

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

Decision notice

Date: 11 February 2020

Public Authority: Torfaen County Borough Council

Address: foi@torfaen.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about objections received about a particular planning application. Torfaen County Borough Council ('the Council') provided some information but withheld details of the objector under regulation 13 of the EIR. The Commissioner finds that the Council has correctly applied regulation 13 to the withheld information. She does not require any steps to be taken.

Request and response

2. On 3 August 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like to know the number and nature of all objections made to the following planning application: 19/P/0252/LBC An exemption would apply to an application such as this on the grounds that information available via an alternative means of enquiry, namely the planning portal under 'comments'. However, whilst an objection has been lodged no details of it have been published. Thus a FOI request is the only means by which I may determine if an objection was made and if it was, by whom and for what reason. Planning applications and all comments there upon are meant to be in the public domain".

3. The Council responded on 16 August 2019 and confirmed one objection had been lodged. It provided the date the objection was received and a summary of the objection, but withheld details of the identity of the objector under regulation 13 of the EIR.
4. On 17 August 2019 the complainant requested an internal review of the Council's refusal to provide the identity of the requestor. He provided supporting evidence to suggest that such information was routinely made publicly available by other local authorities.
5. The Council provided the outcome of its internal review on 12 September 2019 and upheld its decision that regulation 13 applied to the identity of the objector.

Scope of the case

6. The complainant contacted the Commissioner initially on 16 August 2019. He contacted the Commissioner again on 13 September 2019 following receipt of the Council's internal review response to confirm he remained dissatisfied with its handling of the request.
7. The scope of the Commissioner's investigation is to determine whether the Council correctly applied regulation 13 to the withheld information, namely details of the identity of the planning objector.

Reasons for decision

Regulation 13 personal data

8. 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.
9. In this case the relevant condition is contained in regulation 13(2A)(a)¹ 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

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

10. 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.
11. 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?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. In the circumstances of this case, the Commissioner is satisfied that the information (name and home address of an individual who commented on a particular planning application) clearly 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.
17. 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.
18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. 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".

20. 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.

21. 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

22. 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.

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

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

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

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

24. 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.
25. 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

26. 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.
27. 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.
28. The Council provided the Commissioner with comprehensive background information about its obligations in terms of publishing information relating to planning applications, which is detailed below.
29. The request in this case relates to an application under section 8 of the Planning (Listed Building and Conservation Areas) Act 1990 ('the 1990 Act') – consent for works altering a listed building. The Council has a duty under section 10 of the 1990 Act to advertise such applications and under section 10(2) it "*must take into account any representations relating to the application which are received by them*".
30. The Council confirmed that there is no statutory requirement, in planning law, for it to publish information relating to applications made in accordance with the 1990 Act. However, the Council advised that it does maintain a public Planning Register, in accordance with the Town and County Planning Act 1990 ('TCPA 1990'), which includes applications for planning permission. Applications for planning permission are defined

in section 336 of the TCPA 1990 as meaning permission under Part III or section 293A of the TCPA 1990. Technically, these provisions do not include applications made in accordance with section 8 of the 1990 Act for listing building consent. However, the Council's normal practice is to include details of these applications within the Planning Register.

31. The detailed requirements in respect of information to be included within the Planning Register are contained within the Town and Country Planning (Development Management Procedure)(Wales) Order (as amended) ('the 2012 Order'). Article 29 of the 2012 Order prescribes the content of the Planning Register and is set out in three parts³. Whilst there is statutory duty for the Planning Register to include the planning application form, including the applicant's details, there is no requirement contained which imposes a duty on the Council to include comments made in response to public consultations on planning applications within the register. The Council also confirmed that some personal data relating to planning applicants, such as personal email addresses, telephone numbers and signatures are redacted from the application form and are therefore not published on the Planning Register, in accordance with its data protection obligations.
32. The Council maintains its Planning Register in a combination of electronic and paper files dependant on the date of the application. The Council acknowledges that planning case files contain information that is not available to view on the Planning Register (both the paper and online versions). The Council's practice since 2017/2018 in relation to publishing comments on planning applications is to record on the Planning Register that a comment has been received. However, as there is no requirement to publish the contents of comments, these are not available to view on the register. If the Council receives a request to view a public comment, the case officer will summarise the content of the comment and any personal data (and special category data as defined within article 9 of the GDPR) would be withheld.
33. The Council has a statutory duty to consider comments it receives (both negative and positive) and attribute 'weight' to them when determining planning applications. Collection of personal data about the identity of commentators (including their location) is of benefit to the Council in carrying out this statutory function. This is because one of the factors which may add weight to a material comment is the location of the commentator to the development site. For example, a comment from a near neighbour on any impact on amenity is likely to carry more weight

³ <http://www.legislation.gov.uk/wsi/2012/801/article/29/made>

that a similar comment from an individual living some distance from the development site. It is therefore important when attributing weight to any comments that the Council knows the location of the commentator. For this reason the Council does not accept anonymous comments through its online planning portal. The Council does accept anonymous comments if received in handwritten format. These are included in consideration of the application but may be attributed less weight overall. The Council considers this process is of wider benefit to the public who have a legitimate interest in ensuring that the Council acts fairly when considering applications. It also provides confidence to the public about the manner in which applications are determined.

34. The Council accepts that the planning applicant in this case has a legitimate interest in understanding comments and objections received which may have impacted in the determination of their application.
35. The Council also considers that any person commenting on a planning application "*has a legitimate interest in that any person is entitled to make a comment on a development proposal and to be confident that in the course of the determination of an application those comments are taken into account by the decision maker*".
36. The complainant submitted that objections to planning applications must by law go on the public file without names and addresses being redacted. The complainant further pointed out that other local authorities routinely published objections to planning applications, including names and addresses of the individuals who objected and provided evidence to support his position.

Is disclosure necessary?

37. '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.
38. The Council confirmed that the advice on the planning pages of its website states "*You should note that all comments received will be open to public inspection*". However, it draws a distinction between the comments that a person makes and their personal data. The website makes no reference to indicate that a commentator's personal data will be made public. In addition, the Council's privacy notice in relation to

Planning and Building Control, available on its website⁴, does not contain any information to suggest that the personal data of commentators will be made public.

39. In this particular case, the comment was submitted via the Council's public access system. There is no requirement on individuals to register in order to comment on planning applications via this method. Whilst individuals are asked for personal details such as names and address (for the reasons set out in paragraph 33 above), the webpage explicitly states:

"You may make a comment supporting or objecting to this application. Your comments will be submitted and in due course made available to the public. We will not display your personal data online".

In light of the above, the Council contends that the individual in this case would have had an expectation that their comment would be made public but no expectation that their name and address would be.

40. Whilst the Council accepts that the legitimate interests of the public are important it does not consider that disclosure of the name and address of individuals who comment on planning applications is necessary to meet these interests. The Council considers that the legitimate interest relates to the 'important' information about the nature and substance of planning comments and how they may impact on the determination of a planning application. The Council is of the view that disclosing summarised comments with generic information on the location of the commentator (if relevant and appropriate to do so) eg near neighbour, is sufficient to meet any legitimate interest in the public understanding the nature of any concerns about or support for a development proposal. The Council does not consider that disclosure of the name and address of commentators is necessary to satisfy any legitimate interests.
41. The Council pointed out that the commentator has rights in terms of data protection and in accordance with Article 8 of the European Convention on Human Rights within Schedule 1 of the Human Rights Act 1998. The Council considers that commentators may be discouraged from commenting on an application, despite having legitimate concerns, if they believed their personal data would be disclosed.

⁴ <https://www.torfaen.gov.uk/en/Related-Documents/Data-Protection-and-Freedom-of-Information/Privacy-Notices/NPPP/Planning-and-Building-Control-Privacy-Notice.pdf>

42. In this case, the data subject is the person who submitted a comment about a planning application for a specific address. The complainant is therefore requesting the personal information of another identifiable living individual.
43. The Commissioner considers the data subject submitted their comment in a private capacity. Based on the representations provided by the Council the Commissioner accepts that the data subject in this case is unlikely to expect that their personal data would be disclosed into the public domain.
44. The Commissioner accepts the Council's argument that it has an established policy not to release the personal data of individuals who comment on planning applications. She notes that the Council provided a summary of the comment in question and the comment is also contained within the officer report on the planning application, which was published on the online planning register on 23 August 2019. The Commissioner agrees with the Council's arguments that disclosure in this case is not necessary in the interests of the wider public and that releasing this information would likely inhibit the rights, freedoms and legitimate interests of the data subject concerned.
45. That being said, the Commissioner acknowledges that the planning applicant in this case has a legitimate interest in knowing who commented on their application. However, the Commissioner notes that any legitimate interest the planning applicant may have in the requested information is largely specific to them. This is not to say that the legitimate interests of the planning applicant are trivial, but the Commissioner struggles to see any compelling legitimate interest that would necessitate publishing the name and address of the data subject. She is not persuaded that the legitimate interests of the planning applicant override the interests or fundamental rights and freedoms of the data subject in this case.
46. The Commissioner is mindful that she has considered regulation 13 in the context of planning objections in several previous cases⁵. The Commissioner has consistently found that individuals commenting on planning applications have a reasonable expectation that their names and addresses will not be published, although their comments will be disclosed. This meets the legitimate interest in transparency of decision making without undue interference in the privacy rights of individuals. Therefore the Commissioner does not consider that disclosure of those

⁵ For example, www.ico.org.uk/media/action-weve-taken/decision-notices/2015/1043408/fs_50559952.pdf

individuals' personal information is in fact necessary to meet a legitimate interest.

47. As the Commissioner has decided that disclosure in this case is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test. Because 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).
48. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1) of the EIR.

Right of appeal

49. 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

50. 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.
51. 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

Joanne Edwards
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