

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

Decision notice

Date: 5 November 2019

Public Authority: Kirklees Council
Address: Civic Centre
3 Market Street
Huddersfield
HD1 2WG

Decision (including any steps ordered)

1. The complainant requested from Kirklees Metropolitan Council (“the Council”) information in relation to fly tipping on a public footpath. The Council provided the information it considered to be held within the scope of the request. However, it decided to redact parts of the information disclosed citing regulation 13 (personal data) of the EIR.
2. The Commissioner’s decision is that the Council on balance of probabilities held no further information to what was already disclosed and the Council was correct to redact parts of the information provided in compliance with regulation 13 of the EIR.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 23 October 2018, the complainant wrote to the Council requesting information in the following terms:

"Please provide information you may hold regarding the dumping of fly tipping on this public footpath which was reported in June 2018 and the Council's subsequent decision to permit the burying of this waste beneath Footpath 144. This should include records of site visits, emails & telephone calls internally and with the owner of the waste. Also documentation which demonstrates the owner of the waste has transported and dealt with the waste in line with the statutory duty of care required under current legislation. In addition any documentation which demonstrates the Council's decision making process in this case."

5. The Council acknowledged receipt of the information request on 24 October 2018 and provided the complainant with a response on 21 November 2018. The Council disclosed some documents, but withheld some of the content citing regulation 13 of the EIR, which allows public authorities in certain circumstances to withhold personal data.
6. Remaining dissatisfied with the response received, on the same day the complainant wrote back to the Council requesting an internal review.
7. The Council provided the complainant with the outcome of its internal review on 11 February 2019. The Council upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 11 April 2019 to complain about the way his request for information had been handled.
9. The complainant confirmed to the Commissioner that he was not satisfied that the Council had identified all the information it held that fell within the scope of his request, nor with the redactions made under regulation 13.
10. The following analysis focuses on the following:
 - a. whether the Council identified all the information it held within the scope of the complainant's request;
 - b. whether any of the information within the scope of the request is the personal data of the complainant; and
 - c. whether the Council correctly applied regulation 13 of the EIR when it decided to redact some parts of the information disclosed.

Reasons for decision

Is the requested information environmental?

11. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. This provision defines environmental information 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, 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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".*

12. In coming to her view that the requested information is environmental, the Commissioner is mindful of *the Council Directive 2003/4/EC*¹ 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. This will likely include information that would inform the public about the environmental matter under consideration and would facilitate effective participation by the public in environmental decision making.

¹ http://www.legislation.gov.uk/eudr/2003/4/pdfs/eudr_20030004_adopted_en.pdf

13. In this case the information requested is related to a reported fly tipping on a public footpath and how the Council responded to that matter.
14. The Commissioner is of the view that the information in question here is on waste and on measures by the Council that would affect that waste. The Commissioner therefore considers that the information requested in this case falls under the definition of environmental information set out in regulations 2(1)(b) and (c) of the EIR.

Regulation 5(1) – Duty to make environmental information available on request

15. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
17. The Commissioner invited the Council to make a submission in relation to the searches it conducted to identify the information it held at the time of the request.
18. The Council confirmed that it carried out thorough searches in its *"Highways & Transportation Services system (known as ROSS) which is where the requests were logged, collated and completed."* Additional searches were conducted in email accounts of Council officers who were involved in the handling of this matter and in generic email accounts for the Public Rights of Way (PROW) group. The Council also looked into *"the Councillor enquiries/MPS enquiry group as the applicant made contact with these groups raising the same issue as originally raised in ROSS."*
19. The Council explained that in its searches the search terms used were the reference numbers under which the matter was registered in the ROSS system and the Councillor enquiries system, MPs enquiry reference number as well as the unique PROW reference number.

20. The Council stated that the above searches did not result in additional information being identified, further to that which had already been disclosed to the complainant, or withheld under regulation 13.
21. The Council asserted that if further information within the scope of the request were held it would have been recorded electronically.
22. The Council also told to the Commissioner that its officers *"are advised to manage their emails in accordance with their workloads. Any records which need to be retained are stored in the appropriate location (which could be a system or network folder or an email resource account, depending on the nature of the record). In this case it is the ROSS system."*
23. The Council said that there is no statutory requirement to retain information of the nature requested.
24. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold any further information relevant to this request to that which had already identified and either disclosed to the complainant, or withheld under regulation 13.
25. The Council has conducted searches for the information and confirmed that it has no statutory duty or business purpose to hold further information.
26. Whilst the complainant is of the view that further information should be held, it is often the case that there is a gap between what a requester believes should be held and what is actually held by a public authority. She considers that the Council's explanations as to why it does not hold the specific requested information to be reasonable.
27. The Commissioner is satisfied that on the balance of probabilities, further information falling within the scope of the complainant's information request is not held by the Council. Accordingly, she does not consider that there is any evidence of a breach of regulation 5.

Regulation 5(3) – the complainant's own personal data

28. Regulation 5(3) of the EIR provides that the duty to make environmental information available on request imposed by regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.

29. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

"any information relating to an identified or identifiable living individual".
30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
31. Included within the information withheld from the complainant under regulation 13 is an email message sent by the complainant to his MP where he raised his concern regarding public footpath 144. The complainant is clearly identifiable from the information. The letter makes reference to the complainant by name, email address and his postal address.
32. In its response to the Commissioner's enquiries, the Council did not cite regulation 5(3) or consider the complainant's request as a Subject Access Request. However, the Commissioner considers it clear that this information both identifies and relates to the complainant, and so is his personal data according to the definition in the DPA. It is, therefore, subject to regulation 5(3) and the Council was not obliged to disclose this email.

Regulation 13 – third party personal data

33. 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) are satisfied.
34. 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.
35. 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 Data Protection (DP) principles.

Is the withheld information personal data?

36. As explained above in paragraphs 29-30 of this decision notice, section 3(2) of the DPA provides the definition of personal data. The same provision is relevant when determining the personal data of third parties and the same rules apply here - the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

37. 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.
38. 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.
39. The remaining part of the withheld information, other than the personal data of the complainant covered above, consists of names, email addresses, initials and user codes. The Council explained that there are 12 living individuals that could be identified if the information was disclosed without redactions.
40. Having reviewed an unredacted copy of the withheld information, the Commissioner is satisfied that it both relates to and identifies the individuals concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
41. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene the first data protection principle?

42. 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".

43. 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.
44. 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.
45. To determine whether or not disclosure is lawful, the Council should consider whether there is a lawful basis for processing in Article 6(1) of the GDPR:

"processing is necessary for the purpose of the legitimate interests pursued by the controller or by a third party except where such

interests are overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

46. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the EIR is Article 6(1)(f); legitimate interests. In considering the application of this provision 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;
 - 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 interests, fundamental rights and freedoms of the data subject.
47. 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

48. 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.
49. 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.
50. The Council recognises that there is a legitimate interest in this case in respect of understanding how the Council handled an issue related to disposal of waste.
51. The complainant believes that the information requested deserves more transparency. He argued that taking into account that the subject matter of the request is related to environmental issues, members of the public are entitled to know how the Council's decisions of this nature are made.
52. Having considered the above, the Commissioner is satisfied that there is some legitimate interest in the disclosure of the information as it concerns how the Council dealt with this reported incident, as well as there being a general interest in transparency.

Is disclosure necessary?

53. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
54. The Commissioner is aware that the information requested with the personal data of the individuals involved is not in the public domain and is not readily accessible by 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 subjects' interests or fundamental rights and freedoms

55. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or their 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 the information would be disclosed to the public at large 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.
56. 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 regarding the disclosure; and
 - the reasonable expectations of the individuals.
57. 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 the individuals' 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.

58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individual.
59. As part of its submission in response to the Commissioner's investigation letter, the Council provided a brief profile about each individual whose personal data were redacted, followed by an explanation of their involvement in dealing with the concern raised by the complainant.
60. The Council advised that 11 Council officers whose personal data have been redacted hold relatively junior posts and only one of them has his name and email address published in the Council's website but he had no role in dealing with the matter in question.
61. The Council explained that their names appear within the withheld information because:
 - they were responsible for coordinating the information request, but had no role in dealing with the subject matter;
 - the thread of email was passed to them, but had no role in dealing with the subject matter;
 - they logged emailed service requests from the complainant, but had no role in dealing with the subject matter;
 - they handled the service request; or
 - they responded to the service request;
62. However, the Council stated that taking into account their junior positions, none of them would expect that their personal data would be disclosed into the public domain.
63. In addition to the above, the Council explained that the Council officers whose initials and unique user codes were redacted were only "*involved in processing (passing forward, completing and uploading documents on an internal system).*" According to the Council, they too would have a reasonable expectations that their personal data remains undisclosed.
64. As mentioned above in paragraph 44, one of the individuals whose name was redacted was an assistant to an MP whom the complainant contacted in the meantime. The Council stated that this individual's name does not appear to the MP's web page and his name became part of the information held only "*because he passed an email to the MP on to the Council.*" The Council maintains that, due to their facilitating role in this process, it is reasonable to expect that the data subject would not

assume that his personal data to be disclosed into the public domain by the Council.

65. The Commissioner notes that all the individuals involved, whose personal data was redacted, were acting in their professional capacity.
66. The Council stated that, due to the incidental nature of their involvement and/or their junior positions, it did not deem it appropriate to ask them whether they would consent to the disclosure of their personal data.
67. The Commissioner has examined the unredacted copy of the withheld information. She does not consider that disclosing the names of the individuals involved in the communication or who were only copied as part of the handling of the case in question would add any value to the information already disclosed or would contribute to increasing the transparency of the Council.
68. It is the Commissioner's view that although the data subjects in question were acting in their professional capacity, bearing in mind their relatively junior positions it is reasonable for them to expect that their personal data included in the withheld information would remain outside of the public domain.
69. Considering their junior role and the fact that they are not involved in the process of decision making on behalf of the Council, the Commissioner considers that it is likely that disclosing their personal data would cause unnecessary and unjust distress to them.
70. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy may have caused unwarranted distress. She acknowledges that there is a legitimate interest in matters relating to the issue in question, but she does not consider that the legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy. The Commissioner has therefore decided that the Council was entitled to withhold this information under the exception at regulation 13(1).

Right of appeal

71. 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

72. 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.

73. 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
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