

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

### **Decision notice**

**Date:** 18 January 2021

**Public Authority:** Highways England  
**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

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

---

1. The complainant has requested feedback sheets from Highways England (HE) that were completed by members of the public at the A5036 Port of Liverpool Access Scheme public information events in October 2019. HE withheld the requested information under regulations 13(1), 12(5)(f) and 12(4)(b) EIR.
2. The Commissioner's decision is that HE is entitled to withhold the requested information under regulation 13(1)(personal information) of the EIR.
3. The Commissioner does not require HE to take any further steps.

#### **Background**

---

4. HE has provided some background information to the Commissioner by way of context.
5. HE explained that the A5036 Port of Liverpool access scheme is intended to relieve congestion and ease pollution on the existing route

of the A5036 by constructing a new bypass through a public park and farmland in north Liverpool. HE acknowledges that the scheme is controversial and has led to strongly expressed views amongst local residents. It points to the example of a group called Rimrose Valley Friends that has been running a 'Save Rimrose Valley' campaign opposing the scheme.

6. This request arose from two public information events that HE ran in October 2019 to make residents and stakeholders aware of the ground investigation work it planned to carry out in Rimrose Valley. The events were intended as information rather than consultation events. HE states that opponents of the scheme, in particular, demanded that they be given the means to leave written comments. Feedback forms were provide along with an undertaking by HE that they would be read and retained.

## Request and response

---

7. On 17 December 2019, the complainant wrote to HE and requested information in the following terms:

*"Please provide the scanned copies of all feedback sheets completed and submitted to you by members of the public at the A5036 Port of Liverpool Access Scheme public information events on 22nd and 24th October, redacting any personal details."*

8. HE responded on 17 January 2020 and refused to provide the requested information citing the following EIR exception - regulation 13.
9. HE provided an internal review on 24 February 2020 in which it maintained its original position regarding regulation 13 but also cited regulation 12(5)(f) - interests of the information provider.

## Scope of the case

---

10. The complainant contacted the Commissioner on 26 February 2020 to complain about the way the request for information had been handled.
11. After the Commissioner wrote to HE the public authority also said that Regulation 12(4)(b) applied - that the request was manifestly unreasonable.

12. The Commissioner considers the scope of this case to be HE's citing of Regulation 13(1)(personal information), 12(5)(f)(interests of the information provider) and 12(4)(b)(manifestly unreasonable).
13. Usually the Commissioner would consider the application of Reg 12 (4)(b) first before any substantive exceptions applied by a public authority. However HE has not made the complainant aware of its late consideration of this exception and only mentioned that, in hindsight, it was likely to be applicable during correspondence with the Commissioner. The Commissioner therefore considers it appropriate, on this occasion, to consider the application of Reg 13(1) first.

## Reasons for decision

---

### Regulation 2 – Is the requested information environmental?

14. Firstly, the Commissioner has considered whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR:

*“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...”*

15. The request is for information relating to a new bypass. The Commissioner is satisfied that the requested information concerns a measure (regulation 2(1)(c)) that would or would be likely to affect the elements listed in regulation 2(1)(a).

### Regulation 13 personal data

16. 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.
17. 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').
18. 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.
19. 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?***

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. HE provided the Commissioner with the withheld information – the feedback sheets. These sheets express views for or against the scheme and some views where the writer is undecided. HE describes

---

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

the sheets as having a space at the top of the first page in which the writers were given the chance to leave their contact details, should they wish to. HE apologised for the fact that the internal review had stated that the majority of the spreadsheets did not have contact details. In fact only 43 would have been impossible to contact. Of the 266 sheets that were returned, four contained no contact details whilst a further 35 left only their postcode. Four feedback sheets were illegible. HE states that the remaining spreadsheets contain names and addresses which it considers to be personal data. A number of the spreadsheets also contain information that HE considers makes the writer identifiable, or may be used to identify the individual to whom it relates and therefore is also personal data. However, although HE has stated that the majority of the feedback forms contain personal data it is not HE's position that all of the withheld information is personal data. The purpose of the feedback forms was to allow members of the public to leave feedback about HE's public information plans and it does not consider this to be personal data. The Commissioner makes the distinction that where feedback cannot be linked either directly or indirectly then it is not personal data. However, if the opinion can be linked, even indirectly, it is personal data.

25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the writers of the feedback forms. She is satisfied that this information both relates to and identifies many of the data subjects concerned by name, address and/or postcode. Some of the feedback forms could be linked to individual writers via other information or the views expressed. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA. HE did not look at whether any of the personal data could be classed as 'special category data' at the time of the request.
26. 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.
27. The most relevant DP principle in this case is principle (a).

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

28. 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".*

29. 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.
30. 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.

***Is the information special category data?***

31. Information relating to special category data is given special status in the GDPR.
32. 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.
33. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include some special category data. She has reached this conclusion on the basis that there is reference to specific health conditions, including those of children. In response to the Commissioner's questions, HE has stated that there are inferred suggestions of political affiliation. The Commissioner's opinion is that, whilst the majority of content is about environmental concerns that do not necessarily relate to a distinct political opinion or affiliation, some of the views expressed do.
34. 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.
35. 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.
36. HE has stated to the Commissioner that it does not believe that any of the conditions of Article 9 that might allow HE to release the data have been met. HE did not seek nor obtain explicit consent to publish any of the data. Nor, as far as HE is aware, has the data been made public by the data subjects.

37. 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.
38. 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**

39. The Commissioner has now gone on to consider the rest of the information contained in these feedback forms where there is personal data that can be linked directly or indirectly with an individual but does not fall into 'special category data'. This consists of names, addresses, postcodes or other information contained in these forms that could be linked to individuals and descriptions of their location, situation, personal history or other potentially identifying details. HE also states that there is feedback from at least one child that contains personal data.
40. 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.
41. 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>.

---

<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:-



42. 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.
43. 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*

44. 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.
45. 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.
46. As far as Article 6(1)(f) of the GDPR is concerned, HE does not believe that a legitimate interest is being pursued in the request for information. Nor does HE believe that disclosure of the information is

---

*"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".*



necessary; or that that the interest expressed overrides the interests, fundamental rights or freedoms of the data subjects.

47. HE contends that its staff that ran the public information events in October 2019 did not provide the feedback forms as a matter of course, but at the request of the individuals filling them in who wished to leave written feedback. HE undertook to analyse and retain the data that was provided. HE does not believe that there was any lawful basis for processing the information further than that. HE did not seek nor receive consent to release the data to any third party. Given that HE subsequently released a digest of the feedback, it does not accept that there is any legitimate interest on the part of the complainant that would cause the complainant to want to release the original documents containing the personal data.
48. The complainant states that personal information was not requested. Simple measures could have been taken to protect the identity of those who completed the forms. The arguments that disclosure represents a legitimate interest are as follows -
- This was a public engagement process and the public should be able to see all the feedback;
  - There was no signage in place or statements that any feedback would be provided in confidence. This is standard practice in consultations and people normally have to say if they want their response kept private.
  - People would reasonably expect feedback provided at a public event to be made public, though the complainant excepted names, addresses and personal information;
  - Anonymising the feedback would be easy to do with digitised responses and this would remove any problems about identifying people. This must have been done for sharing the feedback internally in HE in order to protect people's privacy.

*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. It is the Commissioner's understanding that further requests have been made since this request. One of these requests asked for a

summary of the feedback provided at the public information events and laid out in some detail how that information should be presented. HE also refused this request because it would have obliged it to create a whole new document and it did not consider it to be an EIR request for that reason. HE then offered an anonymised version of its own summary of the feedback given. After a request for this summary at around the same time as this complaint to the Commissioner, HE has now provided the summary to the complainant.

51. HE has argued that this represents an acceptable compromise. While HE accepts that the digest of comments was heavily abbreviated, it believes that individuals familiar with this matter would understand that, for example, 'tunnel' and 'rail' in the first two summarised sheets meant that the respondents were arguing for a tunnel to be constructed to hide the road; or for more freight to be sent by rail from the Port of Liverpool rather than by road, making the building of a new bypass unnecessary. The themes identified across the feedback sheets were summarised, providing clarity about what HE understood the respondents to mean. HE's position is therefore that it has now gone as far as it felt it could go and sees no reason to go further.
52. It would appear that there has now been further disclosure regarding this request. This might have been sufficient reason to conclude that disclosure is not necessary to meet the legitimate interest of the complainant in disclosure, given that the complainant had already stated that personal data was not being requested. However, there are several factors that have led the Commissioner to conduct a balancing test in this instance. The Commissioner needs to look at the situation at the time of the request; there has been no indication from the complainant that the subsequent disclosure has fulfilled the request and; there appears to be a difference of opinion between HE and the complainant as to what constitutes personal data.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

53. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

54. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
55. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
56. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
57. HE explained that the A5036 Port of Liverpool access scheme is controversial. Many local residents are vehemently opposed to the scheme, and expressed that opposition at last October's events, and in the feedback forms they filled in. However, a significant minority are in favour of the scheme. A similar number are as yet undecided, or their position on the scheme is hard to ascertain from the feedback given. Some of those in favour of the scheme have voiced concern to HE staff about their personal safety, should their support become known to the scheme's opponents. HE considers that several of these possible supporters decided not to leave written feedback at all for this reason. Of the feedback sheets that were filled in without personal details, most were supportive of the scheme or undecided; and it is likely that fear for their safety was a factor in this. There has been abuse and threats of violence to HE staff and contractors which has made HE determined to protect the personal data of individual members of the public who may support the scheme.
58. HE contends that at no point was any undertaking given to share the forms with anyone else. Permission was neither sought from, nor given by those who filled in the forms to allow HE to share the information included in the forms. HE's refusal notice pointed out that members of the public had used the scheme's Commonplace web page to make many of the same comments in a more anonymous setting and that these comments are visible to anyone visiting the site.

59. Conversely, the complainant's argument is that the scheme is of huge public interest and that the views of members of the public are of vital importance.
60. The Commissioner's opinion is that the feedback forms contain personal information that, even with the redaction of name, address, contact details and handwriting could identify certain individuals. Although HE does not consider all the withheld information to be personal data, the Commissioner considers that providing the feedback forms with personal details redacted could not fully anonymise them and that the methods of doing so suggested by the complainant would not render them truly anonymised. These forms would still be considered to be personal data. Additionally, there is no suggestion on the forms that they will be used for anything other than feedback to HE on the proposed scheme. It is the Commissioner's view that the forms contain personal information within the feedback that an individual might not have realised would identify them or be made publicly available.
61. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
62. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
63. The Commissioner has therefore decided that HE was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).
64. As the Commissioner has decided that the requested information is personal data and should be withheld for the reasons given, she has not gone on to consider regulations 12(5)(f) or 12(4)(b).

## **Right of appeal**

---

65. 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)

- 66. 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.
- 67. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**