

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 October 2021

Public Authority: West Suffolk Council
Address: West Suffolk House
Western Way
Bury St Edmunds
Suffolk
IP33 3YU

Decision (including any steps ordered)

1. The complainant has requested from West Suffolk Council ("the Council") information relating to the identity of an individual who made the initial referral for a Tree Preservation Order ("TPO") that was subsequently made by the Council. The Council withheld the requested information under section 40(2) of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner subsequently identified that the information is environmental, and that the Council should therefore have cited regulation 13 (personal data) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 13.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 22 March 2021, the complainant wrote to Council and requested information in the following terms:

"We wish to know who instigated the Tree Preservation Order – TPO/014 (2020)"

5. The Council responded on 19 April 2021. It stated that the information was withheld under the exemption provided by section 40(2) (personal information) of the FOIA.
6. Following an internal review the Council wrote to the complainant on 19 May 2021. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 May 2021 to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under section 40(2) of the FOIA.
8. The Commissioner has identified that the information is environmental information as defined by regulation 2 of the EIR. The EIR provides an exception for personal data (regulation 13), which operates similarly to section 40 of the FOIA.
9. The scope of this case and of the following analysis is whether the Council is entitled to rely upon regulation 13 to withhold the requested information.

Reasons for decision

Is the requested information 'environmental'?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
11. The Commissioner has considered the requested information and is satisfied that it will represent environmental information. This is because the action of making a referral for a TPO will represent a measure as defined by regulation 2(1)(c).
12. The request therefore falls under the EIR, and not the FOIA.

Regulation 13 - Personal data

13. 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 requestor and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
14. 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 UK General Data Protection Regulation ("the UK GDPR").
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("the DPA"). If it is not personal data, then regulation 13 of the EIR cannot apply.

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

16. 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?

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The withheld information is the identity of an individual who made a referral to the Council for a TPO.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to an identifiable individual. She is satisfied that this information both relates to and identifies the person who instigated the tree preservation order. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. 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.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

28. Article 6(1) of the UK 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.
29. 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.
30. In considering the application of Article 6(1)(f) of the UK 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;

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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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".

- 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.
31. 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

32. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requestor's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requestor is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. In the circumstances of this case the Commissioner recognises that there is a legitimate interest that TPOs, which are made by the Council as the relevant local planning authority under the terms of the Town and Country Planning Act 1990 (as amended by the Town and Country Planning (Tree Preservation) (England) Regulations 2012) are subject to appropriate transparency, and where necessary, challenge by any party with an interest in the affected land.

Is disclosure necessary?

34. '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.
35. In the circumstances of this case the Commissioner understands that, whilst the identity of third parties who make referrals for TPOs are not published, details about any subsequent TPOs made by a local planning

authority are subject to appropriate transparency, and in the case of the Council, are searchable by location on its website³. The Commissioner also understands that the decision to make a TPO rests with the local planning authority, and should an affected party wish to challenge it, then such a challenge is against the local planning authority, and not the third party who made the initial referral. As such, the Commissioner does not consider that disclosure of the identity of the individual who made the referral is necessary.

36. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. 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).

The Commissioner's view

37. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

³ <https://www.westsuffolk.gov.uk/planning/protected-trees.cfm>

Right of appeal

38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

39. 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.
40. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF