

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 31 July 2019

**Public Authority:** North Yorkshire County Council

**Address:** County Hall  
Northallerton  
North Yorkshire  
DL7 8AD

#### **Decision (including any steps ordered)**

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1. The complainant requested information from North Yorkshire County Council ("the Council") relating to certain individuals who submitted evidence forms about the use of a bridleway near Thornton-in-Craven.
2. The Commissioner's decision is that the Council correctly redacted the personal details of the individuals under regulation 13 (personal data) of the EIR. However, the Council incorrectly redacted the dates on which the forms were signed, since this is not personal data within the definition at section 3(2) of the Data Protection Act 2018 (DPA). The Council also failed to respond to the request within 20 working days, and failed to carry out a reconsideration when asked within 40 working days. It therefore breached regulations 5(2) and 11(2) of the EIR respectively.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose that part of the relevant forms which shows the dates of signature.
4. The Council must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background to the request

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5. On 29 September 2018, the complainant wrote to the Council to request information of the following description:

*"Many thanks for letting me see some of the documents from the Hawber Lane Restricted Byway case... you mentioned that you would be willing to scan the UEF [user evidence form] sheets and maps with signatures redacted... Would it be possible for you to email the scans to me, please?... [regarding] the photo of the guide post showing the direction to Thornton... any chance you could scan that too?"*

6. On 1 November 2018, the Council provided her with copies of 14 user evidence forms. It had redacted the users' personal details, as requested.

## Request and response

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7. On 27 November 2018, the complainant made a related request in respect of five of the user evidence forms. She requested copies of the forms numbered 3, 4, 10, 13 and 14 respectively, with the users' "names, addresses, ages and date of signing" not redacted.
8. On 11 January 2019, the Council replied, stating that this information was exempt from disclosure under regulation 13 of the EIR (third party personal data) since disclosure would not be fair and/or lawful under the provisions of the GDPR.
9. The complainant wrote again to the Council on 23 January 2019, asking for a further review in respect of the five user evidence forms. The Council explained on 24 January 2019 that its appeal process was now exhausted.

## Scope of the case

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10. The complainant contacted the Commissioner on 25 January 2019 to complain about the way the request of 27 November 2018 had been handled.
11. The analysis which follows considers whether the Council correctly refused to provide the redacted information on user evidence forms numbered 3, 4, 10, 13 and 14 respectively, under regulation 13 of the EIR. It also considers the time for compliance.

## Reasons for decision

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### Regulation 2(1) - is the information environmental?

12. Regulation 2(1) of the EIR provides the following definition of environmental information:

*"...any information in written, visual, aural, electronic or any other material form on-*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

13. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has produced guidance<sup>1</sup> to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.

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[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

15. The Commissioner notes that the withheld information comprises hand-completed forms, in most cases with an attached map, which relate to the use of a path or bridleway near the village of Thornton-in-Craven in North Yorkshire.
16. The Commissioner has considered the information in light of the definition at regulation 2(1). She is satisfied that the redacted information relates to activities affecting, or likely to affect, the elements and factors of the environment. She agrees that the forms which have been redacted are information "on" these activities. The information therefore falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and the Commissioner is satisfied that the Council considered the request under the correct access regime.

### **Regulation 13 - personal data**

17. 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.
18. In this case, the relevant condition is contained in regulation 13(2A)(a)<sup>2</sup>. 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").
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then regulation 13 of the EIR cannot apply.
20. 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?***

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

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

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<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA.

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. In this case, the Council considers that the redacted information (the individuals' names, addresses, ages and the dates of signature) is the personal data of the five individuals who signed the forms. The Commissioner notes that the Council also redacted the individuals' telephone numbers; however, these did not form part of the request for information, and so she has not considered them in this notice.
26. Regarding whether the individuals are living, the Council argued that it made what it considers to be a reasonable assumption that the five individuals are still alive, considering the "*relatively short time*" that has elapsed since the forms were completed. The Commissioner has been able to ascertain from the redacted information that none of the individuals would now be aged over 100, and so, in line with her established approach, she is satisfied that this is a reasonable assumption to make.
27. The Commissioner agrees in this case that the individuals could be identified from their names and addresses. She also considers that their age is an identifying factor, considering the small pool of local people who provided information to the Council. In her view, therefore, the names, addresses and ages relate to and identify individuals.
28. However, the Commissioner is not persuaded that the dates on which the forms were signed either relate to, or identify, individuals. The Commissioner has had the benefit of reviewing all of the evidence forms collected by the Council relevant to this issue, and she notes that the five forms under consideration in this notice were all signed during the same approximately two-week period as the rest of the forms. She considers that even any local knowledge which may exist about the Council's gathering of evidence in this case would not enable individuals to be identified from any one specific date from the relevant period.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the redacted names,

addresses and ages identify and relate to the five individuals who signed the forms, who can also be assumed to be living. This information therefore falls within the definition of personal data in section 3(2) of the DPA.

30. However, the Commissioner finds that the dates on which the five relevant forms were signed does not constitute personal data.

### ***The Commissioner's decision***

31. Since the dates of signature are not personal data, the Commissioner orders these to be disclosed to the complainant.

### **Information which is personal data**

32. Regarding the names, addresses and ages, the fact that these constitute the personal data of identifiable living individuals does not automatically exclude them from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

34. 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".*

35. 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.

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

36. 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. Processing must also be generally lawful.
37. 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”<sup>3</sup>.*

38. 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:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

39. 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*

40. 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.

41. 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; however, trivial interests may be more easily overridden in the balancing test.

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<sup>3</sup> 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, 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 subparagraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*

42. The Commissioner is satisfied that the use of the bridleway is, generally, a matter of local interest. However, in view of the nature of the redacted information, she has been required to consider whether there is a legitimate interest specifically in the disclosure of the names, addresses and ages of the relevant individuals who submitted evidence about use of the bridleway.
43. The complainant has explained that the evidence on the forms was used to inform a decision by the Council to create a public right of way ("PROW"). Having viewed the redacted forms, she considers that a number of anomalies exist, including information potentially having been copied from one form to another.
44. She considers that it should be possible to verify the forms by cross-checking the individuals' names on the electoral register or, if necessary, contacting the individuals by letter. She therefore considers that the Council should disclose the personal information for the purposes of authenticating the forms.
45. The Commissioner is satisfied that there is some limited legitimate interest in the redacted information. She has therefore considered whether disclosure under the EIR is necessary to meet this legitimate interest.

*Is disclosure necessary?*

46. 'Necessary' means more than desirable but less than indispensable or of 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.
47. In this case, the Commissioner understands that, while the Council made some information concerning the PROW public, it would not normally publish the personal information of contributors to the evidence forms. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and she accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

48. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For



example, if the data subjects would not reasonably expect that their information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

49. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individuals expressed concern about the disclosure; and
- the reasonable expectations of the individuals.

50. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

51. In this case, the Council has not contacted the individuals to ask if they consent to the disclosure of the information; it states that this would be impractical as some may have changed their address, and potentially would be an unwelcome intrusion due to the length of time that has elapsed. However, the Council's position is that the individuals would have had no reasonable expectation that their personal data would be disclosed at the date the forms were signed (otherwise, they would not have been likely to provide their evidence freely); the Council also considers that sufficient time has elapsed since the forms were signed that the individuals have no reasonable expectation of disclosure at this stage. The Council closed its case regarding whether to create the PROW in 2012, and the forms are considerably older than that.

52. In addition, the Council considers that there is a possibility of damage and distress to the individuals from disclosure. If interested local parties were able to contact them and ask questions about the forms they submitted years ago, the Council considers that this would potentially amount to harassment.

53. The Council has also provided arguments that its processes and procedures could be prejudiced by disclosure in this case, since it may discourage other individuals providing evidence about land use in future. However, these concerns are not relevant here, since the Commissioner is concerned only with the rights and freedoms of the individuals, weighed against the legitimate interest in disclosure.
54. The Commissioner, as already stated, considers that the legitimate interest in disclosure in this case is very limited. She notes that it is not the individuals' views and/or evidence that the Council has refused to disclose: it is the personal, identifying details of the individuals who provided them. While it is important to the general principle of transparency for the Council to disclose the comments which were submitted about land use, as it has done, the Commissioner is not persuaded that disclosing which person, from a relatively small pool of individuals, made which specific comment, is of significant interest to the public at large.
55. The Commissioner also notes that the evidence that was provided in this case relates to the individuals' private, day-to-day activities.
56. The Commissioner is aware that the complainant considers that there is a legitimate interest in the forms being verifiable with the individual signatories because, in her view, they contain anomalies. However, the Commissioner considers that providing the redacted personal data to the public, under the EIR, is not necessary in this case in order for the complainant or another interested party to be able to pursue a complaint or submit an appeal. While it should be possible for an interested party to challenge the Council's decisions relating to the PROW, the Commissioner would not expect the Council to facilitate any party contacting individual evidence-givers directly.
57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of the information to outweigh the data subjects' fundamental rights and freedoms.
58. The Commissioner therefore considers that there is no Article 6 basis for processing, and so the disclosure of the information would not be lawful.
59. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to consider separately whether disclosure would be fair or transparent.

### **The Commissioner's view**

60. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

### **Time for compliance**

61. Regulation 5(2) of the EIR states that, following a request for information, such information shall be made available by the public authority *"as soon as possible and no later than 20 working days after the date of receipt of the request"*.
62. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request of 27 November 2018 within 20 working days, the Council breached regulation 5(2) of the EIR.
63. In addition, regulation 11(4) of the EIR sets out that, where a requester has made written representations to a public authority within 40 working days of the date on which he or she believed that the authority had failed to comply with a requirement of the EIR (that is, normally, the date of receipt of the public authority's response), the public authority should reconsider its response and provide its decision *"as soon as possible and no later than 40 working days after the date of receipt of the representations"*. This reconsideration is normally referred to as an internal review.
64. In this case, the complainant wrote to the Council on 23 January 2019 asking for a review of its decision regarding the unredacted forms. The Council stated that it had exhausted its review process.
65. In the Commissioner's view, the Council may have failed to recognise that the request of 27 November 2018 was a new request. In asking for unredacted information, the complainant was not simply asking for a review of the response to her request of 29 September 2018, which asked for redacted information. The Council should therefore have carried out a reconsideration of its handling of the request of 27 November 2018 when asked to do so, and therefore breached regulation 11(4) in failing to do so.
66. In the circumstances of the case, the Commissioner does not require the Council to take any remedial steps in respect of regulation 5(2) or regulation 11(4).

## Right of appeal

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67. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

68. 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.
69. 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 .....**

**Ben Tomes**  
**Team Manager**  
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