

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 June 2021

Public Authority: Chapel-en-le-Frith Parish Council
Address: Town Hall
Market Street
Chapel-en-le-Frith
High Peak
Derbyshire
SK23 0HP

Decision (including any steps ordered)

1. The complainant has requested from Chapel-en-le-Frith Parish Council ("the Council") emails concerning a multi-use games area ("MUGA"). This request was made in two parts. The Council disclosed the information at part one of the request, with redactions to personal data under section 40(2) (personal data) of the FOIA. The Council entirely withheld the information at part two of the request under section 40(2).
2. The complainant's grounds for complaint were that the Council had not disclosed all of the information within the scope of the first part of the request. The complainant also objected to the redactions made under section 40(2) in the information that had been disclosed in response to part one of the request.
3. In relation to the second part of the request, the complainant objected to the withholding of information under section 40(2).
4. The Commissioner's decision is first that the request was for environmental information and so the EIR apply.
5. In relation to part one of the request, the Commissioner's decision is that, on the balance of probabilities, the Council does not hold any further

information. The Commissioner considers that, of the redactions to email addresses and personal opinions in the information disclosed in response to part one, a number were correct under regulation 13(1) of the EIR (personal data). However, the Commissioner has found that a number of the redactions were not correct under regulation 13(1). The Council has confirmed to the Commissioner that some of the information was redacted in error.

6. In relation to part two of the request, the Commissioner's view is that the Council was entitled to withhold all of the information it held falling within the scope under regulation 13(1) of the EIR. This consisted only of one email which has been withheld.
7. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant a revised version of the information disclosed at part one where only personal data is redacted. The Commissioner has provided the Council with a list specifying which of the redacted information should now be disclosed to the complainant.
8. The Council 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

9. On 5 August 2020 the complainant wrote to the Council and requested information in the following terms:

"1. All emails (and any attachments they contain) to, from or cc'd to the clerk from January 1 to Dec 31 2011 concerning any aspect of the MUGA in the Chapel en le Frith Memorial Park

2. All emails (and any attachments they contain) to and from [email address redacted] from January 1 to Dec 31 2011 concerning any aspect of the MUGA in the Chapel en le Frith Memorial Park."

10. The Council responded on 2 September 2020. It disclosed the information at part one of the request with the redaction of some information that it considered to be personal data.

11. For part two of the request the Council stated that it had contacted the individual named within the request to seek consent to disclose the emails to and from their account but that the named individual did not give their consent for the requested information to be disclosed. The Council therefore withheld the entirety of the information requested at part two under section 40(2) of the FOIA.
12. The complainant requested an internal review on 8 September 2020. She asked the Council to check that it had disclosed all emails in relation to the first part of her request.
13. On 9 December 2020 the Council provided its internal review decision, which had been undertaken by the Derbyshire Association of Local Councils ("DALC"). The review concluded that some further information had been located that was not initially disclosed. This included some meeting minutes, a tree survey and a number of emails. These documents were then disclosed to the complainant on 9 December 2020.

Scope of the case

14. The complainant contacted the Commissioner on 20 October 2020 to complain about the way her request for information had been handled. At that stage the complainant had not received an internal review response from the Council. She stated:

"I requested copies of emails sent to, from and cc to the Clerk of the council and to the email account of a named individual who worked for the council. The council responded on Sept 2, 2020 and sent me copies of the emails from the clerk's email address but not the named individual on the basis of data protection. I accept the reasons for the refusal to send copies of emails from the named person's email account. However, I subsequently discovered that only a selection of the emails sent to, from and cc to the clerk's email address were sent to me, and that the selection that was sent fundamentally change the meaning of the events that took place and documented in the emails. When the council sent me the emails from the clerk's email address they implied they were a complete record apart of redactions for personal information."

15. Following the internal review and subsequent correspondence as outlined above, the Commissioner asked the complainant to clarify her grounds of complaint. The complainant said that the additional documents disclosed at internal review included emails between the clerk and the named individual. She was therefore of the view that the Council was "selectively choosing which emails" to disclose and that the Council's argument that it

could not release these emails because of a lack of consent was inconsistent. The complainant argued that the missing emails were not personal in nature and were directly related to the commissioning of the MUGA.

16. The complainant raised concerns that, in 2011, the Council published the named individual's email address on its website, and invited members of the public to contact them in their capacity as Chairman of the "Friends of the Memorial Park" party. The complainant argued that the named individual applied for planning permission for the MUGA in the Memorial Park, and that the missing emails concerning the MUGA were sent in the named individual's capacity as Chair of the Committee who oversaw the commissioning and installation of the MUGA. The complainant provided a copy of this webpage.

17. The complainant also raised concerns about the quality of DALC's internal review as the DALC stated in a letter to the Council that it had not conducted an internal review before.

18. In summary the complainant's grounds of complaint were as follows:

- The complainant considered further information to be held by the Council within the scope of part one of the request.
- The complainant was dissatisfied with the personal data redactions in the information disclosed at part one of the request.
- The complainant disagreed with the Council's decision to withhold the information at part two of the request under section 40(2) of the FOIA (personal data).
- The Council handled the request under the FOI legislation instead of the EIR legislation.

19. Therefore, the scope of this notice is to determine firstly which information access regime is appropriate for this request. It also covers whether, on the balance of probabilities the Council held any further information in relation to the first part of the request. It also considers whether the Council was entitled to withhold the information at part two of the request under section 40(2) of the FOIA (personal data) or regulation 13 of the EIR (personal data). It also considers whether the redactions to personal data in the information disclosed at part one of the request were appropriate.

Reasons for decision

Regulation 2 – Is the requested information environmental?

20. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.

21. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"

22. The request in this case was for emails concerning a MUGA at a park. In response to the Commissioner's investigation the Council stated that it disagreed that the information is environmental. However, the Commissioner notes that the request relates to the development of land. Therefore, the Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the elements listed in regulation 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).

23. The Commissioner therefore considers that the Council should have handled the entire request originally under the EIR and not the FOIA.

Background

24. This request relates to an ongoing dispute between the complainant and Council regarding noise and anti-social behaviour at the MUGA in the Memorial Park which is located close to the complainant's property. The details surrounding this planning application and approval can be located on High Peak Borough Council's website¹. The application was approved on 13 December 2010.

5(1) – Duty to make environmental information available on request

25. For clarity, the Commissioner is only considering whether the Council has complied with regulation 5(1) in relation to part one of the request. This is because the second part of the request was refused under regulation 13 and the complainant raised no issue about whether all the information

¹ <http://planning.highpeak.gov.uk/portal/servlets/ApplicationSearchServlet?PKID=125475>

within the scope of that request had been identified. Therefore, the following analysis only relates to part one of the request. This was for:

"1. All emails (and any attachments they contain) to, from or cc'd to the clerk from January 1 to Dec 31 2011 concerning any aspect of the MUGA in the Chapel en le Frith Memorial Park."

26. Regulation 5(1) of the EIR states that *"a public authority that holds environmental information shall make it available on request."* This is subject to any exceptions that may apply.
27. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information was not held, and any other reasons offered by the public authority to explain why the information was not held. She will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
28. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.
29. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The Council's view

30. In the Council's internal review response, it disclosed some further information to the complainant. The Council informed the Commissioner that it has attempted to supply the information in a transparent manner and that all of the information was not provided initially due to a scanning issue. Following dissatisfaction from the complainant, on 10 December 2020, the Council wrote to the complainant and confirmed that all the information highlighted in its internal review had been made available.
31. The Council provided the Commissioner with its submissions regarding the searches it had conducted to locate the requested information. It

confirmed that it held a paper file concerning the MUGA which had a number of emails held as hard copies and the dates of those emails corresponded to this information request. The Council stated that it asked members of the Council to check whether there were any items that had not been placed in this paper file.

32. The Council confirmed that it also searched for the emails electronically. It confirmed that the search for electronic information did not reveal any emails in the archive for the period requested. It undertook a search on the clerk's email account and a related clerk's email account. The Council confirmed that the search terms used in respect of the electronic data were: "MUGA", "Multi User Games Area", "Chapel Memorial Park", "Memorial Park", "[redacted]", "[redacted]" and "[redacted]". The Council stated that it did not have any laptops in the period referred to in the information request.

33. The Council provided an email to the Commissioner of its correspondence with its IT provider dated 1 December 2020. In this, the IT provider confirmed that they had undertaken various searches for the information requested however it could not locate any emails between the date range 02/12/2010 and 01/03/2012 for the clerk's email address, as referred to in part one of the request. The IT provider stated that it suspected an incident within that date range caused data loss. The Council communicated this to the complainant on 10 December 2020:

"As part of the review I was asked to provide a written statement from the Council's IT provider that emails were lost due to a technical occurrence during the period 1 January 2011 to December 2011. This was to confirm that emails had not been deleted following your request. Therefore only hard copies of some emails saved in the file are available."

34. The Council confirmed to the Commissioner that the only information held was in the form of paper copies of certain emails and that no information held had been destroyed. The Council confirmed that the data was not intentionally deleted or destroyed and it did not know when the data loss occurred. It also confirmed that no documents were destroyed other than those that had been lost as part of the data loss incident.

35. The Council provided a copy of its retention schedule to the Commissioner. This schedule does not refer to the retention of emails. The Council stated that it does not have a policy on the retention and deletion of emails and that all of its emails are held in Outlook. The Commissioner asked the Council whether copies of the information might have been made and held in other locations (aside from the paper file). The Council stated that the requested information could only be held on Council computers. It confirmed that it had checked with the Council's IT support

who, "are able to link into the machines and they undertook a search and confirmed that the information was not held on the computer in any other files".

36. The Commissioner asked the Council if there was a business purpose for which the requested information should be held. The Council stated that the information on the MUGA had been kept in the paper file due to an ongoing issue with the complainant. The Council said that it was not aware of any statutory requirement to retain the requested information.

The Commissioner's view

37. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the Council, the information disclosed, the Council's explanations as to why information was not held and the complainant's concerns.

38. The Commissioner notes that the complainant's reasoning for considering further information to be held is that she is aware of one email dated 23 July 2011. However, the Council has confirmed that it holds that email and is withholding it under part two of the request as it is considered to be personal data. The Commissioner therefore does not consider this to be a strong argument that the Council holds further information in relation to part one of the request.

39. The Commissioner is satisfied that the Council carried out adequate and appropriately-targeted searches to locate relevant information within the scope of the request. In particular, the Commissioner notes the Council's explanation regarding the IT provider confirming that it could not locate emails from the requested time period. The Commissioner considers that such searches would have located all information relevant to part one of the request.

40. The complainant has not provided any evidence to demonstrate that the Council holds further information in relation to part one of the request that it has not either disclosed or cited regulation 13 to withhold. Therefore, in the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that it does not hold any further relevant information to that which it had already identified and disclosed to the complainant.

41. The Commissioner is satisfied that, on the balance of probabilities, the Council did not hold any further information falling within the scope of the request to that which it identified in its initial and internal review responses. The Commissioner considers that the Council has complied with the requirements of regulation 5(1) of the EIR.

Regulation 13 – Personal Information

Information withheld at part two of the request

42. Firstly the Commissioner will consider the Council's use of regulation 13 of the EIR to withhold the entirety of the information at part two of the request. This was for:

"2. All emails (and any attachments they contain) to and from [email address redacted] from January 1 to Dec 31 2011 concerning any aspect of the MUGA in the Chapel en le Frith Memorial Park."

43. The Council withheld this information as it considered it to be the personal data of the named individual.

44. In particular, the complainant raised concerns with the Council regarding an email dated 23 July 2011 and questioned whether it had been deleted. The Council confirmed that it held that specific email as a hard copy however it was withholding it under regulation 13. This email is the only document the Council are withholding under regulation 13. The Council have confirmed that this is the only document it holds falling within part two of the request.

45. 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.

46. In this case the relevant condition is contained in regulation 13(2A). 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").

47. 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.

48. 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?

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

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

50. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
51. 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.
52. 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.
53. The information withheld at part two of the request is only one email dated 23 July 2011 sent from the individual named at part two in the request to the clerk and other third parties.
54. The Commissioner notes that the request specifically names and relates to one particular individual's email account. The Commissioner acknowledges that the complainant disputes that the requested information is personal data. The complainant has argued that that this information is not personal data because, in her view, the requested information is not personal in nature and is directly related to the commissioning of the MUGA.
55. The Commissioner accepts the Council's argument that the withheld information is personal data because it is a personal view. She also notes that the named individual was not employed by the Council and was therefore acting in a voluntary capacity. She also notes that it is a personal and not a Council email address.
56. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject. The name, email address and opinion of the data subject quite obviously is information that both relates to and identifies the individual concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
57. 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.
58. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

59. 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".

60. 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.

61. 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

62. 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.

63. 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.

64. 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:-

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, 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".

- 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.

65. 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

66. 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.

67. 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.

68. The Council stated that it has identified no legitimate interests in disclosure. The Commissioner considers there to be some legitimate interest in planning decisions made that will affect the environment.

Is disclosure necessary?

69. “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.

70. The Council has argued that the named individual is a resident who volunteered for the community group and is not an employee of the Council. Therefore, the Council has concluded that it would be the named individual’s expectation that his personal data would not be placed in the public domain.

71. Ultimately, the Council’s position is that the requested information consists of the named individual’s personal email account and the expectation is that any information will remain personal and not be shared

publicly. The Council confirmed that it had contacted the named individual to seek permission to disclose this information but he declined. This was then communicated to the requester. The Council has stated that it does not consider it fair to release the named individual's personal email as the content was that individual's personal view and had no bearing on the MUGA project moving forward.

72. The complainant has suggested that contact details of individuals could be redacted and the information disclosed. However, the Commissioner notes that even with redaction of the name or email address, because the complainant has named an individual in their request, she would be aware of the author of the email.

73. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified and that these have been met in the information that has been disclosed already to the complainant.

74. 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 therefore does not meet the requirements of principle (a).

Redactions in the information disclosed at part one of the request

75. The complainant has also raised concerns about the redactions in the information disclosed to her at point one of the request. The Commissioner has reviewed an unredacted version of the disclosed information in order to determine whether the Council's redactions were appropriate. During the course of this investigation the Council has acknowledged that its redactions were inconsistent in the information it disclosed to the complainant. The Council has redacted some personal email addresses and some professional email addresses. It has also redacted some personal opinions. The Council has since stated that it does not consider some of the email addresses to be personal data and that these were redacted in error. However it maintains its position that the personal email addresses should remain redacted. It also maintains its position that the personal opinions should remain redacted.

Regulation 13 – Personal Information

Redactions to professional email addresses in the information disclosed at part one of the request

76. 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.

77. In this case the relevant condition is contained in regulation 13(2A). 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").

78. 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.

79. 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?

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

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

81. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

82. 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.

83. 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.

84. The Council have made redactions to some professional email addresses under regulation 13(1) in the information it has disclosed in response to part one of the request. Therefore, the information withheld is professional email addresses. During the course of the Commissioner's investigation the Council has acknowledged that some of these email addresses have been redacted in error. The Council have not argued that these professional email addresses are personal data.

85. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the some of the information

does not relate to a data subject where it is a generic email address. This information therefore does not fall within the definition of "personal data" in section 3(2) of the DPA. As the information is not personal data, the Commissioner has not gone on to consider whether disclosure would contravene any of the DP principles. As the Council have incorrectly redacted professional email addresses, it is now required to take the step required at paragraph seven above.

86. However, the Commissioner is also satisfied that some of the information does relate to a data subject where names of individual employees are contained within a professional email address. The names of the data subjects contained within the email addresses quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.

87. 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.

88. The most relevant DP principle in this case is principle (a).

89. 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".

90. 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.

91. 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

92. 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*³.

93. 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.

94. 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

95. 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.

96. 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.

97. The Council has not identified any legitimate interests in disclosure of these professional email addresses which contain the names of individual employees.

³ 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”.

98. The Commissioner does not consider that there is a strong legitimate interest in the disclosure of these email addresses where they contain individual employee names. The Commissioner does not consider that it would be a reasonable expectation of those individuals that their email addresses would be disclosed in response to an information request.
99. Ultimately, the Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified and that these have been met in the information that has been disclosed already to the complainant.
100. 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 therefore does not meet the requirements of principle (a).

Redactions to personal email addresses in the information disclosed at part one of the request

101. 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.
102. In this case the relevant condition is contained in regulation 13(2A). 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").
103. 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.
104. 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?

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

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

106. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
107. 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.
108. 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.
109. The Council has made redactions to some personal email addresses under regulation 13(1) in the information it has disclosed in response to part one of the request. The names and email addresses concerned are members of the "Friends of the Park" Group.
110. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects contained within the email addresses quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
111. 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.
112. The most relevant DP principle in this case is principle (a).
113. 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"*.
114. 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.
115. 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

116. 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"⁴.

117. 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.

118. 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

119. 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.

120. 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.

⁴ 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".

121. The Council has not identified any legitimate interests in disclosure of these personal email addresses.
122. The Commissioner does not consider that there is a strong legitimate interest in the disclosure of these individuals' names or private email addresses. The Commissioner does not consider that it would be a reasonable expectation of those individuals that their email addresses would be disclosed in response to an information request.
123. Ultimately, the Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified and that these have been met in the information that has been disclosed already to the complainant.
124. 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 therefore does not meet the requirements of principle (a).

Redactions to personal opinions in the information disclosed at part one of the request

125. 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.
126. In this case the relevant condition is contained in regulation 13(2A). 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").
127. 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.
128. 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?

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

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

130. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
131. 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.
132. 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.
133. The Council has made redactions to some personal opinions under regulation 13(1) in the information it has disclosed in response to part one of the request.
134. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The opinions of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
135. 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.
136. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

137. 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".

138. 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.
139. 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

140. 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"⁵.

141. 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.

142. 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

143. 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.

144. 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.

⁵ 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".

145. The Council have not identified any legitimate interests in disclosure. The Commissioner considers that there is a limited legitimate interest in relation to the personal opinions contained within the withheld information and that these redactions are extremely minimal.
146. As above, the Commissioner considers that the individuals concerned would not have a reasonable expectation that their personal opinions would be disclosed in response to an information request. The Commissioner is satisfied that that there are less intrusive means of achieving the legitimate aims identified and that these have been met in the information that has been disclosed already to the complainant.
147. 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 therefore does not meet the requirements of principle (a).

Right of appeal

148. 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

149. 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.

150. 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

Sarah Clouston
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF