

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 29 January 2020

**Public Authority:** Cambridgeshire County Council

**Address:** Shire Hall  
Castle Hill  
Cambridge  
CB3 0AP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the proposed Cambridge to Cambourne public transport route. The Council disclosed some information falling within the scope of the request, but refused to disclose all the information held citing regulations 13 – third party personal data; 12(4)d – material in the course of completion; and 12(5)f – interests of the person providing the information.
2. The Commissioner's decision is that Cambridgeshire County Council has failed to demonstrate that regulation 12(4)d is engaged. She finds that regulation 13 is engaged as there is no legitimate interest served in disclosure of the personal data, and that regulation 12(5)f is engaged with the public interest in maintaining the exception outweighing the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information, as redacted by the Council in its submission to the Commissioner.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 16 January 2019 the complainant wrote to Cambridgeshire County Council and requested information in the following terms:

*'Greater Cambridge Partnership: Please supply records and copies of communications of all types between officers and/or Mott MacDonald and/or Joint Assembly and/or Executive Board members in relation to the reports on the C2C Madingley Mulch to Grange Road scheme, which were submitted to the November Joint Assembly and the December Executive Board in 2018, including all comments on drafting and presentation from May 2018.'*

6. The Council responded on 13 February 2019. It stated that all the communications requested could be found on the 'Cambourne to Cambridge consultation page' and directed the complainant to a web link.
7. The complainant was dissatisfied with the response as the information contained in the link predated the time period stated in his request. The Council considered this a request for a review, and responded on 15 May 2019. It supplied some information falling within the scope of the request, but withheld the remainder citing regulation 13 - third party personal data, and regulation 12(4)d - material still in the course of completion.

## Scope of the case

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8. The complainant contacted the Commissioner on 10 June 2019 to complain about the way his request for information had been handled. His request relates to the proposed Cambourne to Cambridge public transport route and he is concerned about the extent to which the views of organisations such as Historic England, National Trust and English Heritage were taken into account when decisions were made about the route. He believes that the withheld information would shed light on the extent to which such views were incorporated by the Council and the Greater Cambridge Partnership when making its decision about phase one of the proposed route.

9. During the course of the investigation the Council also applied regulation 12(5)f (interests of the person providing the information), to a secure portal link and log-in details.
10. The Commissioner considers the scope of the case to be whether Cambridge County Council is entitled to rely on regulations 13 and 12(4)d and 12(5)f to withhold the information requested.

## Reasons for decision

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### **Regulation 12(4)(d) - material which is still in the course of completion, unfinished documents or incomplete data**

11. Regulation 12(4)(d) states that:

*'a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, unfinished documents, or to incomplete data.'*

12. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
13. However, if engaged, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
14. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
15. The Council has explained that the material consists of email correspondence between Cambridgeshire County Council employees and Mott McDonald employees relating to the drafting of documents. This involves officers discussing an impact assessment and the response of Historic England, along with communication with a local group concerning Historic England's response. As the final versions of the documents referred to were later published, discussions concerning the drafting of the documents was work in progress at the time. The

Council has provided links for the Commissioner to view the final documents.

16. The request concerns a proposed public transport route from Cambourne to Cambridge (C2C). Having viewed the links provided by the Council, the Commissioner can see the route is in two phases. Phase one is from Madingley Mulch roundabout to Cambridge City Centre, and phase two is from Madingley Mulch roundabout to Cambourne. The withheld information concerns phase one of the project.
17. Neither phase of the project have been started. However, the fact a public authority has not completed a particular project does not mean that all the information it holds is automatically covered by the exception.
18. Having viewed the final / published documents to which the withheld material relates, the Commissioner notes the dates of these. The following link shows a document titled 'Cambourne to Cambridge Better Public Transport Project: Interim Report, November 2018' where the impact assessment referred to, as well as other information that is withheld, can be found: <https://citydeal-live.storage.googleapis.com/upload/www.greatercambridge.org.uk/transport/transport-projects/C2C%20Executive%20Board%20Report%206%2012%202018%20-%20Appendix%201.pdf>. There is also a report, produced for the Great Cambridge Partnership, dated 6 December 2018, which also includes information that relates to the withheld material: <https://www.greatercambridge.org.uk/asset-library/imported-assets/C2C%20Executive%20Board%20Report%206%2012%202018.pdf>.
19. The Council has also highlighted the Great Cambridge Partnership where relevant, final reports can be found: <https://www.greatercambridge.org.uk/transport/transport-projects/cambourne-to-cambridge/cambourne-to-cambridge-background/>. This link includes in excess of 100 documents dating from 2014 and the Commissioner and is not at all clear which, if any, of the reports and documents listed are relevant to the withheld material. As a result she has only considered the Interim Report dated November 2018 and the Great Cambridge Partnership Executive Report dated 8 December 2018 for the Council's arguments that the 'information relates to the drafting of reports and responses to the public consultation that were subsequently published'.

20. The complainant made his request for information on 16 January 2019, two months and one month after the Interim Report and Executive Report respectively were published. Issues relevant to this case were considered by the Upper-tier Tribunal (Information Rights) ("the UT") in *Highways England v IC and Henry Manisty (2018) GIA/1589/2018* ("Manisty"). This judgment involves consideration of whether the requested information can be considered as separate from any continuing work.
21. The Commissioner is satisfied that as the information requested concerns communication about an impact assessment and associated reports for phase one of the C2C public transport, which have now been published, this can be considered a discrete and separate part of the ongoing C2C project.
22. Having established this, the Commissioner turns to the timing of the request, which was made on 16 January 2019. The Council's submissions showing the final published documents are dated November 2018 and 6 December 2018. As these final documents predate the complainant's request, the Commissioner determines that the communications requested by the complainant that relate to these publications cannot, at the time the request was made, be considered material in the course of completion. Regulation 12(4)d is therefore not engaged, and consequently there is no requirement to consider the public interest in disclosure.

### **Regulation 13 personal data**

23. 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) of the Data Protection Act 2018 is satisfied.
24. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>1</sup> of the Data Protection Act 2018. 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').

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<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

25. 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.
26. 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?***

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. The Council has identified two categories of personal data that it is withholding: references to an individual's medical appointment and direct contact details of people not employed by the Council.
32. Having viewed this withheld information, the Commissioner is satisfied that it relates to living individuals and that those individuals can be identified from it. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA
33. 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.
34. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

35. 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".*

36. 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.

37. 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.

38. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition. Information relating to special category data is given special status in the GDPR.

39. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

40. The Council has identified the medical appointment information as special category data, to which the Commissioner agrees. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

41. The Commissioner considers that the only conditions that could be relevant to a disclosure under the EIR are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

42. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the EIR request or that they have deliberately made this data public.

43. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under regulation 13(1) of the EIR.

### **Lawful processing: Article 6(1)(f) of the GDPR**

44. 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.

45. 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”<sup>2</sup>.*

46. 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) or fundamental rights and freedoms of the data subject.

### *Legitimate interests*

47. In considering any legitimate interests in the disclosure of the requested information under the EIR, the Commissioner recognises that such

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<sup>2</sup> 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*



interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

48. 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.
49. The Council has only withheld the direct contact details of non-Council staff, and not the names. It is clear to see from the remaining personal data not redacted who was involved, at what stage, and the role they played in drafting of the documents. The Commissioner is therefore not satisfied that in the circumstances of this case, disclosing the contact information would further any legitimate interest, either generally or specifically.
50. The Commissioner has therefore concludes that the Council is entitled to withhold the personal information under regulation 13(1), by way of regulation 13(2A)(a).

#### **Regulation 12(5)(f) – Interests of the information provider**

51. Regulation 12(5)(f) states:

*'For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-*

*(f) the interests of the person who provided the information where that person—*

*(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*

*(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*

*(iii) has not consented to its disclosure'*

52. The withheld information comprises a link to a secure FTP website and log-in details through which Mott McDonald's secure data portal could be accessed. It is contained within the email exchanges that the Council is seeking to withhold under regulation 12(4)d, which the Commissioner has determined is not engaged

53. The Commissioner's public guidance on regulation 12(5)f exception<sup>3</sup> explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds the information.
54. With regard to engaging the exception, as recognised by the Tribunal in *John Kuschnir v Information Commissioner and Shropshire Council (EA/2011/0273; 25 April 2012)*<sup>4</sup>, a five stage test has to be considered:
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
  - Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
  - Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
  - Has the person supplying the information consented to its disclosure?
  - Does the public interest in maintaining the exception outweigh that in disclosure?
55. The Council has explained that the information accessed by the link could have been emailed instead, and therefore the link was provided voluntarily, with no expectation of access by anyone else. The Council has not specifically asked Mott McDonald if it may disclose the information as this was considered unnecessary given that there is no situation when a link plus log-in details to its secure portal would be publicly disclosed. It has gone on to explain that disclosure would have

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf)

<sup>4</sup> [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012\\_04\\_25%20Mr%20Kuschnir%20decision.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf)

an adverse effect by making the secure portal publicly accessible and whilst the login details have expired, public knowledge of the secure portal's address would compromise the security of IT systems by encouraging unauthorised accessed.

56. The Commissioner accepts that on the basis of the Council's arguments, the first four parts of the five stage test are met and therefore regulation 12(5)f is engaged.
57. Once engaged, regulation 12(5)f is subject to the public interest test. There is always a general public interest in the disclosure of environmental information on the grounds of transparency and accountability. The question here is whether disclosure of the portal details would further facilitate these grounds.
58. Having considered the specifics of the request, the Commissioner is not satisfied that the secure portal and log-in details in themselves provide anything further within the scope of the request as the log-in details have expired.
59. As the log-in details have expired, the question of harm / adverse effect caused by their disclosure is somewhat weakened. However, the Commissioner does accept that making the information about the secure portal publicly available, along with the form and format of log-in credentials, increases the possibility of motivated individuals attempting to gain unauthorised access to the secure site.
60. The Commissioner therefore concludes that, as the information withheld under 12(5)f does not provide anything further regarding the drafting comments and communications that the complainant seeks, and disclosure of it would place in the public domain details that may compromise Mott McDonald's IT security, the public interest in maintaining the exception is greater than the public interest in disclosure.

## Right of appeal

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61. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

62. 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.
63. 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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