

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

Decision Notice

Date: 4 June 2021

Public authority: Royal Borough of Kensington & Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant requested information regarding the Council's response to a previous request which had been refused under regulation 12(4)(b) of the Environmental Information Regulations 2004 (EIR). The Council refused this request under the exception at regulation 12(4)(b) on the basis that the request was manifestly unreasonable.
2. The Commissioner's decision in this case is that the Council is entitled to rely on regulation 12(4)(b), and the public interest in maintaining the exception outweighs the public interest in disclosure. No steps are required.

Background

3. The complainant in this case has been in dispute with the Council for several years regarding the Council's handling of noise complaints submitted by the complainant's neighbour about the complainant's family home. The Council issued an abatement notice in 2015, which the complainant appealed via the Magistrates' Court in 2016. The Court upheld the Council's decision to serve the abatement notice, but varied the terms of that notice. The Council subsequently withdrew the abatement notice.
4. The Commissioner has issued several decision notices in respect of requests made by the complainant seeking information relating to the Council's handling of the noise complaints. The request that is the subject of this decision notice follows an earlier request refused by the Council in November 2018 (the 2018 request).

5. The Commissioner issued a decision notice in respect of the 2018 request on 30 January 2020, finding that the Council was entitled to refuse the request as manifestly unreasonable under regulation 12(4)(b).¹ The Commissioner accepted as reasonable the Council's explanation regarding the activities required to deal with the 2018 request.

Request and response

6. On 13 February 2020 the complainant submitted the following request for information to the Council.

In RBKC's response to the EIR request submitted in November 2018 [link redacted] RBKC has relied on the "manifestly unreasonable" exception to refuse disclosure of the requested information.

The information requested relates solely to RBKC's involvement in the piano dispute of 2014 to 2017 in which RBKC squandered hundreds of thousands of pounds of public funds in a failed attempt to ban two children from playing the piano in their family home.

RBKC relies on the manifestly unreasonable exception claiming that the information requested comprises:

*1243 items over 254 email accounts;
502 items of information regarding acoustic recordings;
18 items of information over 4 email accounts relating to "maternity".*

1. Please confirm that all 1243 items of information over 254 email accounts were in relation to the piano dispute that is the subject of this request.

How many of those email accounts belong to RBKC officers, employees and agents?

How many of those email accounts belong to RBKC councillors?

Please name these RBKC councillors.

How many of those email accounts belong to non-RBKC elected officials or other UK public figures?

Please list the names of these other elected officials and public figures.

How many of those 254 email accounts belong to other public authorities?

Please name these other public authorities.

¹ <https://ico.org.uk/action-weve-taken/decision-notice/fer0808893/>

How many of those 254 email accounts [sic] belong to private individuals?

Apart from the complainant, who were these other private individuals?

2. Please confirm that the 502 items of information regarding acoustic recordings RBKC claims to have identified, actually relate to the piano dispute? If not, please confirm how many are in relation to the piano dispute?

3. Please confirm that the 18 items of information over 4 email accounts relating to "maternity" over the period in question (from 1st March, 2014 until 8th April, 2015) actually relate to the piano dispute. If not, please confirm how many are in relation to the piano dispute?

5. The Council responded to the request on 12 March 2020. It refused parts 1 and 2 of the request on the basis of regulation 12(4)(b). It provided information in response to part 3 of the request.

Scope of the case

6. The complainant contacted the Commissioner on 16 March 2020 to complain about the Council's response to her request.
7. The Commissioner does not usually accept complaints for investigation unless the complainant has exhausted the public authority's internal review process. However, in this case the Commissioner is mindful that the complainant has been in correspondence with the Council for a number of years regarding various information requests she has submitted on this subject matter. The Commissioner has issued a number of decision notices in respect of these requests, the most recent of which found that the Council was entitled to refuse requests as manifestly unreasonable.
8. The Commissioner considered that the request that is the subject of this decision notice represented an attempt by the complainant to submit a refined request that is not manifestly unreasonable. Therefore she considered it appropriate to accept the complaint for investigation without requiring a further internal review.
9. The Commissioner would also reiterate that her role is to decide whether a particular request has been handled in accordance with the requirements of the EIR. She cannot comment on or become involved in the complainant's wider dispute with the Council.
10. In light of the above the scope of the investigation was the Council's reliance on the exception at regulation 12(4)(b) in respect of parts 1 and 2 of the request.

Reasons for decision

Regulation 12(4)(b): manifestly unreasonable request

11. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable. The term "manifestly unreasonable" is not defined in the EIR. However the Commissioner follows the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC*.²
12. In *Craven* the Tribunal found that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR, save that the public authority must also consider the balance of public interest when refusing a request under the EIR.
13. A differently constituted Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield*.³ The Upper Tribunal's approach, subsequently upheld in the Court of Appeal, established that that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious. The Commissioner is of the opinion that these concepts are equally relevant when assessing whether a request for environmental information is manifestly unreasonable.
14. The Commissioner notes that the main provision for dealing with burdensome requests under the EIR is regulation 7(1). This allows a public authority to extend the time for compliance from 20 to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to meet the 20 day deadline. However, in *Craven* the Tribunal again commented that:

"...it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable."

² [2012] UKUT 442 (AAC)

³ [2012] UKUT 440 (AAC).

The Council's position

15. The Council considered the complainant's request to be manifestly unreasonable on the grounds that compliance would constitute a disproportionate burden on its resources. The Commissioner therefore asked the Council to explain how it had made this assessment.
16. The Council clarified that it would need to undertake preparatory work before the 1243 items could be reviewed, owing to the way information was stored electronically. The Council explained that it would need to download the results of its e-discovery searches and open them as PST files for each email account. The Council did not provide an estimate as to how long this would take.
17. The Council went on to explain that it would need to check each of the 1243 items manually to ascertain whether it was relevant to the complainant's request. Relevant items would then need to be analysed in order to provide the breakdown specified in the request. The Council noted that an item for review, such as an email, may comprise multiple pages of a chain of correspondence. In such instances the Council would need to check each email within a chain.
18. The Council estimated that, on average, it would take approximately two minutes to open and review each item. It calculated that reviewing 1243 items would therefore take approximately 2486 minutes, or 41.4 hours in total.
19. The Council did not provide a separate estimate in respect of the 502 items of information regarding acoustic recordings. However the Commissioner calculates that applying the Council's estimate of two minutes per item would equate to 1004 minutes, or 16.7 hours.
20. In addition to the time required to comply with the request, the Council made further submissions in support of its assessment that the request was manifestly unreasonable. The Council argued that the complainant was unreasonably persistent in that she was attempting to reopen an issue, ie the handling of the noise complaint, that had been the subject of independent scrutiny in the form of the court hearing in 2016. It also argued that the complainant had submitted numerous requests for information, often within a short space of time, thus not allowing the Council to deal with one request before submitting another. In the Council's opinion these frequent and overlapping requests were clear indicators that the request was manifestly unreasonable. The Commissioner interprets these arguments as setting out that the request was also manifestly unreasonable on the grounds of being vexatious.

The complainant's position

21. The complainant strongly maintained that her request was not manifestly unreasonable. As in the previous decision, the complainant provided the Commissioner with several submissions in support of her position. These included allegations about the Council's handling of the noise complaint and links to web blogs on which the case had been discussed. The Commissioner has considered all the information provided by the complainant but does not consider it necessary to refer to each communication in detail within this decision notice.
22. In respect of this specific complaint the complainant argued that she had requested "factual data that should be very easily verifiable". She presumed that the Council's search tool should be sufficiently sophisticated as to combine search terms, such as her surname and the word "piano". The complainant considered it extremely likely that information meeting these search terms would be relevant to her request.

The Commissioner's findings

23. As set out above, the Commissioner notes that the complainant's request relates to a noise complaint that was made about the complainant's family home by their neighbour. The Commissioner recognises that the complainant in this case is of the enduring opinion that she and her family have been ill-treated by the Council regarding the noise complaint. The matter was dealt with by the Magistrates' Court in 2016, yet the complainant has submitted numerous requests for information to the Council since then. The Commissioner has dealt with several complaints about the way the Council has handled these requests, and has issued a number of decision notices as indicated above.
24. In this case the complainant has effectively asked the Council to confirm that the 1243 items returned in a previous search relate to the noise complaint. Given that the Council's arguments relate to the burden anticipated if it is required to comply with the request, the Commissioner has carefully considered what steps would be required for the Council to comply with the request. The Commissioner has further considered the extent to which the request may be considered vexatious, bearing in mind that burden is also a relevant factor in determining this.
25. First and foremost the Commissioner observes that information relating to the noise complaint may include the complainant's personal data. This is relevant because the complainant's personal data is excluded from access rights under the EIR by virtue of regulation 5(3). Therefore the Commissioner considers that the first task for the Council would be to

examine each of the 1243 items and exclude any that comprise the complainant's personal data.

26. The Commissioner recognises that the complainant's request only asks whether each item is relevant to the noise complaint; it does not ask about the detailed content of the information in question. However, the Commissioner is mindful that information relating to the noise complaint is likely to relate to the complainant and may include her personal data. Accordingly, if any of the 1243 items comprises the complainant's personal data, then those items must be excluded from the requested information since they will fall outside the scope of the EIR.
27. The Council's submissions did not include explicit reference to the need to exclude the complainant's personal data from the requested information. However the Council did provide an estimate of the time required to assess each item for relevance to the request, and the Commissioner considers that this estimate reasonably ought to include the time required to check whether the item comprises personal data of the complainant.
28. Accordingly the Commissioner has considered the Council's estimate of two minutes per item in the context of identifying and excluding the complainant's personal data. The Council would need to consider the definition of personal data as set out at section 3(2) of the Data Protection Act 2018:

"any information relating to an identified or identifiable living individual".

29. The individual does not necessarily need to be identifiable from the information itself, but the information does need to relate to that individual. The Commissioner notes that using the complainant's surname as a search term is an obvious and logical step, but considers that this is extremely likely to result in the complainant's personal data being identified as relevant to the request when in fact it would need to be excluded from the results. For this reason the Commissioner cannot accept the complainant's argument at paragraph 22 above.
30. In any event the Commissioner accepts that this detailed consideration could take more or less than two minutes in each case, depending on the nature of the information in question. Therefore the Commissioner accepts an average of two minutes per item to be reasonable. If this is applied to the 1243 items over the 254 email accounts, and the 502 items returned in the acoustic search, it equates to approximately 58 hours.

31. With regard to information that is assessed as not including the complainant's personal data the Council would also need to determine whether it relates to the noise complaint. The Commissioner is prepared to accept that an average of one minute per item would be a reasonable estimate for this activity. However the Commissioner cannot form an estimate as to how many items would be relevant since the analysis required to do so would defeat the purpose of producing an estimate.
32. The Council would then need to consider the breakdown of information as specified in the request. The complainant asked how many items were held in email accounts belonging to a range of individuals, and asked for the names of those individuals:
 - Council officers, employees and agents
Councillors
 - Other elected officials and public figures
 - Private individuals
33. The Council would be obliged to take into account the data protection rights of any third parties as these would be relevant when making decisions regarding compliance with the request. Confirming that information was held in an email account belonging to an individual, or related to an individual would effectively be disclosing personal data about that individual, even if it did not at that time disclose the content of such personal data. Therefore the Commissioner would need to consider whether it could disclose information without contravening the data protection principles as set out at Article 5 of the General Data Protection Regulation.
34. The Commissioner is generally of the opinion that the bar regarding what makes a request "manifestly unreasonable" is, and ought to be, reasonably high. It is insufficient to claim that regulation 12(4)(b) is engaged purely because compliance with a request may require substantial effort. There is no threshold of time beyond which a request is automatically considered manifestly unreasonable, and no direct equivalent to the cost limit at section 12 of the Freedom of Information Act 2000. The Commissioner also recognises that the complainant has tried to submit a more focused request in view of the previous decision.
35. However, the Commissioner is satisfied that this request is also manifestly unreasonable. The Commissioner accepts that the Council would again need to spend considerable time examining and inspecting information in order to separate out the complainant's personal data, and then to determine whether any of the remaining information was relevant to the request. The Commissioner recognises that the complainant has already received her own personal data (to the extent that she is entitled to receive it), and she has been advised that this

information falls outside the scope of the EIR by virtue of regulation 5(3) of that access regime. Nevertheless the complainant has continued to submit requests for information that will almost certainly include her own personal data, knowing that the Council would need to spend time separating this out in order to respond under the EIR.

36. The Commissioner noted in her previous decision that in several previous cases she had found that third party personal data relating to complaints is exempt by virtue of regulation 13 of the EIR. Similarly in this case the Commissioner considers that much of the information in question is likely to fall within the scope of regulation 13.
37. The Commissioner is also persuaded by the argument that the complainant's request is vexatious, over and above the arguments relating to burden. The Commissioner further accepts that, even if the Council did comply with this request, it would be unlikely to satisfy the complainant, who has submitted numerous requests for information on this matter since the noise complaint was originally dealt with. It would be more likely to result in further requests for information on the same topic of the noise complaint, even though the complaint itself has long since been closed.
38. For the reasons set out above the Commissioner concludes that the complainant's request is manifestly unreasonable and the Council was entitled to engage the exception at regulation 12(4)(b). Since regulation 12(4)(b) provides a qualified exception, a public authority may only refuse a request that is manifestly unreasonable if the public interest in maintaining that exception outweighs the public interest in disclosure. Regulation 12(2) of the EIR also provides that the public authority must apply an explicit presumption in favour of disclosure.
39. The Commissioner recognises that the public interest arguments put forward by both parties in this case are similar to the previous decision. Therefore, as indicated above it is unavoidable that some of the analysis will be similar as well, and the Commissioner would reiterate that she has considered all the circumstances of this particular case.

Public interest in favour of disclosure

40. The Council argued that there was very little, if any, public interest in favour of disclosure, even taking into account the presumption in favour of disclosure at regulation 12(2). The Council acknowledged the complainant's allegation that it had conducted the litigation in an improper manner. Whilst the Council recognised that there was a legitimate public interest in transparency around how it spent public money, it did not accept the complainant's allegations to have any merit. The Council argued that this latest request was a further attempt

by the complainant to revive the dispute about the noise complaint when all the other parties considered that it had long been closed.

41. As recognised in the previous decision notice, the Commissioner acknowledges that the complainant has personal reasons for pursuing her request. The complainant has suggested that the Council was unduly influenced by third parties, possibly including elected representatives, when deciding how to proceed with the noise complaint. The complainant believes that compliance with her requests will provide evidence of wrongdoing.
42. The Commissioner recognises the legitimate public interest in transparency regarding alleged wrongdoing by a public authority. However she sees no reason to question a previous First Tier Tribunal decision⁴ which acknowledged that the Magistrates Court had found that a statutory nuisance existed, and that the Council was entitled to issue an abatement notice. The Council appealed the Court's decision to vary the terms of the notice, but later withdrew the notice itself. The Commissioner does not accept the complainant's conclusion that the Council was proven to have acted improperly, and does not afford this public interest argument substantial weight.

Public interest in favour of maintaining the exception

43. The Commissioner's published guidance⁵ on regulation 12(4)(b) says that many of the issues relevant to the public interest test will have already been considered when deciding if this exception is engaged. This is because engaging the exception includes some consideration of the proportionality and value of the request.
44. The Council maintained that, as with the previous decision, the burden of collating and considering the relevant information was out of all proportion to the value of the request. The Council emphasised its belief that the request related to a neighbour dispute, and that the requested information would be of no value to anyone other than the complainant.
45. The Council also argued that compliance with this request would not satisfy the complainant. Rather, it would lead to further requests for information which would increase the cumulative burden on the Council.

⁴ Appeal no EA/2017/0010 issued 27 November 2017

⁵ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

The Council considered that there was a strong public interest in protecting its resources from such unjustified persistence.

Balance of the public interest

46. Since the Commissioner is satisfied that the Council is entitled to rely on the exception at regulation 12(4)(b), the Commissioner accepts that the request is manifestly unreasonable. The question is whether the public interest in maintaining the exception is strong enough to outweigh the public interest in disclosure, including the presumption in favour of disclosure.
47. The Commissioner has carefully considered the public interest arguments put forward by the complainant and by the Council. The Commissioner accepts that compliance with the request would cause the Council an unjustified burden for the reasons set out above. The Commissioner emphasised in the previous decision that the complainant's personal information falls outside the scope of the EIR, yet this latest request still includes information that may be her personal data. The Commissioner is also mindful that the previous decision acknowledged the importance of considering the data protection rights of the other individuals likely to be involved.
48. The Commissioner accepts that there is a considerable public interest in protecting public authorities from burdensome requests, where the value of the requested information does not justify the work required to comply with the request. The Commissioner is satisfied that there is limited public interest in disclosure of the requested information, since the request has at its heart the complainant's long-standing dissatisfaction with the way the Council handled the noise complaint.
49. The Commissioner has acknowledged the complainant's personal sense of grievance, but has found that this is not a strong public interest argument in favour of requiring the public authority to comply with a manifestly unreasonable request. The Commissioner is not convinced that compliance with the request would in fact inform the public about the way the Council handled the noise complaint. It would be more likely to lead to further requests on the same subject, since the complainant is unlikely to accept any response that does not confirm her view of the dispute.
50. The Commissioner has also drawn attention in previous decision notices to the significant pressures faced by the Council in terms of competing priorities and the consequences of dealing with the Covid-19 pandemic. The Commissioner has found that obliging the Council to comply with the complainant's previous requests would be likely to have an adverse impact on the handling of other requests for information, and the delivery of important public services generally. The Commissioner

remains of the view that there is a substantial public interest in protecting the ability of public authorities to deploy their limited resources in the most reasonable and proportionate manner. In this case the Council has had to divert resources to dealing with the complainant's requests that may otherwise have been spent on requests that benefit the wider public.

51. For the reasons set out above the Commissioner finds that the public interest in maintaining the exception in this case clearly outweighs the public interest in disclosure, even taking into account the presumption in favour of disclosure. The Commissioner would urge the complainant to consider carefully the impact of making further requests on the same issue to the Council.

Right of appeal

52. 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 123 4504
Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

53. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.

54. 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

Sarah O’Cathain
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