

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

Date: 27 March 2019

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
Shropshire
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested information from Shropshire Council (the "Council") about land it had purchased. The Council advised him that it did not hold most of the requested information but did provide him with a copy of a Compulsory Purchase Order, with some names and addresses redacted under section 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Council wrongly handled the request under the FOIA. In failing to consider the request under the EIR, it breached the requirement of regulation 14 of the EIR. The Council also breached regulation 5(2) of the EIR in failing to respond within 20 working days and regulation 11(4) of the EIR by failing to reconsider the complainant's representations within 40 working days.
3. The Commissioner finds that the Council was entitled to rely on regulation 13 (personal information) of the EIR to withhold the requested information. No steps are required.

Request and response

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

"I understand the council bought land to build the Theatre Severn SY3 8FT and other buildings and the Guildhall (now University

Centre) SY3 8HQ and other buildings. Please let me know the names and addresses of the sellers, the dates of purchase and the sums paid. Please also let me have a copy of each of the contracts”.

5. On 24 July 2018 the Council responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so: section 21 (accessible to applicant by other means) and section 43 (commercial interests).
6. On 27 July 2018 the complainant requested an internal review of the application of section 43. Having received no response this was chased on 29 August 2018 and again on 31 October 2018.
7. Following the Commissioner’s intervention, the Council provided an internal review on 11 December 2018. It revised its position and advised that it did not hold the contracts. It provided the complainant with some information it had located, ie a Compulsory Purchase Order (“CPO”), from which it redacted some personal data under the exemption at section 40(2) of the FOIA.

Scope of the case

8. The complainant initially contacted the Commissioner about the lack of internal review on 14 November 2018. The Commissioner wrote to the Council on 29 November 2018 and an internal review was subsequently provided on 11 December 2018.
9. On 8 January 2019 the complainant wrote to the Commissioner again to complain about redactions to the Compulsory Purchase Order which had been provided to him. The redactions had been made under section 40(2) of the FOIA and will be considered below.
10. At a late stage in the Commissioner’s investigation the complainant wrote to her stating that he believed his request should have been dealt with under the EIR and he also wished to complain about the length of time taken to conduct an internal review. He expressed further dissatisfaction that the Council had been allowed 20 working days in which to respond to the Commissioner’s enquiries.
11. In respect of the query regarding the EIR, the Commissioner initially notes that when she wrote to the complainant commencing her investigation he was invited to provide details of any other matters he believed should be addressed within 10 working days to avoid any unnecessary delay; this additional matter has been raised outside this time frame and required further correspondence with the Council for its

views as to whether or not it considered FOIA or EIR to be the appropriate regime.

12. The Commissioner has commented on the time limit allowed for a public authority to respond to her enquiries in "Other matters" at the end of this notice.

Reasons for decision

Access regime

13. As set out above, the Council responded to the request under the FOIA. However, it is the complainant's view that the request was for environmental information and that the Council ought to have dealt with it under the EIR rather than the FOIA.
14. The Commissioner raised this point with the Council and it advised that it had decided to deal with it under the FOIA as it didn't consider that the request fell within the definition of "environmental information" under regulation 2 EIR 2004. It explained:

"Whilst the request does relate to land that was bought to build Theatre Severn the specific question relates to financial information in terms of names and addresses of sellers and copies of contracts for the land purchased. As the question was focused on this element rather than specifically about the building project we felt FOI was more appropriate and that Regulation 2 EIR did not apply".

15. 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..."

16. The Commissioner has considered the wording and focus of the request and the wording of Regulation 2 as set out above. The CPO is entitled "*The Shrewsbury and Atcham Borough Council (Land at Frankwell) Compulsory Purchase Order 2004*". It refers to The Town and Country Planning Act 1990 and The Acquisition of Land Act 1981. The CPO clearly relates to the purchase of land and a change of use and she is satisfied that the request should have properly been considered under the EIR by virtue of regulation 2(1)(c).

Regulation 14 – refusal to disclose information

17. In the circumstances of this case the Commissioner has found that although the Council originally considered this request under the FOIA it is the EIR that actually apply to the requested information.
18. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information specifies, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under FOIA.

Regulation 5 – duty to make available environmental information on request

19. Regulation 5(2) states that such information shall be made available:

"as soon as possible and no later than 20 working days after the date of receipt of the request".

20. The Commissioner considers that the request in question constituted a valid request for information under the EIR. As the Council failed to issue a valid response to the request within 20 working days, it breached regulation 5(2) of the EIR.

Regulation 11 – representations and reconsideration (internal review)

21. Regulation 11 of the EIR states that:

(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on

which the applicant believes that the public authority has failed to comply with the requirement.

(3) The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

22. The complainant made representations to the Council on 27 July 2018 which demonstrated that he was unhappy with the response he had received to his request.
23. The Council did not respond until 11 December 2018, after the Commissioner's intervention. The Commissioner therefore concludes that the Council breached regulation 11(4) of the EIR.

Regulation 13 – personal data

24. The Commissioner considers that the arguments provided by the Council in respect of its application of section 40 of the FOIA to the withheld information are comparable to what would be required when considering the application of regulation 13. She has therefore used her discretion and considered them below rather than requiring the Council to issue a fresh response in line with the EIR; this is to ensure that the complainant is not disadvantaged by any further delay.
25. As the Council's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 ('DPA') and General Data Protection Regulation ('GDPR') legislation came into force, the Commissioner considers that the DPA/GDPR applies.
26. 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.
27. In this case the relevant condition is contained in regulation 13(2A)(a)2. 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 set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').

28. 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 EIR cannot apply.
29. 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?

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

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

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. 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.
34. The withheld information in this case is the names and addresses of eight parties.
35. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the named parties on the CPO. She is satisfied that this information both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
36. 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.
37. The Commissioner agrees that the most relevant DP principle in this case is principle (a).

Would disclosure contravene the principle (a)?

38. Article 5(1)(a) GDPR states that:-

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

39. 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.

40. 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) GDPR

41. 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.

42. The Commissioner considers that the lawful basis most applicable is basis (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"¹.

43. In considering the application of Article 6(1) (f) GDPR in the context of a request for information under 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;

¹ 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"*.

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.

44. 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

45. In considering any legitimate interest(s) in the disclosure of the requested information public under 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.

46. 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.

47. The Council advised the Commissioner that:

"We responded by confirming that copies of the contracts were not held but did provide what we did hold ..., which was a copy of the compulsory purchase order. This detailed the extent description and situation of land, the owners of the land and their addresses, the lessees and the occupiers details.

In this case we released to the requester the majority of the information, with the exception of any individual owners and their addresses As such most of the information was sent and in our assessment there would be no or very minimal legitimate interest or public interest as such in knowing exactly who the owners of the land was/were (where individuals). It would mean greater transparency and openness however for the reasons already stated in earlier questions this had to be balanced between the rights and freedoms of the individuals and in our assessment those rights clearly outweighed any legitimate or public interest".

48. The complainant has advised the Commissioner that:

"The redacted information was required under the Town and Country Planning Act 1990. It is necessarily public information. A compulsory purchase order has to be for the greater public good and not for private gain. Again, it is necessarily public information".

49. The Commissioner has viewed the withheld information and can confirm that the information that has been redacted is the details of eight "owners or reputed owners" in five entries on the CPO, the remainder having been disclosed. It is not apparent why their disclosure would be for the "greater public good" and how it would negate "private gain", something which the complainant did not expand on. There are no monetary values on the CPO and it is therefore not possible to assess how much money each party was given to evidence any potential gain. The Commissioner considers that the complainant has provided no specific legitimate interest in disclosure and no such interest is otherwise apparent.

The Commissioner's view

50. As stated above, the complainant has not provided any legitimate interest in provision of the information. It is therefore not necessary for the Commissioner to undertake a necessity test to consider why disclosure would be needed in order to meet that aim. Furthermore, she does not consider that it is otherwise apparent why disclosure of the information would be necessary to serve any public interest.
51. As the Commissioner has decided in this case that there is no legitimate interest in disclosure, she has not gone on to conduct the necessity or balancing tests.
52. As there is no legitimate interest in disclosure, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
54. 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).

Other matters

55. Although they do not form part of this notice the Commissioner wishes to highlight the following.

Time in which to respond to the Commissioner's enquiries

56. In respect of the 20 working day limit which is allowed for a public authority to respond to the Commissioner's enquiries, this is a standard time frame which the Commissioner considers to be reasonable for

additional enquiries to be made and a full response provided. The Council provided its response to her within this time limit.

57. It is also noted that the Council responded to her additional enquiry regarding its citing of FOIA rather than the EIR within 3 working days.

Right of appeal

58. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

59. 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.

60. 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

Carolyn Howes
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