

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 May 2019

Public Authority: Derbyshire County Council
Address: County Hall,
Smedley Street,
Matlock,
Derbyshire,
DE4 3AG

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between a landowner or their associates and the council between specific dates. The council applied the exception in Regulation 13(5) (personal data) to neither confirm nor deny whether any information is held, and maintained its position in its review of the decision.
2. The Commissioner's decision is that the council was correct to apply section 13(5) of the EIR.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 4 July 2018 the complainant wrote to the council and requested information in the following terms:

"I am writing to request the information to which I am entitled under the Freedom of Information Act 2000.

As you are no doubt aware, Lower Hartshay was badly flooded two years ago and there have been numerous meetings between residents and DCC in the intervening years. There has also been a good deal of correspondence, but, to date, no noticeable improvement in the inadequate drainage to the south of the village.

Please send me copies of all correspondence between 1 January 2018 and 4 July 2018, (including letters, emails, telephone conversations, meeting minutes, etc.) between Derbyshire County Council and the landowner, [name redacted], or [their] representatives or tenants regarding remedial work to prevent further flooding in or around Lower Hartshay.

I would like the above information to be provided to me as both paper and electronic copies.

If any of this information is already in the public domain, please can you direct me to it, with page references and URLs."

5. The council responded on 24 July 2018. It said that it was applying Regulation 13(5) of the EIR (personal data) to the request, and said that it could neither confirm nor deny whether information is held falling within the scope of the request.
6. Following an internal review the council wrote to the complainant on 14 August 2018. It upheld its initial decision.

Scope of the case

7. The complainant contacted the Commissioner on 15 August 2018 to complain about the way his request for information had been handled. He complained that the council had not fulfilled his request for information.

8. The Commissioner considers the complaint is that the council was not correct to apply Regulation 13(5) to neither confirm nor deny whether any information is held falling within the scope of the request.

Reasons for decision

Background to the case

9. In her decision notice in case FER0682469¹ the Commissioner's decision outlines some of the history behind the issue of flooding in the village of Lower Hartshay. She highlighted how the council had previously publicly disclosed information, including the outcome of a flood risk management study to the local community.
10. At paragraph 15 of that decision notice, the Commissioner outlined that the council had clarified within the study that it had not been able to categorically find the causes of the flooding. The council had also clarified to the Commissioner that this was partially due to a private landowner refusing permission to carry out investigations on their land. It said at the time however that it was in ongoing negotiations with the landowner to allow permission to carry out investigations in order to establish whether conditions on the land might have contributed to the causes of the flooding. It did not however publicly confirm which property or landowner it was referring to.
11. The Commissioner does not know whether the specific individual named by the complainant in this request for information relates to this same landowner. The council did however state to the Commissioner in case FER0682469 that some information had been provided verbally to the complainant outside of the Act and the Regulations. It said that this information had been provided in order to be helpful.
12. Additionally, in correspondence with the council the complainant said to it that: *"We know that DCC claims to have been in contact with the landowner, yet we have no information regarding the outcomes of any discussions. As things stand, either we are being deliberately kept in the dark about the communications between DCC and the landowner/agent/tenant, or no communication exists. I believe we have a right to know which of these is true."*

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2172870/fer0682469.pdf>

13. The wording of the request suggests that the complainant therefore suspects that the landowner's land may have contributed to the causes of flooding which occurred in the village previously.
14. Due to the specific wording used by the complainant in his request for information to the council, as well as the above background, if the council confirms that information is held this would suggest that the landowner's land may have contributed to previous flooding episodes in the village. In effect, information would only be held falling within the specific wording of the request if the council has approached the landowner regarding the potential for remedial work on the land in question in order to prevent further flooding.

Regulation 13 personal data

15. Regulation 13(5)² of the EIR provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
16. Therefore, for the council to be entitled to rely on Regulation 13(5) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

² As amended by Schedule 19 Paragraph 307(6) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The request is for correspondence between the landowner (and their representatives or agents) and the council regarding any remedial work undertaken on the land to prevent further flooding in part of the village. As the information relates to a specific, named individual, the Commissioner is satisfied that the information would be personal data relating to the relevant landowner. This type of information would both relate to, and identify the individual concerned, and would provide a degree of biographical information about the owner and their property.
22. Due to the nature and wording of the request, the Commissioner is satisfied that if the council confirmed whether or not it holds the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
23. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the council from refusing to confirm whether or not it holds relevant information.
24. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

26. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

27. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
28. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”³.

29. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

³ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

31. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

30. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. The request for information follows flooding which occurred in the village. The public clearly has a legitimate interest in having access to information which might inform, and potentially explain one of the causes of flooding in the area, or why it occurred to the level it did.
33. The council confirmed in the previous case that the flood management study which it carried out was provided to members of the community. The study indicates the importance of landowners providing permission for the council to investigate and carry out work to identify the causes of flooding in the area. Again therefore the public has a legitimate interest in knowing whether work was being undertaken following this, and a confirmation or denial that information is held by the council falling within the scope of this request could, albeit to a very limited degree, highlight whether such work had been undertaken by the council. The public therefore has a legitimate interest in this information being disclosed.

(ii) Is confirming whether or not the requested information is held necessary?

34. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

35. Whilst the public may have a legitimate interest in knowing whether the council completed its investigations with relevant landowners to determine whether their properties contributed to the likelihood of flooding in the wider village, it has far less of a necessity for the council to disclose any information falling within the scope of the request in this case in order to meet that legitimate interest. The complainant's request relates to a specific property and a specific owner.
36. In this sense, the complainants request is too narrow to allow the public to determine whether the council has carried out a comprehensive further work to establish the causes of the flooding since the previous flood management study was published. By specifying an individual and identifying a specific plot of land the council is forced to consider the specific effects of confirming or denying whether information is held on a specific individual. It is not able to respond to the specific request by providing wider information which would specifically meet the legitimate interests of the public in knowing what work it has carried out since the report was published. It is however able to disclose some information voluntarily regarding this, and the council said that it has kept residents up to date on the steps it has taken.
37. The Commissioner is therefore satisfied that in order to respond to the specific request which the complainant made it would be necessary for the council to confirm or deny whether information is held falling within the scope of the request. Confirming or denying whether information is held is the only way in which public could ascertain whether the specific property named by the complainant has had work carried out relating to remedial work following the previous floods.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

38. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
39. The purpose behind the neither confirm or deny response in this case is to prevent an issue whereby landowners might be identified through the application of deduction and reduction – the mosaic effect of disclosing information on such issues might allow the public to identify specific

landowners where work has been carried out. For instance, if the council were to respond regarding a number of other landowners confirming that they do not hold correspondence about remedial work, but then confirmed that it does hold information for one landowner this would allow the public to identify specific land which the council considered might contribute to future flooding episodes. For this reason, the council needs to neither confirm nor deny whether information is held (even where it does not hold relevant information for any individuals in question) in order to prevent the disclosure of the identities of individuals where information is held. The fact that it has chosen to neither confirm nor deny whether it holds information in response to this request is therefore no reflection upon whether information is held or not held regarding the landowner specified in the complainant's request.

40. The Commissioner considers that any confirmation that information is held would provide the public with an indication that it may have identified one of the potential issues which led to the flooding which occurred. It would also clarify that the council has continued to take action to identify and rectify areas of concern in order to prevent, or lessen the probability of further flooding occurring in the village in the future. The public therefore does have a very strong legitimate interest in knowing whether the council was able to investigate the remaining areas of concern as regards the causes of flooding in the area.
41. Given that the council previously stated that it had not been able to fully identify the causes of the floods and a potential issue was the permission of a landowners to assess their land it is more than likely that any confirmation that work had been carried out on *any* individual's land in the area would lead raise the communities speculation that that individual's property may have potentially contributed to previous flooding incidents.
42. Landowners affected would not expect that the council would subsequently disclose information identifying them and their land as having worked carried out relating to the flooding. This could potentially impact upon their relationship with other villagers. The previous flooding episodes are likely to be highly emotive to members of the community who were affected. A degree of fault might be attributed to landowners who have been in correspondence over remedial work on their land, even if no fault was in fact identified.
43. If the council were to confirm that information was held this could have the effect of causing distress and would be a breach of privacy relating to the individual's private life.
44. Additionally disclosing the correspondence could have the effect of leaving landowners in the future concerned that any correspondence

they do have may be disclosed to the wider community. Confirming or denying whether relevant correspondence is held may dissuade the landowner from considering that they are able to correspond with the council in the future, even if the council were only to confirm that no information is held. This would be even more likely if the council were to confirm that information was held.

45. Confirming that any information is held would, in this case, raise the public expectation that that correspondence would be disclosed. This would relate to one individual property, where it is not necessary for the council to disclose the information in order to meet the wider requirements of transparency and accountability.
46. The council has disclosed wider information about the work it has carried out investigating the causes of the flooding. It disclosed a copy of a flood management report to members of the community and has said that it has kept residents up to date on the work it has carried out since.
47. The council needs to be transparent and accountable for the work it has carried out. This does not however mean that it needs to disclose information relating to whether any specific individuals have been in correspondence with the council over the flooding where it is not necessary in order for it to be transparent about the actions it has taken regarding the flooding overall. It would also not be obvious to landowners at the time that they entered into correspondence with the council that details of might subsequently be disclosed to the wider public.
48. EIR requests are generally considered to be applicant blind, and disclosures under the Regulations are considered to be to the whole world. Some information may have been provided to affected residents of the community previously outside of the Regulations. Requests made under the Regulations must however take into account the wider levels of disclosure envisaged by the Regulations.
49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
50. The Commissioner therefore considers that the council was correct to apply Regulation 13(5) to refuse to confirm or deny whether information falling within the scope of the request.

Right of appeal

51. 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

52. 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.
53. 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

[Name of signatory]

[Job title of signatory]

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF