

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

**Decision notice**

**Date:** 8 February 2017

**Public Authority:** London Borough of Hackney  
**Address:** Town Hall  
Mare Street  
London  
E8 1EA

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a Public Spaces Protection Order (PSPO) implemented in the borough on 9 April 2015. She also requested information relating to an amendment made to the PSPO on 5 June 2015. The council refused to disclose the requested information citing regulations 12(4)(e) and 13 of the EIR.
2. During the Commissioner's investigation some information was disclosed to the complainant. But the council confirmed that it wished to rely on regulation 12(4)(e) and 13 of the EIR for the remaining withheld information.
3. The Commissioner is satisfied that regulations 12(4)(e) and 13 of the EIR apply in this case. She has however found the council in breach of regulations 5(2) and 11 of the EIR.
4. The Commissioner does not require any further action to be taken.

**Request and response**

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5. On 12 June 2015, the complainant wrote to the council and requested information in the following terms:

- "1. Please provide any document which were created and/or considered in relation to the decision to make the Public Spaces Protection Order for the London Borough of Hackney No.1 of 2014, dated 9 April 2015.
2. Please provide any documents which were created and/or considered in relation to the decision to make the Public Spaces Protection (Amendment) Order for the London Borough of Hackney No.1 of 2015, dated 5 June 2015."
6. The council responded on 27 July 2015. It refused to disclose the requested information citing regulations 12(5)(b), 12(4)(e) and 13 of the EIR.
  7. The complainant requested an internal review on 15 September 2015. She stated that she had no complaint about the application of regulation 12(5)(b) of the EIR but wished to challenge the application of regulation 12(4)(e) and 13.
  8. As the complainant received no response, she referred the matter to the Commissioner on 10 March 2016.
  9. The Commissioner contacted the council on 20 April 2016 and requested that it carries out the internal review within the next 10 working days.
  10. The council carried out an internal review and notified the complainant of its findings on 27 April 2016. It reviewed the application of regulation 12(4)(e) of the EIR and decided to disclose some of the previously withheld information to the complainant. It however informed the complainant that it remained of the opinion that this exception still applied to some of the requested information. In relation to the application of regulation 13, the council confirmed that it upheld this exception.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 5 May 2016 to complain again about the way her request for information had been handled. She specifically objected the usage of the EIR in this case and also the application of regulations 12(4)(e) and 13 to the remaining withheld information.
12. No complaint was made to the Commissioner about the application of regulation 12(5)(b) of the EIR, so the Commissioner's investigation has focussed on whether the EIR is the correct legislation for the consideration of this request and, if so, whether regulations 12(4)(e) and 13 apply to the remaining withheld information.

## Reasons for decision

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### Is the requested information environmental information?

13. The regulations state that “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 (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;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c).
14. The council confirmed that the PSPO refers to activities such as consuming alcohol, begging, loitering, urinating and defecating, dogs being off leads and the misuse of public toilets. It considers that some of these activities are factors which will affect the elements of the environment outlined in 2(1)(a) of the EIR and are factors likely to have an effect on the state of human health and safety, as described in 2(1)(f). For these reasons, it stated that the request should be considered under the EIR rather than the FOIA.

15. The Commissioner is satisfied that the EIR is applicable in this case rather than the FOIA. She agrees with the council that some of the activities described in the PSPO are activities which will affect the elements of the environment outlined in 2(1)(a) of the EIR and activities which could affect human health and safety, as outlined in 2(1)(f). The Commissioner considers a PSPO is a measure as described in 2(1)(c) of the EIR designed to *positively* affect the factors described in 2(1)(a) and (f) of the EIR.
16. As the Commissioner is satisfied that the request should be considered under the EIR, she will now go on to consider the application of regulation 12(4)(e) and 13 of the EIR.

### **Regulation 12(4)(e) – internal communications**

17. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
18. The council confirmed that the withheld information constitutes the internal discussions that took place within the council relating to the PSPO and so this exception applies.
19. The Commissioner is satisfied that the withheld information constitutes internal communications and so the remaining withheld information falls within the definition of this exception. The correspondence is internal emails and correspondence relating to the PSPO and issues relating to it that were being discussed at the time of the request.
20. The Commissioner will now go on to consider the public interest test.
21. The council stated that it recognised the public interest in disclosure in this case. It accepted that there is a public interest in improving the areas to which the PSPO related and in the transparency and openness of the PSPO process and the decision making behind it. The council confirmed that it understood disclosure would assist the public in understanding more clearly the steps that were taken by the council to implement and then amend the PSPO. Disclosure would assist the public in understanding more effectively why a PSPO was considered necessary and the rationale behind this.
22. However, in this case, the council stated that it considered the public interest in favour of maintaining the exception was much stronger. It argued that public authorities should have the necessary space to think in private without the fear of public intrusion, particularly at a time when the subject matter is still live. The preservation of a safe space in which to allow policy decision making to be carried out is very important and it considers disclosure of internal deliberations at a time when the issue is

still live would have a significant impact on its ability to hold free and frank discussions. The council confirmed that private space to think and debate freely and frankly is required in order to produce good and effective decisions. If this free space was intruded at a time when an issue was still live and very much open to internal debate, officers may feel less able to offer their free and frank views.

23. The council stated that disclosure of the requested information at the time of the request would have disrupted the established process, as set out in policy and legislation, by which it makes decisions and performs its duty in combating anti-social behaviour incidents of crime, nuisance and disorder; incidents which make the lives of many a misery. Such consequences are not within the interests of the wider public.
24. The council advised that decisions relating to PSPO's are often complex, require much deliberation and often touch on contentious issues. It is a very sensitive area and requires the full, free and frank expression of opinions at all stages of the decision making process. The complainant's request was made on 12 June 2015 just a week after the PSPO was amended to remove rough sleeping from the order. It was also made at a crucial time when the council was clearly deciding whether this was the best course of action at this time, as the amended PSPO was discharged three days later on 15 June 2015. The council maintains that the request was made at a crucial stage in the overall decision making process and so carries significant weight when considering the public interest arguments for and against disclosure.
25. The Commissioner considers the timing of the request in this case is a significant factor in establishing where the public interest lies. She notes that the request was made just after the PSPO order had been amended and quite clearly at a time when the council was actively deliberating on whether to discharge the PSPO in full or leave it in force. The Commissioner accepts that free and frank internal discussions would have been taking place at the time of the request to enable the council to decide the best course of action.
26. The Commissioner considers this exception is designed to protect the need for safe space to enable public authorities to consider options freely and frankly and to reach important policy decisions. Officers should be allowed the private space to debate issues and offer their free and frank opinion during the decision making process without the fear of public intrusion and interference. The council has explained that these were the circumstances at the time of the complainant's request. The Commissioner considers the need for private thinking space is at its greatest when options are being considered but no definitive decision has been made. Once a final decision is made there becomes less and less need for this safe space and the public interest begins to tip

towards disclosure so as to enable the public to understand more clearly the reasoning behind that particular decision.

27. The Commissioner notes there are public interest arguments in favour of disclosure. The PSPO was designed to tackle some of the social problems the area was experiencing and is one method that can be used by council's to try and tackle the activities described in this particular PSPO. The public will have a clear interest in the mechanisms being used to tackle such problems, particularly if they are directly affected. There is a public interest in understanding why this course of action was taken and thought to be the best approach at the time, as opposed to any other mechanisms that may be available to public authorities.
28. The Commissioner also notes that the PSPO was amended on 5 June 2015 and the public would be interested to know why such amendments were necessary and the council's rationale behind this. Similarly, it is noted that the PSPO was discharged a week after this amendment (although this event just post-dates the request by three days. But it had happened by the internal review request and ultimate review). Again, the public may wish to know why this decision was taken and felt necessary.
29. Overall, however, and mainly the result of the timing of this request, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.

### **Regulation 13 – personal data**

30. This exception has been applied to a bundle of witness statements, which fall within the scope of the complainant's request. The council has confirmed that the complainant has received a schedule of evidence and this is a summary of the witness statements being withheld.
31. Regulation 13 of the EIR states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach one of the data protection principles outlined in the Data Protection Act.
32. Personal data is defined 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 that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

33. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle 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."

34. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends. However, if she decides that disclosure would be fair and lawful on the data subjects concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

### **Is the requested information personal data?**

35. As stated above, the withheld information is the individual witness statements the council has received, which fall within the scope of the complainant's request. These witness statements contain the personal details of relevant members of the public and their personal account of issues they may have witnessed or specific concerns they have.
36. The Commissioner is satisfied that each member of the public can be identified from the statement they provided and so the statements constitute personal data. The statements contain the names, description of specific incidents and locality; information from which the witness could be identified whether from this information alone or a combination of this information and other information otherwise available.

### **Would disclosure be unfair?**

37. The council confirmed that the witness statements were used to support the implementation of the PSPO and it considers these data subjects would hold the reasonable expectation that the information they provide

will be held in confidence. The council also stated that these data subjects would expect to be safeguarded and not exposed to any risk; the associated risk disclosure and then possible identification could cause. The council also stated that it is heavily reliant on individuals reporting suspected anti-social behaviour breaches. They do so on the understanding that the information provided will be treated in confidence. If witness statements were disclosed in response to a FOIA request this would discourage individuals from sharing information with the council and law enforcement, which in turn would undermine the entire process.

38. The council therefore concluded that disclosure of each witness statement in its entirety would be unfair on the data subjects concerned considering their clear expectations of confidentiality.
39. The Commissioner considers the data subjects concerned would hold the fair and reasonable expectation that the evidence they have supplied in confidence will not be disclosed to the world at large. The council has explained how it relies on members of the public reporting breaches. This process can only work as effectively as it does if members of the public are assured that the information they supply will be treated in confidence and only used by the council to implement measures designed to combat anti-social behaviour breaches. Those that volunteer information would have no expectation that their personal data could be disclosed to the world at large. Such public disclosure could put them at risk and cause considerable distress and upset.
40. The Commissioner is therefore satisfied that the disclosure of each and every witness statement in its entirety would be unfair.
41. The Commissioner understands that there is a legitimate interest in the disclosure of this information; information which will assist the public in understanding more clearly the evidence that support the PSPO. However, such interests must be weighed up against the distress and intrusion disclosure would cause the data subjects concerned. The council stated that it provided the complainant with a schedule of evidence at the internal review stage and confirmed that this is a summary of the evidence it received and used to support the PSPO, as detailed in the individual witness statements. The Commissioner considers the schedule is sufficient to meet any legitimate interest in this information; it enables the public to see the sort of evidence and incidents that influenced the implementation of the PSPO. Full disclosure of each and every witness statement, which would release personal data relating to each witness and potentially other members of the public carrying out the alleged anti-social behaviour is unjustified. As stated above, the Commissioner considers disclosure would cause considerable



distress and upset and potentially place some members of the public at risk.

42. For the above reasons, the Commissioner is satisfied that regulation 13 of the EIR applies in this case.

### **Procedural matters**

43. As the council failed to respond to the complainant's request within 20 working days of receipt, the Commissioner has found the council in breach of regulation 5(2) of the EIR.
44. The council also failed to carry out the internal review within 40 working days of receipt and in fact took over 7 months to comply. Regulation 11 of the EIR clearly states that an internal review should be completed within a maximum of 40 working days. As the council failed to do so, the Commissioner has found the council in breach of regulation 11 of the EIR in this case.

## Right of appeal

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

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

46. 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.
47. 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** .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**