

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

Decision notice

Date: 7 March 2017

Public Authority: Welsh Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant requested information relating to an application made for a particular property to be listed. The Welsh Government disclosed the documents requested, subject to some information being redacted under section 40(2). During the course of the Commissioner's investigation the Welsh Government disclosed some additional information. The Commissioner's decision is that the request falls to be considered under the EIR and the Welsh Government has correctly applied regulation 13 to the remaining withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 23 May 2016 the complainant wrote to the Welsh Government and requested information in the following terms:

"All the information the Welsh Government's historic environment service (CADW) had about the application to list [address redacted]. In particular the originating application giving details of the reasons why the property should be considered for listing and the person or persons who made the application".

3. The Welsh Government responded on 20 June 2016 and provided copies of the documents requested information, but redacted some information from the documents under section 40(2) of the FOIA.
4. On 25 June 2016 the complainant requested an internal review of the Welsh Government's handling of the request. He pointed out that he had purchased the property in question, which was situated next door to his home. He stated that much of the information contained within the documents disclosed was considered to be inaccurate and disclosure of their identity may deter the individual(s) from writing similar communications in the future.
5. The Welsh Government provided the outcome of its internal review on 13 July 2016 and upheld its decision that the remaining information held relevant to the request was exempt under section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 1 August 2016 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Welsh Government disclosed a small amount of information it had originally withheld from the documents disclosed. The Welsh Government also agreed that the correct access regime for the request was the EIR as opposed to the FOIA. The Welsh Government maintained that the remaining redacted information was exempt from disclosure under regulation 13 of the EIR.
8. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Welsh Government should disclose the remaining information held relevant to the request, or whether it correctly applied regulation 13 to the information.

Reasons for decision

Is the information environmental?

9. 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)...”.

10. 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.
11. The information requested by the complainant in this case comprises letters and emails relating to an application to the Welsh Government's historic environment service (CADW) to list a particular property.
12. The Commissioner considers that information concerning a decision whether or not to list a building is environmental information. This is because the listing process is an administrative measure which is likely to affect the environment, under the definition 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. The Commissioner considers that that such information would continue to be environmental information regardless of whether the process leads to a decision to list the building, or not.

Regulation 13 – the exemption for third party personal data

13. Regulation 13 of the EIR states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach one of the data protection principles or section 10 of the Data Protection Act 1998 (‘the DPA’).

Is the requested information personal data?

14. In order to engage regulation 13 the information sought by the applicant must constitute personal data as defined by section 1 of the DPA. It defines personal information 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.
15. In this case, the withheld information comprises the name and contact details of the individual who made an application to CADW for it to list the property in question. In addition, the Welsh Government has withheld other information contained within the documents it disclosed which could lead to the identification of the individual
16. The subject matter of the request concerns an application to CADW to list a particular property, which was purchased by the complainant in this case. The property is situated in a fairly small, rural village.
17. The Commissioner is unable to go into too much detail in this notice about the nature and content of the information which has been redacted from the documents disclosed as it would reveal the actual withheld information. However, the Commissioner has considered the information and is satisfied that it is personal data relating to the individual concerned. 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 name and address, it is likely that disclosure could lead to the identity of the individual in question. The Commissioner is therefore satisfied that the withheld information falls within the definition of personal data as set out in the DPA.

Would disclosure breach one of the data protection principles?

18. Having accepted that 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 first data protection principle to be most relevant in this case. The first data protection principle has two components:
- personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

19. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.
20. The Welsh Government considers that disclosure would breach the first data protection principle. The Welsh Government advised that there is no formal application form or process for listed building applications, however, CADW receives written requests for properties to be listed by letter or email. Currently there is no dedicated privacy notice in place that advises individuals what will happen to their personal data once they make such an application. The Welsh Government confirmed that it will be reviewing this in light of this complaint. However, its position is that any individual making such an application to CADW would have a reasonable expectation that their personal data would be kept confidential and not disclosed to the world at large. The Welsh Government also confirmed that it had consulted with the individual and consent to disclosure was refused.
21. In terms of the consequences of disclosure the Welsh Government explained that the subject matter associated with the request appears to a fairly contentious issue. In his internal review request the complaint indicated that, personally, he intends to take "no action" against the individual who made the application once their identity is known. However, the complainant went on to say that disclosure of their identity "may deter this person/persons from interfering again at a serious level in another person's affairs". The Welsh Government considers this suggests a certain level of detriment is hoped for, if not personally intended. As disclosure under the FOIA is essentially to the world at large, the Welsh Government considers that the possibility of another party taking "action" of their own of whatever kind within this apparently volatile environment cannot be discounted.
22. The Welsh Government provided the Commissioner with more detailed representations about the consequences of disclosure in relation to the withheld information. Due to the nature of these representations and the content of the withheld information, the Commissioner has been unable

to go in to too much detail in this notice as to do so would reveal the nature and content of the withheld information.

23. Based on the Welsh Government's representations and the content of the withheld information, the Commissioner accepts that the individual concerned would have a reasonable expectation that their personal data would remain private and not be disclosed into the public domain. She also accepts that disclosure would give rise to an unfair and unwarranted intrusion on the individual's privacy in the circumstances of this case, and has the potential to cause unnecessary and unjustified harm to the individual in this case.
24. 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
25. In his internal review request and his complaint to the Commissioner, the complainant indicated that he considers that the content of the application to list the build contains "wildly speculative and inaccurate allegations" in respect of his future plans for the property in question. He stated that the person who made the application appears to have not consulted with him about his future plans for the property and he would like to be in a position to reassure the individual and dispel any concerns they have about the property.
26. Although a decision was made not to list the property, the complainant also considers it unfair that his life could potentially have been severely disrupted with associated financial loss and the person who instigated the application is "allowed the privilege of anonymity and could do it again".
27. The Welsh Government has already disclosed information to the complainant that amounts to the "details of the reasons why the property should be considered for listed". The remaining withheld information relates to "the person or persons who made the application". The Welsh Government pointed out that the identity of a person making such a listing building application has no bearing on the final decision whether to list it or not. That decision is solely concerned with the architectural and historic merits of the building. As such, the Welsh Government cannot see any legitimate reason for the public to have access to information about the person who made the application.
28. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is knowing the details of who made the listing building application.

29. 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 he considers that decisions relating to the application have the potential to have a direct effect on him and his 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 any private interests.
30. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. 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. However, the Commissioner notes that the matter was investigated and a decision was taken not to list the building. The Commissioner agrees that any legitimate interests of the public in accessing the information have been met through disclosure of the substance of the application to CADW.
31. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individual 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 listing building application process, but he does not consider that any legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy.
32. 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 Welsh Government was entitled to withhold the information under the exception at regulation 13(1).

Right of appeal

33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

34. 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.
35. 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

Andrew White
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