

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

Decision notice

Date: 16 January 2014

Public Authority: Gwynedd Council
Address: Council Offices
Shirehall Street
Caernarfon
Gwynedd
LL55 1SH

Decision (including any steps ordered)

1. The complainant requested representations provided to Gwynedd Council ('the Council') concerning a particular gate and the use of a right of way on which the gate is situated. The Council refused to provide the requested information under regulation 13 of the EIR. The Commissioner has investigated and found that the information is exempt from disclosure under regulations 5(3) and 13(1) as it contains the personal data of the complainant and the personal data of third parties. Further commentary on the implication of the Commissioner's finding in relation to the Council's obligations under the Data Protection Act 1998 is set out in the 'Other Matters' section at the end of the notice. The Commissioner has also concluded that the Council breached regulation 11(4) in that it did not carry out a review of its decision and provide its response to the complainant within 40 working days.

Request and response

2. On 26 February 2013, the complainant wrote to the Council (relating to a particular gate on a right of way) and requested information in the following terms:

"all letters of "points of view" and the proof of evidence requested by the Council in a letter of 06.06.2006. Ref No PC/13/09/cyf DWO by [name of Council officer]".

3. The Council responded on 25 March 2013 stating that no additional information had been added to the file in question since the complainant made a previous request for the same information on 5 December 2009. The Council stated that "as this request [in 2009] was refused by the Council on 29 January 2010, the Council's perspective has not changed, and is therefore unable to disclose any information based on the original decision". No other specific provisions of either the FOIA or the EIR were cited in respect of the Council's decision to refuse the request in this letter.
4. On 1 April 2013 the complainant wrote to the Council and requested an internal review of its handling of her request. She disputed the Council's statement that she had previously requested the information concerned, and pointed out that her previous request was for photographs submitted as evidence to the Council as opposed to letters of representation. She confirmed that, following the intervention of the Commissioner in respect of the request in question, the photographs in question had been provided by the Council. She asked the Council to review its decision in respect of her request for the letters of representation.
5. The complainant contacted the Council on 3 and 22 May 2013 and subsequently by telephone to chase a response to her internal review request. She then wrote to the Commissioner about the delayed response to her internal review request.
6. Following correspondence from the Commissioner, the Council provided the outcome of its internal review on 18 July 2013. It confirmed that it was treating the request under the provisions of the EIR as opposed to the FOIA. The Council confirmed that the information relevant to the request comprised statements made by individuals and contained their names, addresses and other identifying information. The Council stated that it considered the information to constitute the personal data of those individuals. The Council stated that it considered the information to be exempt under regulation 12(3) of the EIR as disclosure would breach the first data protection principle.

Scope of the case

7. The complainant initially contacted the Commissioner on 21 June 2013 to complain about the delay in the Council's internal review response.

8. Following receipt of the Council's internal review response, the complainant contacted the Commissioner to complain about the Council's handling of her request. Some of the issues the complainant raised were outside the Commissioner's remit, for example, the complainant said she considered the Council's description of the gate as being situated on a road near her farm to be inaccurate and misleading.
9. Following correspondence with the complainant to agree the scope of his investigation the Commissioner considers this complaint to be whether the Council should disclose the information requested, namely the letters of points of view received by the Council in response to its letter of 6 June 2006.
10. During the course of the Commissioner's investigation, the Council acknowledged that some of the withheld information constituted the complainant's own personal data. The Council considered this information to be exempt under regulation 5(3) of the EIR.

Reasons for decision

Is the information environmental?

11. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".
12. In coming to his view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective

participation by the public in environmental decision making is likely to be environmental information.

13. The information requested by the complainant in this case comprises letters from local residents sent to the Council in response to its request for representations regarding a proposal to replace a gate on a public right of way. The Commissioner considers that the information in question is environmental, as the replacement of a gate on a public right of way is a measure, as defined in regulation 2(1)(c); it is an activity likely to affect the elements and factors referred to in 2(1)(a), i.e. the land and landscape, and the withheld information in question is "on" that measure.

Regulation 5(3) – the exemption for personal data - the complainant's own personal data

14. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR will not require the Council to disclose this information.
15. Where requested information constitutes the personal data of more than one individual, then all individuals are data subjects for the purposes of regulations 5(3) and 13. In situations where a request is made by one of the data subjects the Commissioner's approach is to first consider the information under regulation 5(3).
16. There is no right of access to personal data about oneself under the EIR, as regulation 5(3) provides that information is exempt if it constitutes the personal data of which the applicant is the data subject. Personal data is defined in section 1 of the Data Protection Act 1998 ('the DPA') as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
17. The withheld information comprises representations from local residents that were submitted in response to a letter the Council issued asking for comments on its proposals to replace a gate situated on a public right of way. In her complaint to the Commissioner the complainant said that the gate in question "is my property on my land". She also advised that her request was for "personal information about me and my property that could [sic] be identified and was used in decision making by the council, that affected me as an individual".

18. During the course of the Commissioner's investigation, the Council acknowledged that some of the letters of representation contained the personal data of the complainant, which it considered exempt under regulation 5(3) of the EIR.
19. Having viewed the withheld information, it is clear to the Commissioner that some of the letters contain information relating to the complainant, including references to her name and/or references to the "owner/occupier" of the complainant's property. The complainant is clearly identifiable from the references within the withheld information to her and the information is significant and biographical to her. The Commissioner is satisfied that the information is her personal data.
20. The Commissioner therefore finds that regulation 5(3) is engaged for some of the withheld information and as this is an absolute exception there is no public interest test to apply.
21. Having viewed copies of the withheld information, the Commissioner notes that some of the information (including parts of the letters which contain the complainant's own personal data) could be released without disclosing the complainant's own personal data. The Commissioner has therefore gone on to consider whether the Council was correct to apply regulation 13 of the EIR to the information contained within the letters of representation reports which does not constitute the complainant's own personal data.

Regulation 13 – the exemption for third party personal data

22. This exception provides that third party personal data is excepted from public disclosure under the EIR if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.

Is the withheld information personal data?

23. The withheld information comprises responses and representations made to the Council in relation to its proposal to replace a particular gate on a public right of way. The responses include the name and/or address of the responder along with other information which would be likely to lead to the identification of the individual who wrote the letter, such as details of the dates they lived at properties in the local area, their recollection of past events and incidents.
24. As stated earlier in this notice, the subject matter of the request concerns a particular gate on a public right of way, which the complainant asserts is situated on land which she owns. There has been an ongoing dispute and considerable local concern about access along the route on which the gate is situated since 1996. The letters of

representation were sent by local residents to the Council to provide evidence as to the use of the road. They contain a considerable amount of local knowledge about the area in question and the use of the road on which the gate is situated. The Council allege that, in light of the content of the withheld information, and the local interest about the subject matter, redacting all information which could lead to the identification of the individuals in question would render the information meaningless.

25. The Commissioner has considered the information and is satisfied that it is personal data relating to the individuals involved. The Commissioner notes that the subject matter concerns a very local dispute in a small, rural village. As such those likely to have written to the Council about the matter could be reasonably easily identified from the information even without direct reference to their names or addresses. Based on the content of the information and the circumstances surrounding the subject matter, the Commissioner is satisfied that even with suitable redaction of identifiers, such as names and addresses, it is likely that the identity of the individuals would be known to the complainant and other local residents.
26. The Commissioner is therefore satisfied that the withheld information is personal data.

Would disclosure breach one of the Data Protection principles?

27. Having accepted that some of the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the most relevant principle in this case is the first principle.

The first data protection principle

28. In determining whether a disclosure is fair under the first principle of the DPA for the purposes of regulation 13 of the EIR, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency, as well as any legitimate interests which arise in the specific circumstances of the case.

Reasonable expectations

29. The Council argues that the information in question was provided by individuals in response to its proposal to follow a particular course of action in relation to the gate in question. It was not provided for the

purpose of placing objections on public record and the individuals concerned were not informed that the information would be made public. The Council acknowledges that certain individuals have indicated they would be willing to testify in court, however it does not consider that this equates to placing their written representations, which contain details of a personal nature, into the public domain. If the Council were to pursue the issue in a public forum such as a court or tribunal, individuals would have the choice of appearing/coming forward with their evidence which would be contained in a properly drawn up statement.

30. When considering what information third parties should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to the third party's public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). In this case, it is clear that the withheld information relates to the individuals' private lives.
31. It is clear to the Commissioner that the local dispute about the gate is a sensitive and emotive matter. As such the Commissioner considers there would be a reasonable expectation on the part of the individuals concerned that the representations they submitted would be used by the Council to investigate the matter in question but that they would not be disclosed to the public at large.

Consequences of disclosure

32. The Council is of the view that placing the representations into the public domain would cause "unwarranted harm to the individuals in terms of breaching their privacy".
33. The Commissioner recognises that the subject of access on the road in question is an emotive one and one which has provoked a vigorous response from local residents concerned about any impact the matter may have on their homes and lives.
34. The Commissioner also considers that disclosure could lead to potential conflict, or worse, between members of the community. He accepts that disclosure has the potential to cause significant unwarranted harm to the interests of the persons who submitted the representations to the Council.
35. The Commissioner has considered the nature of the withheld information and he is satisfied that disclosure of the information to the public and

the associated loss of privacy has the potential to cause unnecessary and unjustified harm to the individuals in question in this case.

General principles of accountability and transparency

36. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
37. The Council agrees that there is likely to be a legitimate interest in disclosure because it relates to matters concerning a public right of way and the Council's actions in respect of it. However, the Council does not consider that disclosure of the requested information is necessary to meet this legitimate interest because the actions and decisions it has taken in respect of the right of way and the gate in question are ones that are "properly for the Council to take, not the public". The Council also stated that the appropriate avenue to challenge decisions it has made about the issue is through the courts or the Ombudsman.
38. The complainant argued that her request she made was for personal information about herself and her property which was used in decision making by the Council that had a direct effect on her personally.
39. In considering such matters, the Commissioner is mindful that disclosure under the EIR is a disclosure to the world at large. In a case such as this one, the decision for the Commissioner is whether the information requested should be placed in the public domain. The Commissioner recognises that the complainant has personal reasons for making the request in this case, as she considers that decisions relating to the gate have had a direct effect on her and her property. However, neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant because the EIR is about disclosure to the public and public interests, and not private interests.
40. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability and understanding in the Council's decision making process relating to the public right of way. The Commissioner also accepts there is a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
41. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal

data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in matters relating to the right of way, but he does not consider that any legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy.

42. As the Commissioner has decided that the disclosure of the information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question. The Commissioner has therefore decided that the Council was entitled to withhold the information under the exception at regulation 13(1).

Regulation 11 – representations and reconsideration

43. A public authority is required by virtue of regulation 11(4) to notify an applicant of the outcome of its internal review within 40 working days. In this case the complainant requested an internal review on 1 April 2013 and the Council did not provide the outcome of its review until 18 July 2013. The Commissioner has therefore concluded that the Council failed to respond to the request for internal review within the statutory time limit and as a consequence has breached regulation 11(4) of the EIR.

Other matters

44. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Correct access regime

45. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of subject access. When the Commissioner viewed the information in question, it was immediately apparent that it contained personal data relating to the complainant. The Council also acknowledged in its response to the Commissioner that some of the withheld information contains personal data relating to the complainant, which it considered exempt under regulation 5(3).
46. Whilst he notes that the complainant quoted the FOIA in her original request, in the Commissioner's opinion, responsibility for applying exemptions and determining whether a request should be considered under the FOIA, EIR or the DPA rests with the public authority and not the requestor. The Commissioner encourages public authorities to

consider requests under the correct regime in the first instance. In this case the Council should have instigated its own procedures for handling subject access requests much earlier in its dealings with the complainant. Ideally, this should have been at the time it received the request.

47. The approach of the Commissioner where a request is made for information which is the requester's own personal data is that the public authority should deal with the request as a subject access request made under section 7 of the DPA. This action should be taken without it being necessary for the requester to make a further request specifying section 7 of the DPA.
48. The Commissioner therefore recommends and expects the Council to now consider whether the information requested, which is exempt from disclosure under section 5(3) of the EIR, could be disclosed to the applicant in accordance with its obligations under section 7 of the DPA.

Right of appeal

49. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

50. 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.
51. 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

Anne Jones
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