



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0015

**Decided without a hearing
On 29 May 2018**

**Before
KAREN BOOTH
JUDGE**

**DAVE SIVERS
ANDREW WHETNALL
TRIBUNAL MEMBERS**

Between

JOHN GLOVER

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 20 December 2018 (Reference: FER0757606) is in accordance with the law and the appeal is dismissed.

REASONS

(NB In this Decision: the Respondent is referred to as "the Commissioner"; Newcastle under Lyme Borough Council is referred to as "the Council"; the Environmental Information Regulations 2004 are referred to as "the EIRs"; and references to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

Background to the appeal

2. Mr Glover had made a complaint to the Council about noise affecting his property. The Council's environmental health team arranged the installation of sound recording equipment at his property on two occasions (14.10.16 to 17/10/16 and 16/11/16 to 21/11/16). The recordings were analysed by officers from that team and a report was produced on 22/11/16 (pages 31-34), which concluded that the noise did not meet the legal tests for formal action. Mr Glover was not satisfied with that conclusion.

The request for information and the response

3. On 28/1/18 Mr Glover sent an email in the following terms to the Council (page 67):

"Would you please send me via email the following information. A summary of the noise recordings made at [address redacted], on 15th October 2016 and 18th November 2016.

I also would request details of the recordings made on 16th September 2016 at the junction of [road name redacted] and [road name redacted], and the recordings made at the junction of [road name redacted] and [road name redacted] on the same date.

Please supply this information in an open reusable format (Microsoft Word for example) but if this is not possible in a hard copy.

This request is made under [the EIRs], and in accordance with Regulation 9 can you provide any advice and assistance that may help my request be more effective? If my request is too general, please provide advice and assistance as to how it can be refined."

Response and review decision

4. The Council sent an initial response on 29/1/18 (page 68) and a full response in the (undated) letter at page 70. Included with the latter was a DVD

purportedly containing the four categories of information described in paragraph 6 (bullet 1).

5. Mr Glover requested a review of the response (page 72) on the basis that: the information requested had not been supplied; information had not been supplied in the format requested; no help and advice had been offered and the DVD supplied did not contain the information described as provided.
6. The Council's review response is at page 74. The response:
 - listed and described the 11 files purportedly contained on the DVD (4 of which consisted of "WAV files", 4 of which consisted of excel documents and 3 of which consisted of pdf documents);
 - noted that no information was restricted/withheld by the Council;
 - explained why the information had been communicated in the formats referred to above which the Council considered to be "open and reusable";
 - asserted that the Council had provided all the information requested and therefore no advice or assistance was required;
 - denied that the DVD did not contain the information described.

The complaint to the Information Commissioner

7. Mr Glover complained to the Commissioner (pages 78-82). He subsequently sent the further correspondence at pages 84 and 101.
8. His complaint was investigated by the Commissioner. The Council sent a detailed response to the Commissioner's enquiries (pages 107-119).
9. The Commissioner's decision notice was issued on 20/12/18 (page 1). It was decided, on the balance of probabilities, that the Council had provided the information it held to Mr Glover and that the Council had met its obligations under regulations 6 and 9. The Council was not required to take any steps.

The appeal to this Tribunal

Appeal grounds

10. On 14/1/19 Mr Glover appealed to this Tribunal against the Commissioner's decision notice. His grounds of appeal (pages 23-26) included the following key points.
 - The Commissioner failed to investigate his claim that the first DVD he received contained 8 files (and not the 11 files referred to by the Council).
 - The Council's reference to 38 minutes of recordings was based on the length of the recordings on 16/9/16, when in fact the total of the recordings made at his property was 6 hours.
 - The second DVD he received subsequently did contain 11 files but was completely different to the first one.
 - The Commissioner had misapplied the balance of probabilities test.

- Given the Council's assertions about the intricacies and robustness of its systems, how was it possible that the first DVD contained information that does not relate to his property?
- The Council's assertion that he was made aware that a maximum of 10 minutes would be recorded at any one time was untrue. Two of the WAV files provided to him contained an audio recording of the technician who installed the equipment contradicting that assertion.
- There were other issues (such as the failure to provide help and support) but he was limiting himself to the points referred to above. His aim was to establish the noise levels that were recorded whilst the equipment was in his property.
- He cited an extract from a government website which he sent to the Council's environmental health officer about permitted noise levels and the Council's powers to issue a warning notice. He also cited that officer's response (dated 30/1/17) and his advice that the measurements taken indicate that the permitted level was not generally exceeded. He says the graphs provided by the Council appeared to contradict that conclusion and that is why he had requested the information concerned.

His desired outcome (page 21) was: "to obtain the summary of the noise monitoring made at my property in a format that is easily understandable without the need for further manipulation of data. The Council have previously published similar results of noise monitoring in a way that is readily understandable."

Commissioner's response to appeal

11. The Commissioner's Response is at pages 41-53. The key points were as follows.

- The second DVD was provided by the Council on 25/7/18. It was apparently checked by the Council's Customer and ITC Business Manager to confirm that it contained all the files referred to and held (page 109 – point 5). In the absence of the actual DVD, the Commissioner was entitled to accept that the second DVD was a copy of the first.
- The Council had submitted a summary of the data provided to Mr Glover with the duration of recordings summarised in seconds. The Commissioner had been able to glean from that information that approximately 6.8 hours of recordings had been provided to him and that he was therefore correct in that respect. It was unclear why the Council had asserted otherwise, but as Mr Glover has acknowledged that he has received and is possession of six hours of recordings that issue is resolved.
- The Commissioner considered that the Council had correctly understood the scope of the request and conducted a thorough search to identify all of the information held. The Appellant has been provided with a total of 3 DVDs (one before the information request was submitted) and the Commissioner is satisfied on the balance of probabilities that no further information within scope is held.

Mr Glover's further response

12. Mr Glover's further response is at pages 54-66. His key points were as follows.

- He reiterated on a number of occasions that the second DVD was not a duplicate of the first.
- In saying that he had not stated what he wanted the summary to contain and, sending the *actual* recordings instead of a summary, the Council should have clarified what information he was seeking.
- As the Commissioner had now accepted that the recordings were for a duration of 6 hours, her original decision was wrong.
- As regards the WAV files, he should not be disadvantaged by a lack of technical knowledge and this could have been avoided if the Council had offered advice and assistance.
- As regards the Council's decision not to send the information by email, had they provided a summary as requested they would have been able to fulfil that request.
- The lack of date and time information in the second DVD meant that he could not relate the events described in the reports to the recordings provided and he therefore questioned the validity of the recordings.

Our task and the issues we had to decide

13. Our task is set out in section 58 of the Freedom of Information Act 2000 (as applied to the EIRs with modifications).

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

14. The issues we had to decide were as follows.

Issue 1: Had the Council complied with regulation 5 (duty to make available environmental information on request)?

Issue 2: Had the Council complied with regulation 6 (form and format of information)?

Issue 3: Had the Council complied with regulation 9 (advice and assistance)?

The text of regulations 5, 6 and 9 is set out in the Annex to this decision.

The evidence

15. The evidence before us consisted of the paper evidence in the open bundle of documents (126 pages).
16. Both parties requested a paper determination. After considering the bundle of evidence (which included the detailed submissions from both parties referred to above) we were satisfied that we were able to determine the appeal without an oral hearing and that it was fair and just to do so.

What we decided and why

Issue 1

17. Mr Glover has asserted many times that the contents of the first disc (“DVD 1”) he received from the Council between 29/1/18 (when his request was acknowledged) and 2/4/18 (when he requested a review) and the second disc (“DVD 2”) provided on 25/7/18 were completely different. The Council asserts that DVD 2 was a duplicate of DVD 1. The Commissioner has accepted the Council’s assertion.
18. Without having access to the discs, it was simply not possible for us to conclude whether they were duplicates. We accepted, however, that the Council genuinely believed that they were and that they had fully intended to include all of the information in DVD2 the first time round.

We were satisfied that we could decide the appeal fairly and justly without having access to the discs. If DVD 1 was not in fact a duplicate of DVD 2, then clearly the Council was in serious breach of the 20 working-day time limit in regulation 5(2) of the EIRs. What we needed to focus on was whether, by the date of the Commissioner’s decision, the Council had (on the balance of probabilities) made available to Mr Glover all of the information falling within the scope of his request. We therefore focused our attention on the information contained within DVD 2.

19. Mr Glover requested information about (a) noise recordings made at his property on 15/10/16 and 18/11/16 and (b) noise recordings made on 16/9/18 at two specific road junctions.
20. It is not disputed that DVD 2 contained the 11 “files” listed at page 30, consisting of:
 - 4 “WAV” folders containing the relevant sound recordings;
 - 4 excel spreadsheets containing noise measurement data (summarised by the Council at page 108); and
 - 3 pdf documents containing officer notebook entries and sound analysis reports.

21. There was initially some confusion about the duration of the recordings contained in the WAV folders. However, it is now accepted by the parties that the total duration of the recordings made at Mr Glover's property was just over 6 hours and that all of those recordings have been provided to Mr Glover.
22. We also note the references to the "10-minute recordings". Our understanding of the position was that the sound recording equipment that was installed at Mr Glover's property did two things. Firstly, it continuously recorded the noise levels within his property throughout the period of the installation. Secondly, it allowed Mr Glover to press a button on hearing particular sounds (e.g. people shouting) and it would then record those sounds for a set period of 10 minutes. The report at pages 31-34 appears to record particular sounds heard within those 10-minute slots.
- Mr Glover has denied the Council's assertion that he was made aware that a maximum of 10 minutes would be recorded at any one time. That issue is not relevant to the appeal.
23. Mr Glover has not said what information, if any, he believes the Council has failed to make available to him (other than wanting the information in a different format – see below). We agreed with the Commissioner's conclusion that, on the balance of probabilities, the Council did not hold any further information that was relevant to his request.
24. We were satisfied that the Council had complied with its duty under regulation 5 to "make available" the information requested. As mentioned above, however, we were unable to conclude whether the Council had complied with the 20 working-day time limit in regulation 5(2).

Issue 2

25. Mr Glover had made three "formatting" requests:

- (a) he had asked for the information to be sent to him by **email**;
- (b) he had asked for a "**summary**" of the noise recordings made at his property; and
- (c) he had asked for the information to be provided in an "**open reusable format**" (e.g. Microsoft Word) or, if that was not possible by hard copy.

The information was in fact *posted* and contained in a *DVD*. It consisted of: "WAV files" (for the sound recordings); PDF documents of the officer notebook entries and sound analysis reports; and excel spreadsheets containing the noise measurement data.

26. We had to decide whether it was reasonable for the information to be provided in those formats.

27. The Code of Practice issued under regulation 16 of the EIRs¹ does say (paragraph 23) that a request for environmental information may include a request for information to be provided in the form of a digest or summary, which should generally be provided if it is reasonably practical to do so (taking into account the cost). In this case, however, it was not clear as to what Mr Glover wanted by way of a “summary” of the noise recordings made at his property. He had been provided with files containing the *actual* recordings. He was provided with the excel spreadsheets which gave the “measurement duration” and the total recording duration (and in November 2018, the Council produced summaries of the Excel spreadsheet information – at page 108). He was provided with a copy of the Sound recording Analysis report, which *itself* clearly summarises the specific noise events triggered by Mr Glover. He has not specified what he considered to be lacking as regards the information provided or what he wanted to be further summarised. We concluded that the Council had not contravened regulation 5 or 6 by failing to provide any further “summary” of the noise recordings.
28. We considered that it was appropriate and reasonable (for the reasons given by the Council) for the Council to have provided the sound recordings in the form of WAV files (which, from our general knowledge, we recognise as being one of the most commonly used audio file formats), the recording lengths within the excel spreadsheets and the officer notebook entries and sound analysis reports by way of pdf documents. We agreed with the Council that those formats can be described as “open” and “reusable”.
29. The Council has explained why the information was sent by post on a DVD rather than by email (the size of the information requested precluded the latter), which again we considered to be entirely reasonable.

Issue 3

30. We considered whether the Council had complied with its duty to provide advice and assistance to Mr Glover so far as it would be reasonable to expect it to do so. In his appeal, Mr Glover indicated that he did not wish to pursue this point. For the sake of completeness, we decided, however, that we ought to address it.
31. The evidence before us indicated to us that the Council had acted promptly and professionally in its dealings with Mr Glover. The day after he submitted his request for information he received two holding responses, the second of which informed him about how the Council were *likely* to provide the information. We noted that the Council had previously provided him with the noise measurement data in a different form (in a “pack and go file”) but Mr Glover had reported that he was unable to operate that software and so the Council provided that data in a different format.
32. As we understood it, Mr Glover’s argument is that because the Council did not know what he wanted a “summary” of, they should have provided advice and

¹ Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391)

assistance to him before providing the information they thought he had requested. We did not agree.

33. We were satisfied that the Council had provided Mr Glover with everything they held that fell within the scope of his request. The Council did not say that his request had been formulated in too general a manner (which would require them to request more particulars). They had simply said that he had not specified what he wanted by way of a *summary* and it seemed to us that they had acted reasonably in providing the information they did. Mr Glover's next step was to proceed immediately to the review stage. But even then, he did not attempt to explain what he had expected to receive in summary form. He did not attempt to enter into any dialogue with the Council in that respect. In essence, it seemed to us that he did not really know what information he wanted, and he was relying on the Council to tell him. We considered that that was going beyond what was reasonable to expect of the Council.

Mr Glover did subsequently (page 103) refer to a document on the internet that apparently contains information in the type of format that he'd "hoped" to receive, but he did not say that at the relevant time and he has not produced a copy of that document to support his case.

34. We were satisfied that the Council had not contravened regulation 9.

Conclusion

35. We concluded that the Commissioner's decision notice was in accordance with the law and we dismissed the appeal.

Karen Booth
(Judge of the First-tier Tribunal)

Date: 18 July 2019

ANNEX

5 Duty to make available environmental information on request

- (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
- (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
- (4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.
- (5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.
- (6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

6 Form and format of information

- (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—
- (a) it is reasonable for it to make the information available in another form or format; or
- (b) the information is already publicly available and easily accessible to the applicant in another form or format.
- (2) If the information is not made available in the form or format requested, the public authority shall—
- (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;
- (b) provide the explanation in writing if the applicant so requests; and
- (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.

9 Advice and assistance

- (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—

(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and

(b) assist the applicant in providing those particulars.

(3) Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case.

(4) Where paragraph (2) applies, in respect of the provisions in paragraph (5), the date on which the further particulars are received by the public authority shall be treated as the date after which the period of 20 working days referred to in those provisions shall be calculated.

(5) The provisions referred to in paragraph (4) are—

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).