

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 December 2019

Public Authority: Wiltshire Council
Address: County Hall
Bythesea Road
Trowbridge
Wiltshire
BA14 8JN

Decision (including any steps ordered)

1. The complainant requested information relating to planning applications and how the council dealt with these regarding his property. The council initially provided some information but redacted other information under Regulation 12(3) (personal data). The complainant considered that further information should be held. Further information was then provided, however the complainant maintains that further information should still be held. He also complained about the redactions made under Regulation 12(3) from the documents which had been disclosed.
2. The Commissioner's decision is that on a balance of probabilities, no further information is held falling within the scope of the complainant's request. She has also decided that the council was correct to redact the identities of individuals under Regulation 12(3). The Commissioner has also decided that the council did not comply with Regulation 5(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 8 November 2018 the complainant wrote to the council and requested information in the following terms:

"I hereby apply for Wiltshire Council to disclose to me all emails, attendance notes, memoranda, correspondence and other documents of whatever nature, to cover the period from 1 November 2013 up-to-date, as required by Section 1 of the Freedom of Information Act 2000 and Environmental Information Regulations.

Without delimiting the foregoing in any way, I would additionally require the following:-

1. Full details of all emails, memoranda, correspondence, attendance notes and other documents which cover the period up-to-date in relation to all relevant communications with the Valuation Office Agency from 1 January 2015 relating to [address redacted].

2. All emails, attendance notes, memoranda, correspondence and other documents within the Council or with any third party relating to the decision of the Inspector in November 2013 which determined our appeal in relation to the demolition of the [address redacted], and all subsequent communications and documents directly or indirectly relating thereto.

3. All emails, correspondence, memoranda and other documents both with other parties within Wiltshire Council and with all third parties, to cover the period from 1 January 2015 up-to-date relating to pre-application enquiries in respect of [address redacted]".

5. The council responded on 4 December 2018. It provided the complainant with information.
6. On 6 December 2018 the complainant wrote back to the council stating the following:

"I attach a copy of an email from [name of officer redacted] to [name of officer redacted] dated 20 October 2016. Can you please let me have a copy of the email or letter response received by [name of officer redacted] or her attendance note of any phone conversation from [name of officer redacted] or his colleagues pursuant to her email of 20 October?"

7. The council responded on 18 December 2018 and again provided information to the complainant. However on the same date the complainant wrote again to the council stating:

"1. I have yet to see any correspondence between the Council and the VOA including the council instructions dated 19 October 2017 and the instructions dated 24 September 2018 to the VOA and any communications within the Council in relation to this and VOA correspondence more generally relating to [address redacted].

2. I have yet to see the remaining correspondence between the Council and Historic England and relevant communications within the Council relating to the Historic England communications."

8. Following an internal review the council wrote to the complainant on 15 February 2019. It provided further information, however it maintained its reliance on Regulation 12(3) to withhold information.

Scope of the case

9. The complainant contacted the Commissioner on 2 April 2019 to complain about the way his request for information had been handled.
10. He considers that further information should be held. He also complained about some documents which were disclosed, but with redactions which were made under Regulation 12(3) (personal data). His central concern was where large sections of some emails had been redacted under this provision and he provided examples to the Commissioner in evidence of this point.
11. During the course of the Commissioner's investigation the council disclosed further information to the complainant, on 14 August 2019 and 17 September 2019. The complainant however maintains that further information must be held and should have been disclosed to him.
12. The Commissioner therefore needs to consider whether further information is held by the council falling within the scope of the complainant's request. She also needs to consider the redactions made under Regulation 12(3).
13. She also needs to consider whether the council's disclosure of information met with the requirements of Regulation 5(2).

Reasons for decision

Regulation 12(4)(a) – information not held

14. The council argues that it has disclosed all of the information which it holds, subject to the redactions it has made under Regulation 12(3). The complainant argues that further information is held.
15. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
16. In effect the Commissioner must consider whether further information is held by the council which has not been disclosed to him in response to his request for information.
17. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
18. The Commissioner firstly notes that the council has disclosed a large amount of information to the complainant over a period of time relating to this planning dispute. The complainant has analysed this information to a large extent to determine whether, and what further information may be held, and has provided details of this to the Commissioner where he feels that there is specific evidence that further information might not have been disclosed to him. Nevertheless the Commissioner has sought answers from the council regarding the searches it carried out in full for relevant information, as well as seeking specific answers as regards the specific information highlighted by the complainant in his complaints to her. Given the number of documents covered and disclosed previously however, it is difficult to determine with any complete degree of certainty that further information is held.
19. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
20. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Council held further information within the scope of the request.
21. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also

consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

22. During the course of her investigation, the Commissioner asked the Council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the Council established whether or not it held further information within the scope of the request.
23. The council said that in total it had carried out 4 separate searches to determine whether information is held falling within the scope of the complainant's request.
24. It said that its initial searches had had to rely upon manual searches of email accounts as it did not have the necessary software at its disposal to carry out electronic searches for information. Officers searched electronic, manual and web based information stores within the planning department, and a first provision of information had been provided, comprised of over 600 pages of information. The searches were carried out by each council officer either identified by a requestor or known by the council to be associated with the subject of the request. Officers searched their own inbox, sent items and deleted items boxes, following consultation with the Information Governance Team who provide advice on the parameters of the request.
25. It said that, as of its response to the complainant of 14 August 2019, the council had introduced new software able to carry out searches of emails reaching across the whole council. It therefore carried out further searches at this point, and a significant amount of new information was provided to the complainant following this. It said that its new software search system had been used twice in response to the request, using different key search parameters to locate relevant information, and these key search terms were fully described in its response. These search terms were comprehensive in nature. They also included specific searches of the inboxes of relevant individuals highlighted by the complainant.
26. The council provided details regarding the statutory requirements for the retention of information, and provided a copy of its published retention schedule. Effectively documents require to be retained by the Town and County Planning Act 1990 (s69) are retained indefinitely, whilst pre-application advice is retained for a period of 15 years, although there is no specific statutory requirement for that information to be retained.

27. It confirmed that it does not believe that any records related to the address' pre-application advice, planning applications or planning appeal have been deleted or destroyed as the 15 year retention period has not been reached.
28. Following the manual and electronic searches described above it considered that it has retrieved and provided to the complainant all the information it holds based on the description of the requested information and the search parameters used.
29. It answered specific questions which the complainant had raised as regards the information it held, and explained its position as regards these questions. This included detailed responses to questions as regards individual officers which the complainant had suggested had been in correspondence with other government bodies.
30. The council confirmed that, following the above, a total of 1019 pages have been disclosed to the complainant.

The Commissioner's conclusion

31. The Commissioner has carefully reviewed the submissions of both parties and the arguments put forward.
32. Under the circumstances described she believes that the council has provided a description of having carried out adequate searches in appropriate places to determine whether any further information is held falling within the scope of the complainant's request. Whilst its earlier searches had clearly failed to provide satisfactory results, the introduction of the new software allowed it to carry out further searches which were more comprehensive, and further information was located as a result.
33. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held.
34. The Commissioner has considered the complainant's suggestions as to where further information may be missing from the bundles which have been provided to him. However, in the absence of evidence to the contrary, and given the substantive searches described by the council as having been carried out, on a number of different occasions, she considers that there is no evidence demonstrating that further information is held falling within the scope of the complainant's request for information.
35. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the council falling within the scope of the complainant's request for information.

Regulation 13 personal data

36. The council redacted some information from correspondence on the basis that the information was personal data and its disclosure would breach its obligations under the Data Protection Act 2018. The complainant questioned the redactions under Regulation 13.
37. The complainant raised specific concerns about the application of the Regulation 13(1), by way of Regulation 12(3), to an email chain dated 13 April 2018, and in particular, an email from the VOA to the council sent at 13 April 2018 at 12:06. He considered that the council may not have been correct to redact the entirety of the sections it had under section 40(2) and asked the Commissioner to determine whether this should have been disclosed to him in redacted form.
38. 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.
39. 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').
40. 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.
41. 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?

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

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

43. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

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

44. 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.
45. 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.
46. This information comprises of names, signatures and contact details of council officers and other third parties. The Commissioner is satisfied that this information is clearly personal data.
47. The withheld information relating to the email of 13 April 2018 contains records of time and costs for work carried out by individuals within the VOA (effectively a breakdown of costs per time spent by a number of individuals on various tasks. Other redactions were made on the basis they refer to officer's personal lives.
48. 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, and provides biographical information about those individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
49. 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.
50. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

51. 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".

52. 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.
53. 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.

54. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

55. Information relating to special category data is given special status in the GDPR.
56. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
57. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that small sections of the information do contain special category data. She has reached this conclusion having read the content for herself.
58. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
59. The Commissioner considers that the only conditions that could be relevant to a disclosure under the EIR are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
60. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the EIR request or that they have deliberately made this data public.
61. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under Regulation 13(1) of the EIR.
62. The Commissioner has therefore gone on to consider the remainder of the information redacted under Ref 12(3).

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

63. 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.

64. 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.

65. 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.

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

² 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

67. 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.
68. 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.
69. The background to this case primarily relates to the private interests of the complainant and his plans to develop his property. The Regulations however requires requests to be considered as made by any person. Public authorities are not able to take into account the motivations of, or any personal interest which the requestor may have (other than under a few specific circumstances).
70. The complainant has a legitimate interest in obtaining full transparency on how the council and other agencies such as the VOA handled his planning application.
71. Whilst the primary issues surrounding this case relate to the complainants own private interests, the property is effectively composed of two listed buildings. The public does therefore have a legitimate interest in knowing more about the actions and decisions which the council has taken regarding these properties. It therefore has a legitimate interest in having access to the requested information.
72. The council has said that it has disclosed the correspondence and other information which was requested by the complainant, however it has withheld personal data relating to individuals who work in third party organisations. It has also redacted personal data relating to its own staff where it argues that the individuals concerned were not senior officers at the council.
73. 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 relating to decisions made on listed buildings.
74. The Commissioner considers, however, that knowing the identity of the individuals concerned would not greatly add to knowledge about what actually occurred as the essential content of the correspondence has already been disclosed in response to the request. However some of the information may potentially prove helpful to the complainant's personal

interests in challenging council decisions regarding his proposed development.

Is disclosure necessary?

75. '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.
76. 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 generally understandable without the individual identities being disclosed.
77. The Commissioner has considered whether it is necessary to know the identities and contact details of the correspondents, together with the other associated biographical information relating to them, in order to fully meet the public's legitimate interest in transparency over the issues involved.

The complainant's arguments

78. The complainant argues that as the decisions which have been made have led him to a position where he is challenging council decisions regarding his wish to develop his property. He considers that in order to be fully clear on the council's reasons for its decisions the whole of the information he has requested should be disclosed to him. He considers that the redactions which have been made prevent him from fully understanding and challenging the council's position in this respect.

The council's arguments

79. The council recognises that the complainant has a personal interest in the information concerned. It has disclosed the vast majority of the information to the complainant, however it has withheld the names and identities of various individuals on the basis that it is not necessary for the public to have access to that information, and it would lie outside of these individual's expectations to disclose that information to the whole world.
80. Further to this the council points out that it has not withheld all of the personal data. It argues that following consultation with Historic England, the Valuation Office Agency (VOA) and a planning consultants

company, consent to provide unredacted information was given by Historic England and the planning consultants.

81. It said that it is council policy to publish the names and email addresses of employees who are of a managerial grade or above and those who occupy a public facing role.
82. It argued however that the VOA explained that whilst they were happy for emails to be released it is their policy to 'redact the caseworker's name, their direct contact details, their signature (reference to them as a named person) to protect their rights to privacy'.
83. The council notes however that whilst it has withheld the names of some individuals in response to the FOI request, it is aware that the complainant is already likely to know who some of the redactions relate to, as some information has already been passed to his agents, and because he, or his agents, will have had contact with them during the course of the applications. For instance, the email of 13 April 2018 specified by the complainant relates to named VOA officers and the time and costs charged for the work they have carried out, essentially a time sheet. The overall figures for the work which was carried out were however disclosed.
84. The complainant will have access to this information or would be able to ask his agents for a copy of this should he wish to see it. For the absence of doubt, however, the Commissioner questioned this redaction further with the council. On 14 November 2019 the council clarified that that the email of 13 April 2018 had been provided to the complainant in a much less redacted form on 14 August 2019, along with an attached timesheet which was also provided on that date. The redactions made to these documents were the identities of the individuals, with the remainder of the information fully readable. Effectively the majority of this email has been provided, but potentially due to the large amount of redaction in the initial disclosure, it appears that the complainant has not recognised this.
85. The council therefore argued that it considered the legitimate interests of the requestor in providing the redacted personal data and has concluded that whilst it recognises that the complainant has a personal legitimate interest in the identity of the VOA employees (as they authored reports about his property which were fundamental to his planning application) the publication of the personal data is not necessary as the complainant's agent in this matter was copied in to many of the emails when they were sent and the council believes that the complainant is already aware of the name and contact details of the VOA employees.

86. From the public's point of view, a listed building is currently not being developed due to the council decisions regarding the applications it has received. The majority of the information explaining that decision has however been disclosed without the need for specific individuals to be identified, and the disclosed information is generally understandable without that information being present.

The Commissioner's conclusion as to whether disclosure is necessary

87. The Commissioner notes that the events which led to this request are ongoing. The council has disclosed the majority of the content of the correspondence to the complainant, with only the redaction of some identities, contact details and sections of biographical information relating to various individuals relating to their personal lives. Where it has redacted information, however, the majority of that information is still generally understandable, although the gaps where biographical information (relating to the personal circumstances of the officers concerned) has been redacted do create a degree of uncertainty they relate to personal information about officers rather than information about the planning applications or the project. It is however not necessary for the complainant to have access to this information as it does not relate to his personal private interests relating to the project, and would not add any further information to the public to meet the legitimate interests which have been identified.
88. The Commissioner recognises that in some areas, larger sections of redacted information may leave the complainant concerned that information which is vital to him understanding the process which has occurred may not have been provided to him. For instance the redaction which was made to the email of 13 April 2018. However these details have been disclosed in subsequent disclosures to him, barring specific identifiers relating to VOA staff.
89. The Commissioner does not consider that a disclosure of this information to the wider public meets any legitimate interest they have in understanding, in greater detail, the decisions taken by the council regarding the planning applications regarding the listed buildings, particularly given that figures for the overall costs have been disclosed.
90. The Commissioner also accepts the council's argument that it is not necessary for the council to disclose identities and contact information for its mid-level and junior officers. 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.

91. 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, the public has little legitimate interests 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.
92. The Commissioner has also agrees with the council's approach in balancing the disclosure of the VOA information whilst withholding the identities of the individuals involved. 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 majority of the information.
93. On consideration of all of the above, the Commissioner finds, in this case, it was not necessary for the council to disclose the personal data to the complainant in response to his request in order for it to meet the legitimate interests in the council being transparent and accountable for its actions.
94. 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).
95. 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)

96. 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.
97. In this case the complainant made his request for information on 8 November 2018. The council however provided information in form, including further disclosure at the internal review, dated 15 February

2019 and again during the course of the Commissioner's investigation (including in September 2019).

98. The council did not therefore comply with the requirements of Regulation 5(2) in this instance.

Right of appeal

99. 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

100. 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.

101. 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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