

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

**Decision notice**

**Date:** 10 August 2020

**Public Authority:** Maidstone Borough Council

**Address:** Maidstone House  
King Street  
Maidstone  
ME15 6JQ

**Decision (including any steps ordered)**

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1. The complainant requested from Maidstone Borough Council (the Council) the name of the barrister who was representing the Council on a matter with the intention to initiate a judicial review procedure and some other circumstantial information relating to a planning appeal.
2. The Council provided an explanation but refused to disclose the name of the barrister under regulation 13 of the EIR as it considered it to be the personal data of a third party.
3. The Commissioner's decision is that the Council was correct to withhold the name of the barrister under regulation 13(1) (personal information) of the EIR.
4. The Commissioner does not require the Council to take any further steps.

**Background information**

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5. On 10 November 2015, the Council received a planning application for a residential development of 30 dwellings in Yalding. The application was refused by the Council by a decision notice dated 17 February 2016.

6. Subsequently, the above mentioned decision was appealed to the Planning Inspectorate (the PI). On 31 January 2017 the PI adopted a decision<sup>1</sup> that allowed the appeal and it granted the planning permission for a residential development of 30 dwellings in Yalding.
7. The Council engaged a barrister with the intention to seek judicial review by lodging an appeal to the High Court. However, the Council omitted to submit the appeal within the deadline specified.
8. From the parties' submissions to the Commissioner, it appears that the complainant in this case has had correspondence with the Council prior to submitting the information request that is the subject matter of this decision notice.

### Request and response

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9. On 6 September 2019, the complainant wrote to the Council and requested information in the following terms:

*"I would ask you once again for the name of the barrister who worked for free on the case for the judicial review. I would also like to know who is taking responsibility for MBC's failings in this case."*

10. The Council responded on 3 October 2019. In relation to the name of the barrister, the Council confirmed holding the information requested. However, it refused to provide this information citing Regulation 13(1) of the EIR as the basis for this refusal. In relation to the second part of the request, the Council provided the following explanation:

*"the matter was raised at planning committee and an explanation was given as to the reasons for failing to lodge the appeal to the High Court in time. We have followed our internal processes and, while we were disappointed that this situation arose, no further action was taken."*

11. Remaining dissatisfied with the Council's response, on 7 October 2019 the complainant requested an internal review from the Council expressing the reasons for his dissatisfaction with the response received.

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<sup>1</sup> [http://www.maidstone.gov.uk/\\_data/assets/pdf\\_file/0005/139469/ORD-033-Appeal-decision-Land-At-Mount-Avenue-Blunden-Lane-Yalding.pdf](http://www.maidstone.gov.uk/_data/assets/pdf_file/0005/139469/ORD-033-Appeal-decision-Land-At-Mount-Avenue-Blunden-Lane-Yalding.pdf)

12. The Council provided the complainant with the outcome of its internal review on 18 October 2019. The Council upheld the refusal of the request.

### Scope of the case

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13. The complainant contacted the Commissioner on 9 December 2019 to complain about the way his request for information had been handled. The complainant stated *"I strongly believe that as a public body MBC should provide me with the findings of this meeting and give me the reason why the woodlands have been destroyed."*
14. The complainant stated that the result sought from this case was to obtain *"an explanation of how they failed to meet a deadline to apply for a judicial review"* and *"the name of the barrister who worked for free on this case."*
15. As this case concerned only the request made on 6 September 2019, which did not cover some of the information the complainant now indicated he was seeking, the complainant was advised to make a fresh information request to the Council for any other information he wished to access. The focus of this case was the withholding of the barrister's name.
16. In addition, in the course of her investigation, the Commissioner asked the Council to reconsider whether the withheld information fell under the definition of environmental information as provided in regulation 2(1) of the EIR. The Council confirmed that it considers that it does.
17. In light of the above, the following analysis covers:
  - a. whether the Council applied the appropriate legislation when handling this request; and
  - b. whether the Council was correct when it refused to disclose the name of the barrister.

### Reasons for decision

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#### The correct legislation

#### Regulation 2(1) – is the information environmental?

18. Regulation 2(1) of the EIR provides the following definition of environmental information:

*"...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, 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. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled. The Commissioner has produced guidance<sup>2</sup> to assist public authorities and applicants in identifying environmental information.
20. The Commissioner reiterates that in the present case, the withheld information consists of the full name of a specific barrister who was engaged in preparing a case on behalf of the Council. The Commissioner notes that the name itself, regarded in isolation, would not constitute an element or factor of the environment; or a measure that could have an impact to the elements or factors of the environment as elaborated in regulation 2(1) of the EIR.

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[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

21. However, the Commissioner considers that in the context of the information request in question, the core of which was a planning application followed by a planning appeal, the information requested falls within the scope of 'measures' as defined by regulation 2(1)(c).
22. Therefore, the Commissioner considers that the Council was correct to handle the request under the EIR relevant provisions.

### **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) is satisfied.
24. In this case the relevant condition is contained in regulation 13(2A)<sup>3</sup>. 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').
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(1) 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

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

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. As explained above, the withheld information in this case consists of the name of a barrister. The Commissioner accepts that the individual in this case would be identifiable from the information and that this information would relate to them. Therefore, she finds that the information in the context of this request would fall within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

32. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

33. The most relevant DP principle in this case is contained in Article 5(1)(a) of the GDPR which 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 FOIA 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.

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

35. 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 this Article applies.

36. The Commissioner considers that the lawful basis most applicable here 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>4</sup>.

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

#### Legitimate interests

39. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, 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

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<sup>4</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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) 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".*

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 Council stated that:

*"There appears to be no legitimate purpose in the disclosure of the barrister's name. The requester is clearly aggrieved by the effect of the development which was lawfully permitted by the Secretary of State's planning inspector on appeal. The requester has failed to demonstrate any link between the Council's asserted 'incompetence' and the effect of the development permitted by the Secretary of State. As such, the requester has not and cannot demonstrate a legitimate interest in the disclosure of the requested personal data."*

42. On the other hand, in a correspondence sent to the Commissioner, arguing why should he have access to the withheld information, the complainant stated:

*"He was acting in a professional capacity for a public body and I believe I am entitled to this information."*

43. The Commissioner disagrees with the Council on this point and she accepts that there is a legitimate public interest in disclosure of information which would promote accountability and transparency. In the circumstances of this case, the Commissioner recognises that there may be a legitimate interest in knowing who the people are that participate in certain processes on behalf of the Council and its constituents, that ultimately may have an impact on the lives of members of the public. The Commissioner also appreciates that the complainant may have a personal interest in disclosure of the withheld information based on the representations he has made.

*Is disclosure necessary?*

44. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

45. The Commissioner has considered whether disclosure of the full name of the barrister is necessary to meet the legitimate interest in transparency that she has identified above.

46. The Council did not submit any specific arguments as to why it would or would not consider it necessary to disclose the withheld information.



However, it maintained that *"It is highly likely that disclosure of the information will lead to unjustified distress being caused to the individual concerned."* The Council also confirmed that *"the barrister has given explicit instructions that he does not consent to the release of his personal information."*

47. The Commissioner refers to her guidance on personal information<sup>5</sup>, which states that when determining necessity, consideration must be put on *"whether disclosure under FOIA or the EIR is necessary to achieve these needs or interests, or whether there is another way to address them that would interfere less with the privacy of individuals."* In addition, the guidance provides that *"the necessity test therefore involves judging whether there are alternative methods of meeting the identified legitimate interest."*
48. In the present case, the Commissioner notes that the complainant's information request, reproduced above in paragraph 9, was formulated in such a way that if the Council were to respond, it would inevitably lead to disclosing personal data. Although, the Commissioner accepted that there is legitimate interest in transparency and accountability in processes that the Council either manages or is involved in, she does not consider that disclosing the name of a specific individual, would significantly increase the transparency of such processes or the accountability of the responsible public officials.
49. Therefore, the Commissioner does not consider that disclosing the barrister's name is necessary in order to meet the legitimate interest in this case.
50. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
51. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in transparency, she does not need to go on to conduct the balancing test and has not done so.
52. Therefore, the Commissioner finds that regulation 13(1) of the EIR is engaged in respect of the withheld information and the Council was not obliged to disclose the name of the barrister in question.

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<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

## Right of appeal

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53. 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)

54. 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.
55. 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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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