

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

**Date:** 14 December 2021

**Public Authority:** Denbighshire County Council

**Address:** [information@denbighshire.gov.uk](mailto:information@denbighshire.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant requested various information relating to a contract awarded to District Enforcement by Denbighshire County Council. The Council provided some information but withheld other information on the basis of section 40(2) (personal information) FOIA, or regulation 13 EIR in the alternative. It also refused to provide other information either in reliance on section 43 FOIA (commercial interests) or regulation 12(5)(e) EIR (confidentiality of commercial or industrial information) and regulation 12(5)(d) (the confidentiality of proceedings) of the EIR.
2. The Commissioner's decision is that Denbighshire County Council has now complied with its obligations under regulation 5(1) of the EIR, and that it was entitled to rely on regulation 12(5)(e) and regulation 13 to withhold the remaining information. However, in failing to provide all of the information within the required timescales, the Council has breached regulation 5(2) of the EIR.

**Request and response**

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3. On 19 August 2020, the complainant wrote to Denbighshire County Council ('the Council') and requested the following information in respect of the contract awarded to District Enforcement by the Council, with particular focus on data sets in relation to the contract, duties, responsibilities, performance and outcomes in the context of Denbighshire Control of Dogs Public Space Protection Order as follows:
  1. *"Tender submission bid details, including their business plan to fulfil this contract.*

2. *Contract award details covering the DCC meeting(s) Agenda, approvals and corresponding minutes associated with the meeting(s) held.*
  3. *Contract details covering the award date, contract duration, payment mechanism and structure, terms of reference, scope of the work to be undertaken, monitoring and evaluation provisions and reporting obligations.*
  4. *District Enforcement Standard Operating Procedures for day to day activities in the execution of the contract, including any amendments to revised operating practices implemented to address the additional demands of the COVID-19 pandemic.*
  5. *Staff training structure, delivery and training course details for Enforcement Officers including supplementary training provided to ensure COVID-19 protocols are adhered to.*
  6. *Enforcement details since 2<sup>nd</sup> March 2020 categorising the nature of the offences on a monthly basis.*
  7. *Similarly on a monthly basis, the number of walk-offs, warnings issued and recorded. Fixed penalty notices served and percentage of defaulters, number of cases processed and prosecuted by the Courts and the number of cases pending Court adjudication.*
  8. *Demographic data, also on a monthly basis, covering the age or age groupings, gender and resident/non-resident status (outside Denbighshire) of alleged offenders.*
  9. *Following the suspension of the Denbighshire Control of Dogs Public Space Protection Order, given the expiry of the Order on 2<sup>nd</sup> March 2020, details of District Enforcement's proposals to contact all recipients of warnings, FPNs, Court imposed fines/costs to provide formal letters of apology and the issuance of refunds for FPN fines and Court fines/costs paid. ..."*
4. The Council responded on 14 December 2020. It provided information in respect of items 2, 3, 6, 7, 8 and 9 but withheld information in respect of items 1, 4 and 5 on the basis that it was commercially sensitive citing section 43 FOIA or regulation 12(5)(e) of the EIR should the information be considered environmental.
  5. Following an internal review the Council wrote to the complainant on 11 March 2021 with the responses to each item summarised below:
    1. Some information provided but withheld other documents either in part or in their entirety on the basis of regulations 12(5)(d), 12(5)(e) and 13 of the EIR.

2. The complainant was informed that the Council held no further information relevant to this item of his request.
3. The Council thanked the complainant for his simplified, consolidated table, but did not comment further.
4. Standard Operating Procedures document attached.
5. As number 4 above.
6. The Council attached spreadsheets and confirmed that between 23 March 2020 and 1 June 2020, there was a complete suspension of enforcement activity due to the Covid-19 pandemic.
7. The complainant was informed that the Service and Access to Information Team had spent some time endeavouring to understand which statistics he required and over which timeframe, asking the complainant to clarify this part of his request as simply and clearly as possible.
8. The Council attached a new map showing the locations of where the offenders for the dog PSPO breaches reside throughout the UK between the dates of 2 March 2020 and 20 August 2020. The Council also confirmed that District Enforcement were unable to break the data down further.
9. The Council thanked the complainant for his comments.
6. The complainant contacted the Council on 14 March 2021 either expressing dissatisfaction with the responses or with queries in respect of items 1, 2, 4, 5, 7, 8 and confirming that in respect of item 9, he wanted to know why he had not been given an apology.
7. The Council responded on 15 April 2021 informing the complainant that it had nothing to add in respect of his request, but attached two further maps which included dog exclusions and some clarification of each map. It also confirmed that Public Space Protection Orders for the relevant period had been cancelled, meaning that no-one had been prosecuted.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 13 November 2020 to complain about the way his request for information had been handled. However, as the internal review had not been completed until 11 March 2021 his complaint was not accepted as valid until this date.

9. In correspondence to the Commissioner, the complainant attached a copy of his request for an internal review and his post internal review correspondence to the Council as the basis of his complaint.
10. During the course of the Commissioner's investigation, the Council revisited its response, identifying new information as falling within the scope of the request which it provided to the complainant, and disclosing some information it had previously withheld on the basis of regulation 13.
11. Items 3, 6 and 9 have not formed part of this investigation on the following basis:
  - Post internal review correspondence from the complainant, included confirmation that he was satisfied with the response he had received in response to item 3 of his request, and -
  - did not include any reference to item 6 after his request for an internal review where he provided a simplified consolidated table from the eight spreadsheets he had received in response to this item of his request.
  - Item 9 (why the complainant has not received an apology) is a service matter between the Council and the complainant and beyond the remit of the Commissioner's powers.
12. The scope of the following analysis is to consider whether the Council has complied with its duties under regulation 5 of the EIR in respect of items 2, 4, 5, 7 and 8, and whether it was entitled to rely on regulations 12(5)(d), 12(5)(e) and 13 in respect of item one and item five of the request.

## **Reasons for decision**

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### **The appropriate legislation**

13. The Commissioner has first 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..."*

14. The Commissioner considers that the information in question relates to an agreement between the Council and a third party in respect of the Denbighshire Control of Dogs Public Space Protection Order and falls within the scope of 'measures' defined by regulation 2(1)(c).

## **Regulation 5**

15. Under regulation 5(1) of the EIR, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
17. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
18. In this particular case the complainant was not satisfied that he had received all information falling within the scope of his request in respect of the following items:

### *Item 2 – Contract award details including agendas and minutes of meetings*

19. As part of its original response to the complainant, the Council forwarded a link to its website which it considered provided the details in response to this item that the complainant was seeking.

20. However, in his request for an internal review, the complainant stated that there was no information regarding the decision made and a search on its website on this topic refers to a subsequent meeting dated 14 February 2019 including appendices outlining details of the "*Environmental Enforcement Provision*" which he argued suggests there may be other relevant information not disclosed.
21. Whilst the Council maintained that it held no further information on this matter in its internal review, during the course of the Commissioner's investigation, the Council informed the Commissioner that it had previously withheld a confidential report to Cabinet, but that it was now prepared to disclose this document in full to the complainant which the Commissioner understands was part of the Council's disclosures of 31 August 2021.
22. In the same correspondence, the Council informed the Commissioner that it was investigating whether any information exists concerning pre-contract meetings about District Enforcement, and confirmed on 9 September 21 that it holds no recorded information about discussions that took place before the procurement process resulted in District Enforcement being employed, providing the following response it has received from its Lead Officer:

*"The process went through Procurement and we spoke about it, many, many times. There were no meetings that were held with agendas or minutes recorded. The whole process was subject to the procurement process."*
23. The Commissioner has considered the complainant's arguments and details of the Council's search and has concluded that on the balance of probabilities, it has now provided all information it holds relevant to this part of the complainant's request.

*Item 4 – Standard Operating Procedures both day-to-day and including any amendments to address the additional demands of the COVID-19 pandemic*

The Council has confirmed that the SOP (Standard Operating Procedures) previously disclosed to the complainant was the one in use at the relevant time, but was amended in May 2021. It also informed the Commissioner that due to further enquiries it had made with District Enforcement, regarding COVID-19 training that it had identified two relevant email chains which have now been disclosed to the complainant under separate cover.

24. It further confirmed that it holds no recorded notes about the training on its network drives, explaining that the training took the form of regular informal briefings in line with frequent updates from the Welsh

Government, and confirmed that it is not the Council's practice to record each informal briefing session.

25. The Commissioner is satisfied that the Council has now provided all information it holds relevant to this part of the complainant's request.

*Item 5 – Staff training structure, delivery and training courses for Enforcement Officers including supplementary training to ensure COVID-19 protocols are adhered to*

26. The Council informed the Commissioner on 31 August 2021 that a copy of District Enforcement's training documentation was to be sent to the complainant with the name of the staff member redacted and he understands that this has now been done.

*Item 7 – number of walk-offs, warnings issued and recorded. FPNs served and percentage of defaulters, numbers of cases processed and prosecuted by the courts, and the number of cases pending court adjudication*

27. In respect of item 7 the complainant informed the Council that he could not reconcile the information and figures presented with various data-sets contained in the spreadsheets provided with the Council's original response. He added that they appeared unrelated to the Denbighshire Control of Dogs Public Spaces Protection Order and assumed they may relate to other enforcement provisions.
28. In its internal review, the Council informed the complainant that it had spent some time endeavouring to understand which statistics the complainant required and over which timeframe requesting that he clarifies this part of his request as simply and clearly as possible.
29. The complainant expressed concern that the Council was only then requesting clarification of this item.
30. The Council confirmed to the Commissioner on 20 August 2021 that District Enforcement have now provided copies of the spreadsheets and have now forwarded them to the complainant.
31. Based on the above, the Commissioner is satisfied that on the balance of probabilities the Council has now disclosed all information it holds relevant to this item of the request to the complainant.

*Item 8 – Demographic data, covering the age or age groupings, gender and resident /non-resident status ... of alleged offenders*

32. In relation to item 8, the complainant was dissatisfied that the demographic data he had received with the Council's original response

did not allow correlation of the age grouping, gender and resident/non-resident categories aligned to the specific offences under the Denbighshire Control of Dogs Public Spaces Protection Order.

33. The Council provided a new map with its internal review which it confirmed showed the locations of where offenders for dog PSBO breaches reside throughout the UK between the requested dates. It also confirmed that the data does not show streets and towns, just areas and informed the complainant that District Enforcement were unable to break it down further.
34. The complainant remained dissatisfied with the Council's response in respect of item 8 stating that there were two maps without much in the way of explanation as to what they were intended to portray. He further stated that the age related data was particularly relevant as he believed that enforcement officers were targeting older dog walkers, and he viewed this information as critical, if only dismiss the perceived age discrimination. He did not accept that the break down he required was not held.
35. The Council provided two maps and confirmed that map one represented the offence location and map two the offender location. It added that it was unable to zoom any closer to protect the identities of the offenders and reminded the complainant that despite what had been issued, all PSPO's during this period were cancelled with no one having been prosecuted.
36. Following the Commissioner's investigation, the Council confirmed that District Enforcement had provided copies of spreadsheets that sit behind the maps previously disclosed, and stated that they contain the demographic information the complainant had requested. The Commissioner understands these have now been provided to the complainant.
37. As with item 7, the Commissioner is satisfied that on the balance of probabilities the Council has now disclosed all information it holds relevant to this item of the request.

Having considered the arguments put forward by the complainant, the additional information provided during the course of this investigation, and the explanation of the Council in respect of each of the above items, the Commissioner is satisfied that the Council has now disclosed all relevant information it holds and has therefore complied with its obligations under regulation 5(1) EIR.



### **Regulation 5(2) – timescales for responding to request**

38. Regulation 5(2) of the EIR states that a public authority must make information available no later than 20 working days after the date of receipt of the request.
39. In this particular case, the Commissioner notes that the request was submitted on 19 August 2020, yet the Council did not respond to this request until 14 December 2020 which is clearly outside of the specified timescale under regulation 5(2).
40. Additionally, the Council subsequently disclosed additional information with its internal review dated 11 March 2021 and during the Commissioner's investigation. The Commissioner has therefore recorded a breach of regulation 5(2) in respect of the Council's handling of this request.

### **Regulation 12(5)(e) – the confidentiality of commercial or industrial information where such confidentiality is provided by law**

41. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
42. The Council is relying on regulation 12(5)(e) to withhold some of the information contained in the following five documents:
  - *Document 1 - pages 36-39, 40, 43-49*
  - *Document 2 – pages 1-3*
  - *Document 3 – page 3*
  - *Document 5 – Pages 1-5*
43. In her assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
44. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the

information was disclosed under the EIR, it would cease to be confidential.

**Is the information commercial or industrial in nature?**

45. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
46. The Commissioner has considered the information withheld on the basis of regulation 12(5)(e) and notes that it relates to a contract between the Council and a third party (District Enforcement) for a service which the third party would profit from. She is satisfied therefore that it is of a commercial nature.

**Is the information subject to confidentiality provided by law?**

47. In relation to this element, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligation or statute.
48. As stated in paragraph .....of this notice, the withheld information relates to the commercial interests of either District Enforcement or those of the Council.
49. The Council has informed the Commissioner that the information is protected by the common law of confidence and is not publicly available. It has further confirmed that there is an implied duty of confidence.
50. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider are:
  - Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.

Having considered the withheld information, the Commissioner is satisfied that the information is not trivial. Additionally, no evidence has been presented to the Commissioner to indicate that the information is in the public domain. The Commissioner therefore considers that the information does have the necessary quality of confidence.

51. The Council considers that an obligation of confidence exists in relation to this information. The figures were provided to the Council as part of its contract with District Enforcement. The Council would therefore have understood that they had received this information with an implied duty of confidence.
52. The Commissioner is therefore satisfied that the information was shared in circumstances importing an obligation of confidence and considers that the common law of confidence applies to this information.

**Is the confidentiality required to protect a legitimate economic interest?**

53. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm *might* be caused by disclosure. The Commissioner considers that it is necessary to establish that on the balance of probabilities, some harm *would* be caused by the disclosure. In accordance with various decisions heard before the former Information Tribunal, the Commissioner interprets '*would*' to mean '*more probable than not*'.
54. In terms of the withheld information generally, the Council considers that disclosure of the information would adversely affect its own commercial interests and those of District Enforcement. It has argued that by disclosing for example, parts of the Intelligence Lead Patrolling and Deployment Strategy, it would be divulging information such as the operating hours of the Enforcement Officers, and numbers of staff deployed to enforcement operations.
55. The Council also considers that the disclosure of the information would damage its commercial interests as it receives an income from any fixed penalties issued.
56. The Council has also provided more specific arguments in support of withholding particular documents as follows:

*Document 2*

57. Document 2 contains an illustration of a deployment approach adopted by a different Council which also has a contract with District Enforcement. Denbighshire Council has stated that neither itself or District Enforcement wanted to prejudice the activities of another party

by disclosing an unredacted copy of the document and considers the disclosure of the withheld information would also be likely to prejudice not only their interests but those of the other Council.

*Document 3*

58. The withheld information in Document 3 contains contract information in relation to two Councils who also have contracts with District Enforcement. Denbighshire Council has confirmed that the exception was applied to protect District Enforcement's commercial interests by preventing its competitors from gaining an unfair financial advantage by disclosing the contract price submitted in respect of previous tenders. It has also redacted the team structure which gives some indication of the modus operandi of the company on the same grounds as discussed under general arguments.

*Document 5*

59. The Council has also withheld some information from document 5 on the basis that they contain a confidential and sensitive risk assessment which details District Enforcement's working practices in relation to lone working and working with members of the public. The Council has informed the Commissioner that this risk assessment may have 'given them [District Enforcement] the edge' compared to other bidders.
60. The Commissioner is satisfied that disclosure of the withheld information would adversely affect both District Enforcement's commercial interests as disclosure would give District Enforcement's competitors inside knowledge of its working practices and give them an unfair advantage in any future bids.

**Would confidentiality be adversely affected by disclosure?**

61. As the first three elements of the test cited at paragraph 45 of this notice have been established, the Commissioner is satisfied that disclosure of the information into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of District Enforcement and the Council. He has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

### **Public interest arguments in favour of disclosing the information**

62. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
63. The Council has not provided any arguments in favour of disclosure, however the Commissioner considers that just as some weight should always be attached in favour of transparency, similarly there will always be general arguments in favour of accountability.

### **Public interest arguments in favour of maintaining the exception**

64. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in protecting the principle of confidentiality and that of avoiding commercial detriment.
65. The Council has stated that disclosure of the information would prejudice the Council's and District Enforcement's operations and strategies, and considers that this enforcement is ultimately a statutory duty (by virtue of the Environmental Protection Act 1990).
66. It further informed the Commissioner that deployment information is provided in confidence to the Council and discussed confidentially. The Council considers that it is clearly in the public interest to maintain the confidentiality of this information as the public would expect the Council and District Enforcement to carry out effective enforcement and to reduce the number of such criminal offences.
67. The Council has further argued that revealing the time of day that Enforcement Officers undertake their patrols would have an adverse effect on the commercial viability of District Enforcement as it would prevent their ability to detect environmental crime. The Council's duty to enforce would also be undermined with some members of the public taking advantage of this information to avoid being fined for their conduct. The Council considers that the balance of public interest is weighted in favour of maintaining the exception.

### **The balance of the public interest arguments**

68. The Commissioner has considered the arguments put forward both in favour of disclosure and maintaining the exception. The Commissioner

acknowledges the explicit presumption in favour of disclosure under regulation 12(2) of the EIR.

69. The Commissioner is also mindful of the general principles of accountability and transparency of decisions made by public authorities and more specifically in respect of environmental enforcement.
70. However, he considers that there is a strong public interest in protecting the principle of confidentiality not just in general, but in respect of information relating to the enforcement of environmental crime.
71. He also considers that there is a strong public interest in avoiding commercial detriment and believes that the risk of commercial detriment to both District Enforcement and the Council were the withheld information be disclosed is not in the public interest. He has therefore concluded, that in all the circumstances of the case, the balance of public interest test is weighted in favour of maintaining the exception.
72. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
73. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.
74. His decision therefore is that the exception to the duty to disclose environmental information at regulation 12(5)(e) applies to the withheld information, and it has not been necessary to consider the Council's alternative exception at regulation 12(5)(d) in relation to this particular information.

### **Regulation 13 personal data**

75. 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.

76. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
77. 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.
78. 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?***

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

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

80. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
81. 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.
82. 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.
83. The withheld information in this case is as follows:
  - Document 1 – Name of Health and Safety Manager and name of Communication Manager
  - Document 2 – Name of local authority and names of officers
  - Document 3 – Names of officers in other local authorities

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

- Document 6 – Names of officers in operational structure and background history of Managing Director

84. In the circumstances of this case, having considered the withheld information, with the exception of the name of the local authority, the Commissioner is satisfied that the information relates to living individuals. She is also satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
85. The fact that information constitutes the personal data of identifiable living individuals 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.
86. The most relevant DP principle in this case is principle (a).

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

87. 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".*

88. 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.
89. 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**

90. 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>.*

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<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".*



91. 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.
92. 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*

93. 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.
94. 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.
95. In this particular case, other than the complainant's obvious interest in the information, the Commissioner cannot identify any other legitimate interest.

#### *Is disclosure necessary?*

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

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

96. '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.
97. The Commissioner is mindful that the Council has disclosed redacted copies of the documents containing the withheld information, which provides the details the complainant has requested, and does not consider that the disclosure of the names of the individuals referred to within the documents would add anything further to the request. She has therefore concluded that disclosure of the names is not necessary.
98. 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**

99. 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).

## **Right of appeal**

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100. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

101. 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.

102. 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 .....**

**Catherine Dickenson  
Senior Case Officer  
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