

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

Date: 31 July 2019

Public Authority: North Tyneside Council
Address: Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside
NE27 0BY

Decision (including any steps ordered)

1. The complainant has requested from North Tyneside Council ("the Council"), all correspondence between named council officers and a sole trader. The Council provided some information, but redacted some under regulation 13 of the EIR – third party personal data.
2. The Commissioner's decision is that the Council is entitled to rely on regulation 13 of the EIR to refuse to provide the information it withheld.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 November 2018, the complainant wrote to the Council and requested information in the following terms:

"I request the following information under the Freedom of Information Act:

Copies of all the correspondence to date between [first named council officer] and [named sole trader].

Copies of all the correspondence to date between [second named council officer] and [named sole trader].

Copies of all the correspondence to date between [third named council officer] and [named sole trader].

Copies of all the correspondence to date between [fourth named council officer] and [named sole trader].

Copies of all the correspondence to date between [fifth named council officer] and [named sole trader].

Copies of all the correspondence to date between [sixth named council officer] and [named sole trader].

The term 'correspondence' is to refer to electronic mail or hard copy or any written communication."

5. The Council responded on 26 November 2018. It asked for the request to be clarified, in regard of what correspondence is required and the timeframe.

6. The complainant responded to the Council on 28 November 2018 and provided the following:

"Thank you for your reply. To enable my FOI request I can put the timescale as from 1st January 2017 for all the specified individuals in my FOI request. I do not believe that my FOI request will exceed an appropriate limit as the expectation is that the amount of correspondence in total will be relatively small. As my request concerns a small business and their activities and conduct, it is my expectation that such information requested will relate to that business and not to the fabric of the business's rented premises, or the Council tax details of said premises. My request is, I contend, both fair and reasonable to make and is not made in a vexatious manner. As I have not had prior sight of the information requested I contend that my request is as specific as it can be at this time."

7. The Council responded on 14 December 2018. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions of the Freedom of Information Act 2000 (FOIA): Section 40(1) – personal data of the requester, section 40(2) – third party personal data and section 41 – information provided in confidence.

8. Following an internal review the Council wrote to the complainant on 19 December 2018. It stated that it upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 8 January 2019 to complain about the way his request for information had been handled.
10. Following receipt of the complaint, the Commissioner advised the Council that the request falls under the Environmental Information Regulations (EIR) and as such, the response would be considered using the EIR.
11. The Commissioner considers that the arguments provided by the Council in respect of its application of section 40(2) 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.
12. The Commissioner notes that the Council also considered that some of the withheld information had been provided in confidence and in the event that regulation 13 is not engaged, she will use her discretion to consider further relevant provisions of the EIR.

Reasons for decision

Regulation 2(1) -Is the requested information environmental?

13. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"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... emissions... and other releases into the environment, likely to affect the elements referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes... and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

14. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “*any information... on*” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment.
15. The Commissioner has considered the withheld information in this case which consists of correspondence between council employees and a sole trader. Due to the subject matter of the correspondence, the request falls under the EIR.
16. The Commissioner is therefore satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect or be likely to affect the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b).

Regulation 13 – the personal data of a third party

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.

17. 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’).
18. 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.

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

19. 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 requested information personal data?

20. Section 3(2) of the DPA 2018 defines personal data as:

“any information relating to an identified or identifiable living individual”.

21. Consequently the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The Council considers that all of the withheld information is personal data. It consists of correspondence between particular named parties, and the Council considers that it is the personal data of all of these individuals as well as other individuals referred to in the correspondence.
25. The Commissioner notes that it is not the Council's position that only the names and contact details of the individuals are personal data. Rather, it considers that all of the correspondence, due to its subject matter, relates to individuals who are identifiable from the correspondence.
26. In the circumstances of the case, having considered the withheld information, the Commissioner considers that it does relate to and identifies living individuals. Specifically, she considers that all of the withheld information can be said to be the personal data of the sole trader since it relates to their activities. She is therefore satisfied that it falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The Commissioner is satisfied that this information both relates to and identifies certain individuals. The fact that information constitutes the

personal data of an identifiable living individual does not, however, automatically exclude it from disclosure under the EIR.

28. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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".

30. 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.
31. 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.
32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".²

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

"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."

33. 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) of fundamental rights and freedoms of the data subject.

34. 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

35. 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.

36. 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.

37. The personal data being considered in this case is that of several individuals regarding the business at the site in question. The complainant has stated that he is interested in correspondence which relates to the business's operating practices, as he considers that the business has affected the public's enjoyment of an open space. The Commissioner accepts that this is a legitimate interest.

Is disclosure necessary?

38. '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.

39. The Commissioner is aware that the correspondence which has been requested is not in the public domain and isn't readily accessible through

other means. She therefore accepts that disclosure under the EIR would be necessary to meet the legitimate interest in disclosure explained above.

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

40. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, the impact of disclosure has to be considered. For example, if the data subjects would not reasonably expect that the 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.
41. 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. 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.
42. The Council has stated that it believes that the individuals concerned would have an expectation of confidentiality and privacy. It has added that due to the circumstances of this case, it has not asked any individual for consent to disclose their personal data.
43. In carrying out the balancing exercise, the Commissioner has focused on the rights and freedoms of the sole trader. As previously explained, she is satisfied that all of the withheld information is his personal data.
44. In her view, it is clear from the withheld information that the sole trader corresponded with the Council with no expectation that the correspondence would be made public. The correspondence relates to private matters regarding the operation of his business.
45. The Commissioner notes the Council's view that disclosure could endanger the physical or mental health or the safety of relevant

individuals and she agrees that, at least to some extent, it is likely that damage or distress would be caused by the disclosure of the information.

46. The Commissioner acknowledges that the sole trader operates in a public area. However, from viewing the information, the Commissioner has not identified anything which would raise a concern as to how the business is being operated.
47. 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 subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
48. 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.
49. 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).

Right of appeal

50. 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

51. 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.
52. 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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