Local Government & Social Care OMBUDSMAN

Report by the Local Government and Social Care Ombudsman

Investigation into a complaint about Gloucester City Council (reference number: 22 012 725)

17 July 2023

The Ombudsman's role

For almost 50 years we have independently and impartially investigated complaints about councils and other organisations in our jurisdiction. If we decide to investigate, we look at whether organisations have made decisions the right way. Where we find fault has caused injustice, we can recommend actions to put things right, which are proportionate, appropriate and reasonable based on all the facts of the complaint. We can also identify service improvements so similar problems don't happen again. Our service is free.

We cannot force organisations to follow our recommendations, but they almost always do. Some of the things we might ask an organisation to do are:

- apologise
- pay a financial remedy
- improve its procedures so similar problems don't happen again.

We publish public interest reports to raise awareness of significant issues, encourage scrutiny of local services and hold organisations to account.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mr and Mrs W	The complainants

Report summary

Environmental Services & Public Protection & Regulation

Mr and Mrs W complained the Council failed to properly investigate their complaint about an alleged noise nuisance in their business property, caused by a neighbouring business. As a result, they say they have suffered frequent intrusive noise while they are at work, causing them distress and, in some cases, to lose business.

Finding

Fault found, causing injustice, and recommendations made.

Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. ***(Local Government Act 1974, section 31(2), as amended)***

To remedy the injustice identified in this report, we recommend the Council:

- write a formal letter of apology to Mr and Mrs W, acknowledging the frustration they have suffered, and the uncertainty caused by its poor handling of the investigation into their allegations of noise nuisance;
- offer to pay Mr and Mrs W £250 each, for the same reason;
- if it receives any new complaints of nuisance about the business in question, it should start a fresh investigation, approaching it as it would an investigation of nuisance affecting a residential property; and
- circulate guidance to all relevant staff highlighting and correcting the factual errors we have identified in this case, which include that:
    - a statutory nuisance can be suffered in a non-residential property, and the law does not limit this solely to residential properties. Therefore, when someone alleges they are suffering a statutory nuisance in a non-residential property, officers should approach it in the same way as a complaint about a residential property;
    - creating a statutory nuisance, in isolation, is not a criminal offence, and so it need only be proved to the civil standard to warrant serving an abatement notice. It is the breach of an abatement notice which constitutes a criminal offence; and
    - section 82 of the Environmental Protection Act concerns statutory nuisance, not common law nuisance.

The Council has accepted these recommendations.

The complaint

1. Mr and Mrs W complained the Council failed to properly investigate their complaint about an alleged noise nuisance in their business property, caused by a neighbouring business. As a result, they say they have suffered frequent intrusive noise while they are at work, causing distress and, in some cases, to lose business.

Legal and administrative background

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. ***(Local Government Act 1974, sections 26(1) and 26A(1), as amended)***

3. We consider whether there was fault in the way an organisation made its decision. If there was no fault in the decision making, we cannot question the outcome. ***(Local Government Act 1974, section 34(3), as amended)***

Statutory nuisances

4. Under the Environmental Protection Act 1990 (EPA), councils have a duty to take reasonable steps to investigate potential 'statutory nuisances'.

5. Typical things which may be a statutory nuisance include:

   - noise from premises or vehicles, equipment or machinery in the street
   - smoke from premises
   - smells from industry, trade or business premises
   - artificial light from premises
   - insect infestations from industrial, trade or business premises
   - accumulation of deposits on premises.

6. For the issue to count as a statutory nuisance, it must:

   - unreasonably and substantially interfere with the use or enjoyment of a home or other premises; and / or
   - injure health or be likely to injure health.

7. There is no fixed point at which something becomes a statutory nuisance. Councils will rely on suitably qualified officers (generally an environmental health officer, or EHO) to gather evidence. They may, for example, ask the complainant to complete diary sheets, fit noise-monitoring equipment, or undertake site visits. Councils will sometimes offer an 'out-of-hours' service for people to contact, if a nuisance occurs outside normal working time.

8. Once the evidence-gathering process is complete, the environmental health officer(s) will assess the evidence. They will consider factors such as the timing, duration, and intensity of the alleged nuisance. The officer(s) will use their professional judgement to decide whether a statutory nuisance exists.

9. Councils can also decide to take informal action if the issue complained about is causing a nuisance, but is not a statutory nuisance. They may write to the person causing the nuisance or suggest mediation.

Abatement notices

10. If the council is satisfied a statutory nuisance is happening, has happened or will happen in the future, it must serve an abatement notice. If the nuisance is noise from premises, the council may delay service of an abatement notice for a maximum of seven days, to attempt to address the problem informally.

11. An abatement notice requires the person or people responsible to stop or limit the activity causing the nuisance. Failure to comply with an abatement notice is an offence, which can lead to prosecution and a fine.

12. A person who receives an abatement notice has a right to appeal it in the Magistrates' Court. It may be a defence against a notice to show they have taken reasonable steps to prevent or minimise a nuisance.

Section 82 of the Environmental Protection Act 1990

13. A member of the public can also take private action against an alleged nuisance in the Magistrates' Court. If the court is persuaded they are suffering a statutory nuisance, it can order the person or people responsible to take action to stop or limit it.

14. This process does not involve the council, but it is good practice for councils to draw a complainant's attention to their right to private action under section 82.

How we considered this complaint

15. We produced this report after examining relevant documents, including Mr and Mrs W's correspondence with the Council, the Council's notes of its investigation and contact with the other party, the law and Government guidance on statutory nuisance, and comments the Council provided in response to enquiries we made.

16. We also shared a draft copy of this report with each party for their comments, and considered these before issuing the final report.

What we found

17. The following chronology provides a summary of the key events relevant to this complaint. It does not include every detail of what happened.

18. Mr and Mrs W own and run a business on the ground floor of a building. On the first floor of the building there is another business. We will refer to these as Businesses A and B respectively.

19. In 2022 Mr and Mrs W reported to the Council they were suffering a noise nuisance, caused by activities in Business B. Between August and October they completed a noise diary, which reported frequent instances of loud "banging" from Business B on most days. They said the noise and vibration was powerful enough to shake walls and light fittings in Business A, that it caused them to have headaches, and that on several occasions it had driven customers away.

20. Mr and Mrs W submitted the noise diary to the Council on 5 October. They say they called the Council the following day, but were told it could only deal with "amplified music" as a potential source of noise nuisance.

21. The Council's notes say an officer visited Business A on 17 October, at which time Business B was closed and so there was no noise. After discussing the problem with Mr and Mrs W, the officer said they "made it clear that the banging noise doesn't meet the threshold for Statutory Nuisance".

22. The officer spoke to the owner of Business B on the phone the following day. The owner told the officer Business B was open from "Monday to Sunday between 0800hrs to 2300hrs". The officer suggested the owner add an extra layer of noise insulation, but noted the owner said he could not afford to do this. The owner also said his relationship with Mr and Mrs W had broken down.

23. The Council's notes then say an officer visited again on 7 November. On this occasion Business B was open, and the officer noted they had witnessed the banging noise in "the far corner of [Business A]". The officer went upstairs to Business B and spoke to the owner, who said he would be happy to have a 'restorative justice' meeting with Mr and Mrs W; however, Mr and Mrs W then rejected this suggestion.

24. Following this visit, Mr and Mrs W had some further email communication with the Council, which culminated in them making a formal complaint.

25. The Council responded on 24 November. It explained councils rely on section 79 of the Environmental Protection Act 1990 to investigate noise complaints, which "places a duty on local authorities to investigate noise affecting residents in their place of residence". It pointed out Mr and Mrs W's business was not a residential property, but despite this it had decided to investigate their complaint "informally".

26. However, the Council explained that commercial premises, accused of creating noise nuisance, can rely on a legal defence of 'best practicable means' (which means they have taken all reasonable steps to control the noise). In this case, it considered the owner of Business B had achieved this by his use of noise insulation, and because he was seeking "additional [insulation] solutions". The Council said it had also considered whether it could take action under the planning or health and safety at work rules, but decided these did not apply.

27. The Council advised Mr and Mrs W they had a right to take their own action under section 82 of the Environmental Protection Act. It said this covered "Common Law nuisance" and that this had a lower threshold than statutory nuisance.

28. The Council encouraged Mr and Mrs W to engage in mediation with the owner of Business B, and also suggested they may wish to take the matter up with their landlord if they felt they had been misled in agreeing to their lease.

29. Mr and Mrs W submitted a stage 2 complaint on the same day. They said the legal definition of a statutory nuisance referred to nuisances which affect the "use or enjoyment of a home or other premises", and was not, therefore, restricted to residential properties as the Council had said.

30. Mr and Mrs W said they could not afford to take private action against Business B. They also explained they were not prepared to engage in mediation, because they felt they should suffer "zero disturbance" in the same way they did not cause disturbance to Business B.

31. Mr and Mrs W also questioned the fact the Council had originally told them it could only take action against nuisance caused by amplified music, but now said it was because their property was non-residential. They said neither of these was a valid reason for the Council not to act.

32. The Council replied on 9 December, and said Business B's "operational times" were "Monday and Wednesday 16:30 to 17:30 then 18:00 to 19:00", and "Friday after 19:00". It said officers were satisfied the owner had taken reasonable steps to install noise mitigation and minimise impact, and that Business B had been operating to these hours "well in advance" of Mr and Mrs W's occupation of their property.

33. The Council said that, when dealing with complaints about noise nuisance, it could approach the problem as either a potential statutory nuisance, or as anti-social behaviour. It explained the criteria for statutory nuisance and said it did not consider this "the appropriate remedy [because] it is not consistent with a criminal offence". The Council also said it did not consider the owner's behaviour to amount to anti-social behaviour.

34. The Council reiterated the owner was willing to resolve the problem amicably, as they were "currently engaged with [another local authority] in delivering activities … beyond their normally scheduled operating times". It encouraged Mr and Mrs W to reconsider mediation, and advised them again of their rights under s82 of the Environmental Protection Act.

35. Mr and Mrs W complained to us on 14 December.

Analysis

36. Our role is to review how councils have made their decisions. We may criticise a council if (for example) it has not followed an appropriate procedure, not considered relevant information, or failed to properly explain a decision it has made. We call this 'fault', and where we find it, we can consider the consequences of the fault and ask the council to address these.

37. But we do not make decisions on councils' behalf, and we do not provide a right of appeal against contested decisions. If we find a decision has been made without fault, we cannot criticise it, no matter how strongly a complainant may feel it is wrong. We do not uphold complaints simply because someone believes a council should have made a different decision.

38. What this means is, in a complaint about noise nuisance such as this one, it is never for us to come to our own view the noise amounts to a statutory nuisance, and that the council should therefore take action to enforce against it. This remains a matter of professional judgement for the council alone to make.

39. We should also note that, while it is for councils to determine whether a noise meets the threshold of a statutory nuisance, we consider it unlikely any council would require 'zero disturbance' on the perpetrator's part, as Mr and Mrs W have requested. Rather, a council would generally expect the perpetrator of a nuisance to take steps to mitigate it, to the point where it no longer met the statutory nuisance threshold.

40. The law does not define a specific procedure for councils to investigate alleged statutory nuisances, but it does require them to undertake 'reasonably practicable' steps to investigate when a person complains about a potential nuisance. Based on standards of good administrative practice, this means that councils should act without undue delay, do everything they reasonably can to obtain reliable objective evidence about the nuisance, make a thorough assessment of the evidence, and then make a clear decision whether it amounts to a statutory nuisance. And, if so, they should then take prompt enforcement action.

41. Mr and Mrs W say the Council originally told them it could only deal with amplified music as a possible noise nuisance. We have not seen an objective record of this comment and so we cannot make a finding about it, although it is certainly not the case that councils can only enforce against nuisance caused by amplified music.

42. But what is objectively clear is that the Council considered that, as Mr and Mrs W's property was non-residential, the statutory nuisance regime did not apply here. This is stated explicitly in the Council's stage 1 complaint response.

43. A statutory nuisance is defined, in guidance published by the Department for Environment, Food & Rural Affairs (Defra), as something which affects a "home or other premises". This clearly implies both residential and non-residential properties. There is nothing in the guidance, nor the Environmental Protection Act itself, which says a non-residential property cannot suffer a statutory nuisance. We do not consider there is any evidence to support the Council's interpretation of the law.

44. We are conscious the Council decided to investigate anyway. However, it says it decided to do this "informally". The Council expanded on this point in its response to our enquiries in this case, where it said:

"The city council in our investigations aim to be impartial in their assessments as such do not believe there is an injustice to either party, our aim is to ensure an amicable solution that allows for harmonious operation of both businesses. As our investigations have indicated no statutory nuisance has been identified to date and although it does not fit into the remit of our typical Statutory Noise Nuisance investigations, The City Council has continued to ask both parties to work together in finding a solution. [Business B] has agreed and is continuing to seek further mitigation where possible and avoids the opening times of [Business A].

"It is often the case in the experience of investigating officers, without co-operation and collaboration it is difficult to find amicable solutions, (and limitations due to limited funding available to small businesses/charities) our aims are to continue to work with the [Business B] and [Mr and Mrs W] to ensure that they both can operate without significant disturbance."

45. We consider this to be fundamentally incorrect. This is not to say councils cannot take an informal, conciliatory approach to resolving disputes of this nature, but they may only do so after deciding there is not a statutory nuisance. If there is a statutory nuisance, then the law says councils must take enforcement action (albeit with a possible seven-day delay in some cases). It follows, therefore, that the first step for councils in such cases is to carry out a proper investigation, and gather enough reliable evidence to make this critical decision.

46. We do not consider the Council has done so here. Its investigation consisted of two visits to Mr and Mrs W's premises. During the first, there was no noise to be heard because Business B was closed. Despite this, the officer told Mr and Mrs W it was not a statutory nuisance. The officer's note does not provide any justification for this statement, although we infer it may be because of the Council's faulty interpretation of the law.

47. During the second visit, the officer did hear the noise. Given this prompted them to visit Business B and speak to the owner, it is likely – on balance – they considered the noise worthy of further investigation. However, they did not make a decision, at that point or later, whether it reached the threshold of a statutory nuisance. Instead, the Council took the decision that, because the owner had installed some sound insulation, there was nothing further for it to do.

48. In fact, throughout this complaint and our enquiries, the Council has made a great deal of the fact the owner of Business B has been co-operative. In isolation this is, of course, positive; but this does not mean Business B is not causing a statutory nuisance, and if it is, the law says the Council must act formally. It is not enough for the Council simply to point to some mitigation the owner has installed and then take no further action, especially when it is yet to decide whether there is a statutory nuisance.

49. We note the Council has referred to the fact the owner could possibly rely on a 'best practicable means' defence, if he were to appeal an abatement notice. This is true, and it can be an important consideration for councils when dealing with statutory nuisances. However, for this to become relevant, the Council would first need to decide whether the noise Business B is creating is a statutory nuisance, which it has not done.

50. Similarly, the Council said the owner of Business B had been operating to "the existing schedule" long before Mr and Mrs W occupied their property. We infer the Council is referring here to another potential defence against an abatement notice, which is called 'coming to the nuisance' – in other words, that the perpetrator had already been creating the noise, or other nuisance, before the complainant(s) occupied their property, and so it is the complainant's actions, and not the perpetrator's, which are responsible for the problem.

51. However, there is caselaw on this principle (*Coventry and others v Lawrence and others [2014] UKSC 13*), and it is not a simple question of 'who was there first?', as the Council has made it out to be here. And, again, for this to be relevant, the Council would first need to decide the noise was a statutory nuisance.

52. All this leads us to be concerned that the Council decided right at the beginning it would not find a statutory nuisance in this case. Everything it did then appears to have been an attempt to retrospectively justify this decision, rather than an open-minded and balanced enquiry to decide whether Mr and Mrs W were suffering a statutory nuisance. This is fault.

53. And there are also various other points of fault in this case.

54. First, in its stage 2 response, the Council said the owner's actions were not "consistent with a criminal offence" for the purposes of section 79 of the Environmental Protection Act. This implies the Council believed it needed to prove to the criminal standard of proof ('beyond a reasonable doubt') that a statutory nuisance existed, to serve an abatement notice.

55. This is not correct. To serve an abatement notice, a statutory nuisance need only be proved to the civil standard of proof ('the balance of probabilities'), which is a much lower threshold. It is only once an abatement notice has been served, and breached, that the matter becomes a criminal offence.

56. Second, again in the stage 2 response, the Council said Business B was operating only for two (separate) hours each day on Mondays and Wednesdays, and "from 1900hrs" on Friday. This appears to relate to the point the Council made in its response to our enquiries, that the owner was attempting to avoid opening at the same time as Mr and Mrs W's business.

57. But, again, it is clear this is incorrect. In fact the Council noted itself, during its phone call with the owner after the first visit, that Business B was open for much longer hours than this, and on every day of the week. Business B also advertises itself as being open at similar times on two internet sites. And a further website also shows Business B's opening hours coincide daily with those of Business A.

58. Given our concern the Council prejudged its decision here, it does not appear the opening hours point has made any substantive difference to the outcome. But it reinforces the fact the Council has not carried out a robust investigation.

59. As we have explained, it is not for us to decide whether Mr and Mrs W are suffering a statutory nuisance, and so none of our criticisms should be read to mean they are.

60. But the law requires the Council to carry out a proper investigation of their complaint of noise nuisance, and we are not persuaded it has discharged that duty here. Most critically, it has relied on a faulty interpretation of the law; and this has tainted its entire consideration of the matter, and led it to dismiss the possibility there was a statutory nuisance right at the beginning.

61. It remains possible the Council would have decided there was no statutory nuisance, even if it had investigated properly. We cannot say, therefore, the injustice to Mr and Mrs W is that the Council should have served an abatement notice on the owner.

62. And, even if it had, this does not mean the noise would necessarily then have been abated. The owner would have had the right to appeal any notice, and so we must entertain the possibility the court would have upheld an appeal. Or, the owner may simply have chosen to breach the notice, leaving the Council with the decision whether to prosecute him for this.

63. So we cannot speculate what would have happened, had there been no fault here. But the uncertainty caused by the Council's fault represents its own injustice to Mr and Mrs W. We are also satisfied they have suffered frustration and distress because of the Council's failure to properly investigate. We will consider what the Council should do to remedy this in the next section.

64. But before that, there is another, separate point of fault we will discuss.

65. In its stage 1 response, the Council said:

"You may wish to take a private case (known as a Common Law nuisance or a section 82), you have indicated this is being considered by yourselves. The advantages to you taking such a case is that it is not restricted to particular types of nuisances/categories and the legal threshold is lower for a common law nuisance compared to that of a statutory nuisance…"

66. Section 82 of the Environmental Protection Act allows members of the public "aggrieved of a statutory nuisance" to apply direct to the Magistrates' Court, instead of asking their local authority to investigate. The court will then make its own decision whether there is a statutory nuisance, and order its abatement if so.

67. Common law nuisance, on the other hand, is a different part of civil law. It is not what the court considers when hearing a section 82 application. The Council has conflated these two procedures.

68. Mr W has already told us they do not intend to pursue a section 82 application anyway, and so we do not consider this fault represents an injustice to Mr and Mrs W. However, we consider the Council should take steps to ensure relevant staff have an accurate understanding of complainants' rights under section 82.

Conclusions

69. The Council's duty in this case was essentially a straightforward one – take what steps it reasonably could to gather objective evidence about the noise, and

decide whether it amounted to a statutory nuisance. But the Council has not discharged this duty.

70. It appears the Council dismissed the possibility this could be a statutory nuisance at the beginning of the process, all because of a faulty interpretation of the law. Although it then investigated anyway, its investigation was brief, and it relied on weak justification not to take it further. It also made a series of factual errors.

71. To put right the injustice this has caused, we consider the Council should do two things.

72. First, if the Council receives any further complaints about alleged noise nuisance from Business B, it should begin its investigation of the alleged noise nuisance again. It is for the Council to decide how to conduct the investigation, but it should ensure it takes all reasonable steps to gather objective evidence about the noise, and then make an open-minded decision whether it amounts to a statutory nuisance.

73. And, for reasons of fairness and objectivity, we consider this investigation should, if possible, be undertaken by an officer or officers not previously involved in the case.

74. Second, the Council should offer Mr and Mrs W a financial remedy for the frustration they have suffered because of its poor investigation, and the uncertainty it has caused. We consider £250 each is an appropriate offer, based on our *Guidance on remedies*.

Recommendations

75. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. ***(Local Government Act 1974, section 31(2), as amended)***

76. Within one month of the date of this report, the Council should:

- write a formal letter of apology to Mr and Mrs W, acknowledging the frustration they have suffered, and the uncertainty caused by its poor handling of the investigation into their allegations of noise nuisance;
- offer to pay Mr and Mrs W £250 each, to reflect the frustration they have suffered, and the uncertainty caused by its poor handling of the investigation into their allegations of noise nuisance;
- if it receives any further complaints about alleged noise nuisance from Business B, it should start a fresh investigation, approaching it as it would an investigation of nuisance affecting a residential property; and
- circulate guidance to all relevant staff highlighting and correcting the factual errors we have identified in this case, which include that:
    - a statutory nuisance can be suffered in a non-residential property, and the law does not limit this solely to residential properties. Therefore, when someone alleges they are suffering a statutory nuisance in a non-residential property, officers should approach it in the same way as a complaint about a residential property;
    - creating a statutory nuisance, in isolation, is not a criminal offence, and so it need only be proved to the civil standard to warrant serving an abatement

notice. It is the breach of an abatement notice which constitutes a criminal offence;

- section 82 of the Environmental Protection Act concerns statutory nuisance, not common law nuisance.

77. The Council has accepted these recommendations.

Final decision

78. We propose to complete our investigation. There is evidence of fault by the Council which caused injustice to Mr and Mrs W. The Council should take the action identified in paragraphs 76 and 77 to remedy that injustice.