considers it reasonable for a public authority to explain this to an applicant and advise them of their rights to submit a subject access request for their personal data, under the DPA.
70. The Commissioner therefore considers that the RBKC has breached regulation 9(1).

Right of appeal

71. 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@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

72. 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.

73. 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

Jon Manners
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