

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

Decision notice

Date: 1 November 2019

Public Authority: Canterbury City Council
Address: Council Offices
Military Road
Canterbury
Kent
CT1 1YW

Decision (including any steps ordered)

1. The complainant has requested information about complaints in respect of a specified property over a defined period of time. Canterbury City Council ("the Council") withheld the information because it considered that the information within scope was the personal data of third parties and that disclosure would breach the GDPR principles.
2. The Commissioner's decision is that, as the complainant and his family have either owned or occupied the land in question during the time period specified, all the information falling within the scope of the request is in fact the complainant's own personal data. She has therefore applied Regulation 5(3) of the EIR proactively to prevent disclosure.
3. The Commissioner does not require any further steps to be taken under the EIR.

Request and response

4. On 5 February 2019 the complainant requested copies of complaints made about a specific address from 1978 to December 2018.
5. On 5 March 2019, the Council responded. It refused to provide the requested information. It stated that the information in question was the personal data of the individuals who had submitted the complaints and it

considered that disclosing such information would breach the principles of the General Data Protection Regulation ("the DP principles"). It therefore argued that the information was excepted under Regulation 13 of the EIR.

6. The complainant then refined his request to seek only a list of complaints, showing the date each one was made along with a summary of the content. The Council again refused this request citing Regulation 13 of the EIR.
7. Following an internal review, the Council wrote to the complainant on 7 June 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 15 June 2019 to complain about the way his request for information had been handled.
9. At the outset of the investigation, the Commissioner noticed the similarity between the address which the complainant had provided and the one specified in the address. She therefore asked the Council to consider whether any of the requested information was in fact the *complainant's* personal data. She then asked to be provided with copies of any information which the council *did not* consider to be the complainant's personal data.
10. The Council responded and provided the Commissioner with complete copies of each complaint. It stated that "*We provided [the complainant] with copies of letters constituting his own personal data under Subject Access rights.*" However, based on other information within the Council's submission, it appeared that the Council had only provided the complainant with copies of letters it had sent to him in respect of the complaints which had been submitted – not copies of the complaints themselves. It therefore maintained that the information was the personal data of the individuals who had submitted the complaints.
11. Having considered the withheld information, the Commissioner was not convinced that the information could not be sufficiently anonymised to protect the data protection rights of the individuals. However, it was clear that almost every complaint named the complainant and referred to him as occupying the property in question. She has therefore taken the decision to apply Regulation 5(3) proactively to the withheld information in its entirety, preventing its disclosure.
12. The analysis that follows explains why the Commissioner has exercised her discretion in this manner.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
14. As it is information relating to planning and the enforcement of planning laws, the Commissioner believes that the requested information is information about "measures" affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

The Council's position

15. Council argued that the withheld information could not be sufficiently anonymised as to remove the possibility that the individual who

submitted the complaint could be identified from the wording of the complaint. It noted that the property in question was in a rural location and therefore it would be possible, by reference to geographic locations, to identify the person who made the complaint – even if their names were removed. It did not expand on this point, or identify any examples, within the withheld information, which would support this line of argument.

16. The Council argued that the individuals who submitted the complaints had done so voluntarily and would therefore have a legitimate expectation that their identities and the fact that they had made a complaint, would be disclosed to the subject of their complaint. As it believed the individuals in question were identifiable from the information, the Council therefore argued that disclosure would breach the DP principles – namely that personal data should only be processed in a manner which is “lawful, fair and transparent.”
17. Finally, the Council noted that it has served a Planning Enforcement Notice on the complainant, copies of which were included in the withheld information. It noted that the complainant had yet to comply and that:

“Consequently, as the personal data relates to a matter which may be or is a criminal offence the personal data may also be criminal offence data.”

18. The Council went on to inform the Commissioner that:

“In accordance with the Data Protection Act 2018 s11(2)(a) & (b) the definition of ‘criminal convictions data’ as provided by GDPR A10 includes the alleged commission of offences and proceedings relating to actual or alleged offences. Such data is termed ‘Special Category’ data per DPA2018 s11(1).

“In this case there is potential for [the complainant] to have committed an offence that would qualify to be treated as ‘Special Category’. The representations of third parties would also qualify to be treated as ‘Special Category’ data in as much as they relate to the proceedings.

“We maintain that investigations into planning enforcement matters qualify as proceedings.”

The Commissioner’s view

19. The Commissioner has a number of problems with the Council’s submission as it makes some basic errors in relation to data protection law.

20. Information about actual or alleged criminal offences is not 'Special Category' data: it is Criminal Offence Data.¹
21. The Council has not explained why it believes the Planning Enforcement Notice falls within the scope of the request and it would appear to the Commissioner that it does not – as the request sought the *complaints* which had been submitted.
22. Even if the Commissioner were to accept that the Enforcement Notice was within scope, a criminal offence can only be committed if the person(s) on whom it is served fails to comply with the required actions. Therefore the Notice cannot, itself, identify or allege that someone has committed a criminal offence. The criminal offence (or alleged offence) must have already been committed for information to fall into this category of personal data.
23. Complaints about planning breaches might be part of the "proceedings" for serving an enforcement notice, but breaching planning conditions (and hence having an enforcement notice served) is not itself a criminal act. *A failure to comply with the Notice* is the criminal offence and the complaints have nothing to do with (non-)compliance with the Notice – therefore the complaints cannot relate to "proceedings" necessary to dispose of a criminal offence.
24. Finally, even if the Commissioner *were* to accept the Council's argument that the complaints were part of the "proceedings" for a criminal offence, she certainly doesn't accept that it is criminal offence data *about the individuals who made the complaints*. They have committed no criminal offence, nor are they alleged to have done so. It could only be criminal offence data *about the complainant*.
25. Having reviewed the content of the complaints which had been submitted, she did not identify any distinguishing features which would identify the person who had submitted it. Whilst she accepts that a phrase such as "we can see from our bedroom window that...." might enable someone to work out the direction from which the person making the complaint had viewed the property in question, such phrases were largely absent from the withheld information. In the absence of cogent explanations from the Council, she considers that appropriate redactions

¹ Special Category Data is defined in Article 9 of GDPR and relates to information such as a person's race, medical records and sexual orientation. Criminal Offence Data is defined in Article 10 of GDPR and section 11(2) of the Data Protection Act 2018 as information relating to criminal offences (or alleged offences) and "proceedings" to dispose of those offences.

may allow the information to be anonymised such that it does not identify the third parties involved.

26. The Commissioner has thus decided to consider personal information about the complainant as the main part of her decision.

Regulation 5(3) – Personal data of the requestor

27. Regulation 5(1) states that: *“a public authority that holds environmental information shall make it available on request.”*
28. Regulation 5(3) states that: *“To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.”*
29. The withheld information was all generated as a result of allegations that the complainant and his family had breached planning rules in respect of their home and the area surrounding it. The correspondence is therefore inextricably linked to the complainant’s home and the complainant is referred to as living at the property several times within the withheld information.
30. The Commissioner takes the view that the address of and details about an individual’s home would be the personal data of that individual. As the address and details are central to both the request and the withheld information, it follows that the entirety of the withheld information would be personal data, as it could identify the complainant, either on its own or in conjunction with other publicly available information, such as from the Land Registry, or from local knowledge. The information in question is, therefore, the personal data of the complainant.
31. The Council has not attempted to cite Regulation 5(3) at any point during this process – despite the Commissioner raising the likelihood that it might apply at the outset of her investigation.
32. The Commissioner is also responsible for regulating Data Protection legislation and, as such, takes her responsibility to protect personal data seriously when considering information which can be disclosed under either the FOIA or the EIR. She will therefore step in and apply exceptions (or exemptions) herself to prevent disclosure of personal data where she considers this necessary in order to avoid a breach of data protection legislation.
33. Disclosure under the EIR is considered to be disclosure to the world at large and not to the complainant specifically. It is the equivalent of the Council publishing the information on its website.

34. In this case, the Commissioner considers that the Council should not be publishing such information and she has thus applied Regulation 5(3) to prevent the information being disclosed. Regulation 5(3) is an absolute exception and the Commissioner is not required to consider either the balance of public interest or the complainant's wishes – although she comments further on this request in "Other Matters" below.
35. The Commissioner therefore concludes that, as the information in question is the personal data of the complainant, Regulation 5(3) is engaged and the Council was not obliged by the EIR to disclose the withheld information.

Other matters

36. The Commissioner cannot require a public authority to take action under the Data Protection Act via an EIR decision notice. However, given the basic lack of understanding of data protection law which the Commissioner has highlighted above, the Council may wish to reconsider the request of 5 February 2019 under Subject Access.

Right of appeal

37. 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

38. 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.
39. 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

Phillip Angell
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