

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 October 2019

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested information from Norfolk County Council (the Council) regarding details provided for an investigation which related to a project to develop a waste incinerator in Norfolk. The Council provided information which contained some redactions in accordance with regulations 12(3) and 13(1) (third party personal data) of the EIR.
2. The Commissioner's decision is that the Council was correct to apply regulations 12(3) and 13(1) to withhold some of the information. However, the Commissioner finds that the Council did not comply with the requirements of regulation 5(2) as it disclosed some information beyond the statutory time limit. The Council also breached regulation 11(4) of the EIR by failing to provide its internal review response within the required 40 working days. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

3. On 23 February 2018 the complainant wrote to the Council and requested information in the following terms:

"Please provide a copy of all correspondence (including attachments and referenced documents) between Norfolk County Council and Defra between July 1st 2011 and November 1st 2011."
4. On 26 February 2018 the Council acknowledged receipt of this request.

5. On 21 March 2018 the Council responded and informed the complainant that her request was being processed under the EIR as it considered the information requested falls under the definition of environmental information. The Council also advised that it was extending the time limit for responding and that the additional 20 working days would take it up to 24 April 2018.
6. On 27 April 2018 the complainant notified the Council that the response was overdue.
7. On 30 April 2018 the Council apologised to the complainant for the delay in issuing a response. The Council informed her that it was still working on this and hoped to release the information as soon as it could. The Council had also advised her that she could request an internal review once the response was issued.
8. On the same day and on 22 May 2018 the complainant expressed her dissatisfaction with the delay on releasing the information.
9. On 23 May 2018 the Council provided the complainant with some information relating to the request and redacted some parts of the information under regulation 12(3) and regulation 13(1) (personal data). The Council also informed the complainant that it was still reviewing the correspondence and that it would later disclose the information to her as a second batch.
10. On 11 June 2018 the complainant contacted the Council about the delay in disclosing the information, and on the same day the Council informed her that the redacted information was waiting approval from the service manager.
11. On 13 June 2018 the Council provided the complainant with some further information relating to the request. The Council redacted information under regulation 12(3) and 13(1) (personal data) of the EIR. The Council informed the complainant that it was still reviewing the correspondence covered by the request and that it would later disclose the information to her as a second batch.
12. On 16 July 2018 the complainant questioned the redactions of Council officer's details from the information which the Council had released to her, and requested an internal review.
13. On 17 September 2018 and 25 September 2018 the complainant chased the Council's internal review response.

14. On 1 October 2018 the Council provided the complainant with its internal review outcome. It clarified that the redactions relate to individuals who were not responsible for policy development or significant decision-making in relation to the incinerator project.

Scope of the case

15. The complainant contacted the Commissioner on 21 October 2018 to complain about the way her request for information had been handled. Specifically, the complainant was dissatisfied with the Council's internal review. She confirmed her complaint was with regards to the Council's delay in responding, with its lack of communication, and also of the redaction of Council's officers, external advisors and external government advisors names within the information provided.
16. The following analysis considers whether the requested information can be categorised as environmental information which should be handled under the EIR. It also covers whether the information is the personal data of a third party that can be withheld under regulations 12(3) and 13(1) of the EIR. The procedural matters associated with the Council's handling of the request have also been considered.

Reasons for decision

Is the requested information environmental?

17. The Council dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information satisfies the definition of environmental information provided by regulation 2 of the EIR.
18. Under regulation 2(1) of the EIR environmental information is defined 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 ...land, landscape and natural sites including wetlands...biological diversity...*

(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) and (b) as well as measures or activities designed to protect those elements”.

19. The Commissioner has considered the withheld information in this case, which relates to a project to develop a waste incinerator in Norfolk. The withheld information is names of individuals redacted from a report, minutes of meetings and correspondence relating to the proposed project.
20. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(b), 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). She is therefore satisfied that the Council considered the request under the correct access regime, and has gone on to examine whether the Council was correct to rely on regulations 12(3) and 13(1).

Regulation 12(3) / regulation 13(1) – third party personal data

21. 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.
22. 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”).

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

23. 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.
24. 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?

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

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.
28. 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.
29. This information comprises the names, signatures and contact details of Council officers and other third parties.
30. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a third party. She is satisfied that this information both relates to and identifies the third party concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
31. 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.
32. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

33. 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".

34. 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.

35. 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) of the GDPR

36. 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

37. In considering the application of Article 6(1)(f) 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 legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

²Article 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".

Legitimate interests

39. In considering any legitimate interest(s) in disclosing 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.
40. 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.
41. The background to this case relates to a failed plan to introduce a £500m waste incinerator at King's Lynn³. In 2011 initial plans had been prepared and contracts were signed. However, there were significant objections to the project taking place, including strong public opposition demonstrated in a public referendum⁴. In April 2014 the Council withdrew from the contract, stating that the reason was due to a failure to secure satisfactory planning permission. It was later made public (December 2014) that the Council had agreed to pay compensation of £33.7m to the developer, Cory Wheelabrator for sums it had incurred in developing the project.
42. The Council disclosed the requested information to the complainant but it withheld personal data relating to agents, other agencies and organisations. Information relating to current and former Council employees was also redacted. The Council argued that the individuals concerned were not responsible for policy development or decision making in relation to this project, which is the subject of this request. The Council further argued that as the individuals concerned were not in a position to be held directly accountable for policies or key decisions relating to the project, they would have a reasonable expectation that their names would not be in the public domain.

³ <https://www.bbc.co.uk/news/uk-england-norfolk-30276721>

⁴ <https://www.bbc.co.uk/news/uk-england-norfolk-12612333>

43. The complainant argued and considered it concerning that anyone from the Council, or any advisors acting on its behalf, that are sending, receiving or copied into confidential emails that are *"effectively drawing up a £600 million contract, are not considered responsible for significant decision-making."* The complainant further argued that *"the individuals concerned, should have the expectation that their public actions will be subject to scrutiny irrespective of what attempt the Council makes to avoid accountability."*
44. She is also of the view that there is a legitimate interest in transparency and knowing the names of those that had worked on the project, and who contributed to the important decisions made in order to complete a contract, which involved significant sums of public money. The complainant believes that taxpayers have paid for legal and financial advisors for the project, but she considers this to be unreasonable when all the decisions over the £600m contract were made by one person.
45. The complainant believes that the public interest is not simply in what had been said but that there is an interest in who had said it. She argued that the public is aware of the matter which resulted in a cost to *"Norfolk taxpayers £34 million"*, however, the complainant considers that the public want to know who the individuals behind it were.
46. 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 which ultimately led to the Council owing significant sums of money as a result of the circumstances surrounding the project.
47. However, the Commissioner considers that knowing the identity of the individuals concerned would not greatly add to knowledge about what actually occurred. The content of the correspondence has already been disclosed in response to the request, including the senior Council officer's details and the job titles/roles of the correspondents. She also considers that as the correspondence relates to July 2011 – November 2011 the value of knowing the identities of the correspondents is weak. The public are aware of what occurred and the main issues which were involved.
48. Whilst the Commissioner considers that the public does have the legitimate interest in the information, she considers that this is relatively weak in this situation.

Is disclosure necessary?

49. "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.
50. 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 had been redacted. The chain of events running through the correspondence is however still fully understandable without the individual identities being disclosed.
51. The Commissioner has considered whether it is necessary to know the identities and contact details of the correspondents in order to fully meet the public's legitimate interest in transparency over the issues involved with the failure of the project.
52. The complainant believes that disclosure of the information is necessary for the public to be able to establish the seniority of those involved, and knowing that they were qualified to perform their roles. She argued that *"If they were not in a senior enough role then the public have a right to know that low-level officers and advisors were tasked with drawing up a £600 million contract, the full cost of which fell to Norfolk taxpayers, and the Council should be held accountable for it."* The complainant believes that the Council should be held accountable for it and also argued that there is no public interest in withholding the names.
53. The complainant deems it unfair to Norfolk's taxpayers to continue to prevent the disclosure of the names of the people who contributed in drawing up the contract for the project. Specifically, *"at that level of involvement, at that level of responsibility and at that level of public money."*
54. The Council stated that in this case, all of the correspondence that the complainant requested has been disclosed with only the names of individuals redacted. It said that this means she will be able to see the full content of the exchanges between the Council and Defra. It added, the names of organisations and job titles have not been redacted. Therefore, the Council's view is that the complainant's legitimate interests in understanding decisions made and holding the Council to account, can be met without the disclosure of the personal data of individuals within the various organisations involved.

55. The Council said that these individuals do not have sufficient decision-making authority to warrant them being held publically accountable.
56. The Commissioner has considered this argument. The roles of some of the individuals where their identities have been redacted, are not specifically junior roles in all cases. For instance, the Commissioner notes that the roles include tier 4 officers such as a Project Manager, a Business Support and Development Manager and a Media and Public Affairs Manager. As mid-level managers acting on behalf of the Council, it is clear that these individuals would have had a level of decision-making responsibility, albeit that their work would have been managed and directed by more senior managers within the Council structure.
57. The Council reported that individuals that have been named in connection with this matter, have in the past received abuse and threats. It argued that the complainant's persistence in pursuing the names of its officers appears to be less about holding the Council to account regarding its spending and decision making, but rather an attempt to harass individuals. The Council referred the Commissioner to a previous decision notice FER0745063 in which the complainant argued that the personal information of Council officers should be disclosed in very similar circumstances to these, and in which the Commissioner found that the Council had correctly withheld personal information under regulation 13(1) of the EIR.
58. The Council explained that some of the redacted information relates to employees of other organisations and that these individuals have not been contacted. It said that it does not consider that it is necessary to disclose these names in order to be transparent regarding the nature of the correspondence between the Council and Defra. The Council further explained that due to the historic nature of the information and the fact that there are so many individuals, it has not been possible to contact them all to ask for their consent to their names being disclosed.
59. The Council provided the Commissioner with the names of its employees that have been redacted and the Council said that they were not willing to have their data disclosed due to the acrimony attached to this project.

60. The Council described what it considered to be the consequences of disclosure, it said it would cause distress and anxiety to those officers that have either already been subjected to abuse or who fear that they will be. The Council argued that it has disclosed a large amount of information regarding this project and also included all of the content of the discussions which will inform the public's understanding of the decisions made. It confirmed that the only information withheld is the personal data of individuals without decision-making authority.
61. The Council reiterated that disclosure of individual's names would not increase understanding of the Council's actions regarding this project. It said that it holds individuals to account on a personal level via its performance and appraisal system and that individuals reasonably expect to be able to go about their daily work, out of the public eye. The Council considers that it would not be fair for individuals in relatively junior roles to be held publicly accountable.
62. The Commissioner understands that the Council's redaction of the requested information is on the basis that it is not necessary to disclose the actual names of the individuals in order to meet the public's legitimate interest in creating transparency over what occurred. However, the Council considers that it is necessary to disclose the job roles of senior officers for it to be transparent about the level (in terms of seniority) of the correspondence which was taking place. This does feed into the legitimate interests of the public in identifying whether the actions of any parties were deficient.
63. The Council has in effect, made a judgement on the necessity of disclosing the actual names in order to meet the legitimate interests of the public. It has decided that the legitimate interests can be met without the disclosure of identities in this instance. The Council considers that it is not necessary to disclose the actual identities of the individuals to meet the public's legitimate interests. The Commissioner agrees with this approach.

The Commissioner's conclusion

64. The Commissioner notes that the events which led to this request occurred in 2014. She also notes the Council's argument that some of the individuals whose identities have been redacted have now left the Council and that the remaining members of staff had not given their consent to the disclosure of their identities.
65. The Council has disclosed all of the content of the correspondence to the complainant, with only the redaction of some identities and contact details. The organisations and job roles of Council officers were not redacted.

66. The Commissioner accepts the Council's argument that it is not necessary for the Council to disclose information on mid-level and junior officers that did not have decision-making responsibilities without the oversight from more senior managers. In this respect, it is the Council as a whole which is accountable for any issues which occur during their oversight of a project, or in the way a project is implemented. In this situation it was clear that overall responsibility for such an expensive and high level project, designed to run for decades, would sit with senior managers and with elected members rather than with more junior officers and managers.
67. The Commissioner 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, although it is still for the Council, not the public, to hold the actions of its employees to account. Any failure of the Council as a whole can be addressed by the electorate through the election process.
68. 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, there is little public interest 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. The complainant's arguments for holding more junior officers accountable does not take into account that it is the Council which is ultimately responsible for their actions, not the public directly.
69. The Commissioner is also mindful that, where contactable, some individuals have refused consent for their names to be disclosed and, in any event, she is satisfied that the public interest in accountability has been served by the information which the Council disclosed. The legitimate interest in knowing their identities would also be outweighed by the risk of harassment argued by the Council.

70. The Commissioner has also outlined above that she agrees with the Council's approach in balancing the disclosure of job roles of senior employees of third party organisations without disclosing the actual names of the individuals involved. Whilst some of the individuals are, or were, senior within their organisations and could be identified with research by interested parties, they do not work for the Council. 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 remaining information.
71. On consideration of all of the above, the Commissioner finds that it was not necessary in this case, for the Council to disclose the requested information to the complainant in order to meet the legitimate interests of the public in the Council being transparent and accountable for its past actions.
72. Due to the Commissioner's decision that disclosure is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test. Therefore, as disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. For that reason it does not meet the requirements of principle (a).
73. The Commissioner has decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2)(a).

Regulation 5 (2)

74. 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.
75. In this case the complainant made her request for information on 23 February 2018. The council did not provide its response until 23 May 2018, with further information provided on 13 June 2018.
76. The Commissioner's decision is that the Council did not comply with the requirements of regulation 5(2).

Regulation 11 - Representations and reconsideration

77. Regulation 11 of the EIR permits a complainant to make representations following a public authority's response to an environmental information request.
78. Regulation 11(4) of the EIR requires public authorities to carry out the internal review within 40 working days of receiving representations from the complainant.
79. In this case the complainant requested an internal review on 16 July 2018 and the Council, despite acknowledging receipt, did not provide the outcome of its review until 1 October 2018. The Commissioner therefore finds that by failing to carry out an internal review within the statutory time limit of 40 working days, the Council breached regulation 11(4) of the EIR.
80. As the internal review has been carried out, the Commissioner does not require the Council to take any steps.

Right of appeal

81. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

82. 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.

83. 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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