

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 June 2019

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DQ

Decision (including any steps ordered)

1. The complainant requested correspondence between the council and DEFRA regarding a contract between the council and Cory Wheelabrator which the council withdrew from in 2014. The council provided the information but withheld the names of some of the correspondents, applying Regulation 13(1) (personal data).
2. The Commissioner's decision is that the council was correct to apply Regulation 13(1) to withhold the information. She has however decided that the council did not comply with the requirements of Regulation 5(2) in that it did not provide the information which it did disclose within 20 working days. She has also decided that the council did not comply with Regulation 11(4) in that it did not provide a review of its decision within 40 working days.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 18 June 2018, the complainant wrote to the council and requested information in the following terms:

"Please provide a copy of all correspondence (including attachments and referenced documents) between Norfolk County Council and Defra between Nov 1st 2011 and Mar 1st 2012.

In the interests of time and efficiency I only require one copy of each rather than multiple copies."

5. The council responded on 14 August 2018. It disclosed the majority of the information however it withheld the names, signatures and contact details of some individuals from the correspondence. It applied the exception in Regulation 13(1) to withhold the information.
6. Following an internal review the council wrote to the complainant on 30 October 2018. It disclosed further information to the complainant, however it maintained its position that the remaining information was exempt under Regulation 13(1).

Scope of the case

7. The complainant contacted the Commissioner 25 November 2018 to complain about the way her request for information had been handled.
8. She argued that the council was not correct to apply Regulation 13(1) to withhold the identities of individuals from the correspondence.
9. She complained that the council had not responded to her request within the time period stipulated in Regulation 5(2), and that that it did not inform her of the reasons for the delay.
10. She also complained that the council had not responded to her request for review within 40 working days as required by Regulation 11(4).

Reasons for decision

Regulation 13 personal data

11. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

12. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then Regulation 13 of the EIR cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. 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.
19. This information comprises the names, signatures and contact details of council officers and other third parties. The Commissioner is satisfied that the information is clearly personal data

¹ As amended by Schedule 19 Paragraph 307(3) DPA.

20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to various individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. 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 if to do so would be lawful, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

26. 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*" lawful bases for processing listed in the Article applies.
27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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"².

² Article 6(1) goes on to state that:-

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, 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 disclosure of the information 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.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) 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.

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

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) 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".

32. The background to this case surrounds a failed plan to introduce an Energy from Waste plant, The Willows incinerator, at King's Lynn³. Initial plans were drawn up and contracts signed, however there were significant objections to the project going ahead, including strong public opposition demonstrated in a public referendum⁴. In 2014 the council made a decision to withdraw from the contract, stating that this was due to a failure to secure satisfactory planning permission. In December 2014 it was made public that the council had paid the contractor £33.7m as compensation for the early termination.
33. The council has disclosed the correspondence which was requested by the complainant, however it has withheld personal data relating to agents, other agencies and organisations. It has also redacted personal data relating to its own staff where it argues that the individuals concerned were not decision makers or senior officers at the council. Where the name forms part of an email address or signature block, only the name has been redacted and the organisation has been left unredacted. Job titles/roles have also not been redacted.
34. The complainant argues that given the costs to the council of withdrawing from the project there is a strong public interest in the council being open about the individuals at the council and at DEFRA who were involved in order that greater light can be shed on what occurred.
35. Having considered the above the Commissioner is satisfied that the public has a legitimate interest in having access to information which can create greater transparency on issues which ultimately led to the council owing significant sums of money as a result of the circumstances surrounding the project.
36. The Commissioner considers however that knowing the identity of the individuals concerned would not greatly add to knowledge about what actually occurred as the content of the correspondence has already been disclosed in response to the request, including the job roles of the correspondents.

³ <https://www.bbc.co.uk/news/uk-england-norfolk-26925831>

⁴ <https://www.bbc.co.uk/news/uk-england-norfolk-12612333>

37. She also considers that as the correspondence relates to 2011-12 the value of knowing the identities of the correspondents is weak. The public are aware of what occurred and the main issues which were involved, and the senior council officers details were disclosed along with the content of the correspondence.
38. Whilst the Commissioner considers that the public does have a legitimate interest in the information, she therefore considers that this is relatively weak in this situation.

Is disclosure necessary?

Council staff

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Commissioner notes that the content and substance of the correspondence has been disclosed to the complainant, except that some individual's identities, signatures and contact details have been redacted. The chain of events running through the correspondence is however still fully understandable without the individual identities being disclosed.
41. The Commissioner has considered whether it is necessary to know the identities and contact details of the correspondents in order to fully meet the public's legitimate interest in transparency over the issues involved with the failure of the project.
42. The complainant argues that the individuals taking part would have been acting in some decision making capacity regardless of their level of seniority. She also argues that as the project was eventually withdrawn, costing the public a significant amount of money, then the public has a legitimate interest in knowing who the individuals are. In her complaint to the Commissioner she states that:

"There has long been an accountability vacuum at County Hall, a steady erosion of individual responsibility, no concept of responsibility for an individual's bad choices or decisions which has been created and maintained by the 'blame culture' that exists within it, and fiercely protected and prevented by the legal department irrespective of cost, even at the expense of truth."

43. The council argues that a disclosure of the information is not necessary. It argues that the names of individuals which it has redacted are (or were) all tier 4 or below within its structure, or that they work for other agencies or organisations. It considers that it is the council and its senior management which are accountable to the public for the issues which arose. Less senior officers are accountable to the council rather than to the public directly.
44. It argues that the legitimate interests in understanding decisions made and holding the authority to account can be met without the disclosure of the personal data of individuals within the various organisations involved who do not have sufficient decision-making authority to warrant them being held publicly accountable. It argues that as the full content of the emails has been disclosed, including the job roles and the organisations which are in correspondence, then it is not necessary to disclose the identities of the individuals in order to meet the public's legitimate interest in transparency and accountability.
45. The Commissioner has considered this argument. The roles of some of the individuals whose identities have been redacted are not specifically junior roles in all cases. For instance, the Commissioner notes that the roles include tier 4 officers such as a Project Manager, a Business Support and Development Manager and a Media and Public Affairs Manager. As mid-level managers acting on behalf of the council it is clear that these individuals would have had a level of decision making responsibility, albeit that their work would have been managed and directed by more senior managers within the council structure.
46. The council argues that in situations where it is considered appropriate, managers and senior officers hold staff to account if their work is deficient. Its argues that:

"The Council has a well-established performance and appraisal system and holds individuals to account on a personal level via that system. Individuals reasonably expect to be able to go about their daily work out of the public eye and it would not be fair for individuals in relatively junior roles to be held publicly accountable."
47. The council therefore argues that it is not necessary for the public to be able to hold less senior officers to account personally for their actions when they are acting under more senior officer's supervision, on behalf of the council. It is the council as a whole, and senior officers who provide oversight and management of the project which should be held to account for the actions which the council takes.

48. It says that in this respect it has not redacted the identity of some of the correspondents, including the Project Director and the Head of Finance, from the information it has disclosed.
49. It argues that the legitimate interests in understanding decisions made, and holding the authority to account, can be met without the disclosure of the personal data of individuals within the various organisations involved who do not have sufficient decision-making authority to warrant them being held publicly accountable.
50. Further to this the council points out that previously, officers involved with this project have in the past received threats and abuse. It considers that a disclosure of the identities would cause distress and anxiety to those officers that have either already been subjected to abuse or who fear that they will be.
51. It also points out that as the contract was terminated in 2014, and the requested correspondence dates back to 2011 – 2012, many of the correspondents will now have moved on from their roles or left the council altogether.
52. It argues that due to the historic nature of the information and the fact that there are so many individual's data held within the documents it was not possible to contact them all to ask for their consent to their names being disclosed.
53. The Commissioner has also noted that the complainant questions whether there is evidence of the threats and abuse which officers received previously. She has also argued that the council has previously disclosed the identities of many of the individuals in previous disclosures to her, and therefore it should not be in a position to withhold the same identities as regards this request. She has also identified that on one email from a senior officer there is a warning to employees that emails may need to be disclosed in accordance with the requirements of the Freedom of Information Act.
54. The Commissioner notes that the complainant herself has identified news stories relating to previous harassment which occurred to council staff. The Commissioner also notes the press story at <https://www.edp24.co.uk/news/politics/norfolk-county-council-leader-s-telephone-threats-over-king-s-lynn-incinerator-1-823600> relates to direct threats received by the leader of the council.
55. Whilst the previous disclosure of the identities of individuals is a relevant factor, and the Commissioner notes this point, the question for her is whether it is *necessary* for the information to be disclosed in order to meet the legitimate interests outlined above as regards this case.

Third party redactions

56. As regards individuals identities from other organisations the complainant argues that:

"Norfolk County Council have only addressed the redaction of "staff" names, not the redaction of all the names – I would suggest that their paid advisors and Defra officials are very much responsible for significant decision making."

57. The council argues that it does not consider that it is necessary to disclose names in order to be transparent regarding the nature of the correspondence between the Council and DEFRA.
58. The Commissioner notes that the individuals whose names have been redacted from third party organisations include some fairly senior individuals such as monitoring officers and the Project Director for Residual Waste Services. Where the identities have been redacted however the job titles have been disclosed. The Commissioner recognises that this may make it fairly easy for interested parties, who are willing to carry out a small degree of research, to identify who the blanked out identity refers to in some cases.
59. The Commissioner understands that the council's redaction of this information is on the basis that it is not necessary to disclose the actual names of the individuals in order to meet the public's legitimate interest in creating transparency over what occurred. However, it considers that it is necessary to disclose the job roles of senior officers in order for the council to be transparent about the level (in terms of seniority) of the correspondence which was taking place, and this does feed into the legitimate interests of the public in identifying whether the actions of any parties were deficient.
60. In effect the council has made a judgement on the necessity of disclosing the actual names in order to meet the legitimate interests of the public, and it has decided that the legitimate interest can be met without the disclosure of identities in this instance. It considers that it is not necessary to disclose the actual identities of the individuals in order to meet the public's legitimate interests. The Commissioner agrees with this approach.

The Commissioner's conclusion as to whether disclosure is necessary

61. The Commissioner notes that the events which led to this request occurred in 2014 and before. She further notes the council's argument that some of the individuals whose identities have been redacted have now left the council. It also confirmed that those who remain had been asked if they consented to the disclosure of their identities and that they had not given their consent.

62. The council has disclosed all of the content of the correspondence to the complainant, with only the redaction of some identities and contact details. Where it has redacted information it has left the organisations and job roles of council officers in place.
63. The Commissioner accepts the council's argument that it is not necessary for the council to disclose information on mid-level and junior officers who did not have decision making responsibilities without oversight from more senior managers.
64. In this respect, it is the council as whole which is accountable for any issues which occur during their oversight of a project, or in the way a project is implemented. In this situation it was clear that overall responsibility for such an expensive and high level project, designed to run for decades, would sit with senior managers and with elected members rather than with more junior officers and managers.
65. She considers that there is only a very weak legitimate interest in the disclosure of the identities of mid-level and junior employees. At this level they are accountable to the council, as its employees. At a more senior level this balance may tip in favour of disclosure in order that the public may be aware of senior officers' decisions and actions, albeit that it is still for the council, not the public, to hold the actions of its employees to account. Any failure of the council as a whole can be addressed by the electorate through the election process.
66. The Commissioner has consistently maintained in previous decision notices that, whilst it might be appropriate for senior staff to be held publically accountable for decision-making, there is little public interest in identifying junior or mid-level staff who are ultimately responsible to the council for such matters rather than directly to the public. Moreover, in addition to having a reasonable expectation that their names would not be placed in the public domain, the legitimate public interest in disclosure has been met by the disclosure of the content of the correspondence. The complainant's arguments for holding more junior officers accountable does not take into account that it is the council which is ultimately responsible for their actions, not the public directly.
67. The Commissioner is also mindful that, where contactable, some individuals have refused consent for their names to be disclosed and, in any event, she is satisfied that the public interest in accountability has been served by the information disclosed by the council. The legitimate interest in knowing their identities would also be outweighed by the risk of harassment argued by the council.

68. The Commissioner has also outlined above that she agrees with the council's approach in balancing the disclosure of job roles of senior employees of third party organisations without disclosing the actual names of the individuals involved. Whilst some of the individuals are, or were, senior within their organisations and could be identified with research by interested parties, they do not work for the council. It is not necessary to specifically identify them within the context of this disclosure in order to meet the legitimate interests of the public in holding the council to account, particularly given the overall disclosure of the remainder of the information.
69. On consideration of all of the above, the Commissioner finds, in this case, it was not necessary for the council to disclose the information to the complainant in response to her request in order for it to meet the legitimate interests of the public in the council being transparent and accountable for its past actions.
70. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
71. The Commissioner has therefore decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2)(a).

Regulation 5(2)

72. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. Regulation 5(2) requires that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
73. In this case the complainant made her request for information on 18 June 2018. The council did not however respond until 14 August 2018, with further information provided again on 30 October 2018.
74. The council itself confirmed to the complainant that, in this case, it did not comply with the requirements of Regulation 5(2) in this instance.
75. The Commissioner's decision is that the council did not comply with the requirements of Regulation 5(2).

Regulation 11(4)

76. Regulation 11(4) provides that a public authority shall notify the applicant of its review decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
77. In this case the complainant requested that the council carry out a review on 31 August 2019. The council did not provide its response to the review until 30 October 2018.
78. The council therefore confirmed that it had not met with the requirements of Regulation 11(4) in carrying out the requested review of its decision on this case.
79. The Commissioner's decision is that the council did not comply with the requirements of Regulation 11(4).

Right of appeal

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

81. 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.

82. 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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