

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

Date: 15 August 2022

Public Authority: Derbyshire Fire & Rescue Service
Address: Butterley Hall
Ripley
Derby
DE5 3RS

Decision (including any steps ordered)

1. The complainant has requested from Derbyshire Fire & Rescue Service (DFRS) fire safety notices and other warnings, cautions or alerts regarding properties used by the University of Derby for educational, administration or student accommodation purposes. They also asked for records of any related internal decisions, advice or comment from the university or third parties. DFRS initially stated that the requested information was not held and provided advice and assistance. Over a period of time DFRS provided the complainant with some information but withheld other information, citing regulations 12(5)(b), 12(5)(e) and the exception for third party personal information.
2. The Commissioner's decision is that regulations 12(5)(b) and 12(5)(e) are not engaged. Regulation 12(3)/13(1) has been cited appropriately to some, but not all, of the withheld personal information as detailed in paragraph three of this decision notice. The Commissioner has proactively applied regulation 5(3) to part of the requested information. The Commissioner accepts, on the balance of probability, that DFRS does not hold any further information falling within scope of the request. However, it breached regulation 5(2) by responding late.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the information that is being withheld under regulations 12(5)(b) and 12(5)(e) with appropriate redactions for part of the personal information that was withheld under regulation 13(1), as detailed in the bullet point below.
 - Redact the names, job roles, contact details, signatures and qualifications of junior employees of DFRS, the University of Derby and other external organisations. This includes email headers, the body of emails or email footers. The contact details, signatures and qualifications of senior employees, internally and externally must also be redacted but not their names and job roles.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 17 August 2020 the complainant made the following request for information:

“Please provide sight of fire safety notices and other warnings, cautions or alerts in respect of properties used by University of Derby students and / or staff for educational, administrative or student accommodation purposes.

Please also provide records of any internal decisions made by Derbyshire Fire & Rescue services related to above, as well as related advice or comment from the University of Derby or third parties.”
6. DFRS responded on 16 September 2020 and stated that, after a search, the information was ‘not held’ but offered advice and assistance.
7. On 9 October 2020 the complainant revised his request as follows:

“1. I have been in touch with the CFOA [Chief Fire Officers Association] which has confirmed that the National Fire Chiefs Council’s Enforcement Register is maintained by the individual fire

and rescue services which are in turn responsible for all data submitted to the database.

2. The DFRS response to my FOI request suggests that its own data is not enabled to provide free text searches. That is not a credible position in 2020. Can I suggest that DFRS revisits its response to include the employers of the designated 'responsible persons'?

3. Whilst you may wish to revise your response to my FOI request, I provide, in the meantime, two addresses for your consideration and response per my original FOI request:

3.1 The Copper Building, One Friargate Square, Agard Street, Derby

3.2 Homes for Students, The Croft, Cathedral Road, Derby, DE1 3FQ

4. In relation to 3.1 above, please amend my FOI request to now include all records relating to DFRS's contact with Derbyshire Constabulary in relation to fire safety at this building."

8. On 23 October 2020 DFRS responded to part one of the request to state that it was not required to answer questions if information was not held.
9. DFRS was unable to respond to parts two and three as it required more time. DFRS wrote again on 13 November 2020 stating that it was unable to respond regarding what it termed part four (actually part three of the complainant's follow-up request) but confirmed that it held some information.
10. DFRS sent another holding email on 30 November 2020 explaining that it was still unable to respond.
11. On 10 December 2020 DFRS responded and provide some information to the complainant regarding one of the named addresses.
12. On 6 January 2021 the complainant asked for clarification on certain points.
13. DFRS responded to the request/clarification on 15 January 2021 answering the question asked in part one of the request/clarification. Having extended the timeframe of the search (from 2017 instead of 2019), DFRS provided some more information.

14. On 2 February 2021 the complainant made the following request:

"...To close the Copper Building thread, please confirm and clarify what appears to be intimated in the DFRS FOI response:

1. that at no time has DFRS ever issued or referenced an enforcement notice or a prohibition notice in its recorded communications related to the Copper Building,
2. that at no time from January 2016 to May 2018 has DFRS ever recorded its inspection of the Copper Building to ensure that occupancy levels were being adhered to (we have already gathered university curriculum timetable evidence that confirms that they were not),
3. that at no time has DFRS confirmed with the supplier of the Copper Building's 'people counting' system that its systems are suitable for use related to fire safety (we already have written confirmation from the supplier that the systems were unsuitable for use in a fire safety context).

Finally, on the matter of the Croft, we have a written statement from the CFOA that it cannot and does not delete records from the enforcement notice database and that all notices would remain visible once discharged. To confirm the FOI response, is DFRS contesting the CFOA's declared position and accusing the CFOA of deleting the enforcement notice record for the Croft?"

15. On the same day, DFRS stated that it was not obliged to answer questions.
16. The complainant responded on 6 April 2021 asking that their last email be considered as a new information request.
17. DFRS responded on 5 May 2021 and provided answers to the complainant's questions.
18. On 7 May 2021 the complainant wrote again to say that some information had not been provided and to add further clarification.
19. This email was acknowledged as an internal review request on 10 May 2021 but the complainant disputed this on 18 May 2021.
20. The complainant wrote to DFRS on 19 May 2021 to correct a factual error they had made.

21. On 20 May 2021 the complainant provided some extra information and a reference number to assist in the location of the information.
22. DFRS provided an internal review on 11 June 2021 that refused the request made on 2 February 2021, confirming that information was held in relation to parts one and two of the request, but refused to either confirm or deny information relating to part three of the request. Information was withheld under sections 21 FOIA, 31 FOIA and section 40(2) FOIA.
23. On 28 June 2021 the complainant reminded DFRS that it needed to provide any other certificates it held relating to the building in question.
24. DFRS responded on 30 June 2021 stating that it had referred the complaint as an internal review. DFRS offers an extra review in certain circumstances.
25. The complainant wrote again to DFRS on 8 July 2021:

"For reference, as well as the wider sphere of records sought within my FOI request, there is a measure of urgency specific to the following documents:

 1. 07.07.15 Building control 'Initial Notice', to include 'description of work'.
 2. 08.10.15 (and others) Building control 'Final Certificate' (details already provided).
 3. Communications, to include warning letter(s) threatening to use fire safety enforcement action to close the building and responses, between DFRS and University of Derby (including Vice Chancellor).
 4. Related communications between DFRS and Derby City Council..."
26. DFRS conducted a further review on 9 July 2021 and maintained its position regarding the refusal notice of 11 June 2021.

Scope of the case

27. The complainant contacted the Commissioner on 28 June 2021 to complain about the way their request for information had been handled.
28. On 29 April 2022, DFRS issued a fresh refusal notice under the EIR to the complainant's original request, having had a conversation with the

ICO in which the Commissioner explained that the request needed to have been dealt with under the EIR. The refusal notice stated that some information was not held but that a further search could be conducted if specific addresses were provided. It explained that correspondence relating to planning matters was available on Derby City Council's planning register. The information relating to part two of the request was refused and DFRS cited regulations 12(5)(b), 12(5)(e) and the exception for third party personal data.

29. The complainant was not content and refuted the use of these exceptions on 9 May 2022.
30. On 18 May 2022 DFRS responded again and this time included the various interactions that had taken place during the period from the request on 17 August 2020 to the final review in July 2021. These are set out in paragraphs 31-36 below.
31. DFRS responded to the four points raised in what it describes as the complainant's revised request of 9 October 2020:
 - Part one – DFRS did not consider it to be an Information request.
 - Part two – The information is not held and DFRS expressed the view that the EIR did not apply.
 - Part three – No information was held for the Copper Building but it attached information relating to The Croft, with personal data redacted.
 - Point four – in an update on 30 October 2020, DFRS stated that it had no record of contact and that the EIR did not apply.
32. On 6 January 2021 the complainant had sent a request for clarification to DFRS.
33. The response from DFRS was provided on 7 January 2021 following a search conducted for the timeframe from September 2017 to January 2021.
34. Documents relating to fire safety at the Copper Building were provided with redactions for personal data. The complainant made a request on 2 February 2021 (in four parts) and reiterated it on 6 April 2021. DFRS said that their response was the same as it had provided on 5 May 2021. DFRS referred to the complainant's request for clarification (7 May 2021) and stated that its response was the same but under the EIR as

opposed to FOIA and cited regulations 12(5)(b), 12(5)(e) and the personal data exception.

35. Finally, DFRS responded to the complainant's emails of 18 and 29 June 2021. It explained that it held Site Specific Risk inspection records and correspondence on fire safety and fire safety records. This information was excepted under regulations 12(5)(b) and 12(5)(e) and the exception for personal data.
36. On 29 July 2022 DFRS disclosed further information to the complainant, having reconsidered this matter based on what information was already in the public domain.
37. The Commissioner considers that the scope of this case is DFRS's citing of regulations 12(5)(b)(the course of justice), 12(5)(e)(commercial confidentiality), 13(1) (personal information). The Commissioner also intends to look at what information DFRS holds and whether there were any procedural breaches.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

38. Regulation 2(1) of the EIR defines environmental information as any information in any 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;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

39. The requested information relates to measures concerning fire safety. This is clearly an environmental measure referred to in regulation 2(1)(c) of the EIR that will also affect the state of human health and safety referred to in regulation 2(1)(f) of the EIR.

Regulation 5(1) – right of access to information

40. Regulation 5(1) of the EIR requires a public authority holding environmental information to make it available on request.
41. DFRS states that it had provided some information to the complainant that falls within scope of this request in 2017 and 2019, prior to it being made. DFRS provided some information to the complainant on 10 December 2020 and 18 January 2021. The Commissioner notes that DFRS disclosed further information on 29 July 2022.
42. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner is not expected to prove categorically whether the information is held. He is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities, following the lead of a number of Information Tribunal decisions.
43. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider the searches carried out by DFRS and any other relevant factor.
44. The Commissioner asked DFRS some specific questions and some general questions concerning the searches it had made and how it had established that it held no further information.

DFRS's view

45. One Friar Gate Square, Agard Street, Derby (the Copper Building)

Firstly, in relation to the above address, DFRS does not hold any complaints from 2015. It does not record the name of the employers of designated 'Responsible Persons'. DFRS does not hold any information on contact with Derbyshire Constabulary in relation to fire safety at the above address. DFRS states the following:

"Inspection to ensure occupancy levels were adhered to –

In accordance with our statutory duties under the Regulatory Reform (Fire Safety) Order 2005¹ and Fire and Rescue Services Act 2004², the Service carries out Fire Safety Audits of non-domestic buildings to check fire safety provisions and procedures. It is a matter for the Responsible Person(s)³ to put in place, and maintain, appropriate fire safety measures in accordance with Regulation Reform (Fire Safety) Order 2005⁴."

46. The Croft, Cathedral Road, Derby, DE1 3FQ

In relation to the above address, DFRS states that it does not record the name of the employers of designated 'Responsible Persons' on its Enterprise Information System (EIS) or elsewhere. A manual search of each record and filed document on EIS showed that there was no record of any such information held.

47. The Commissioner asked DFRS what searches had been carried out to check that it did not hold any information within the scope of the request and why these searches would have been likely to retrieve any relevant information. DFRS explained that it had searched its EIS regarding the Copper Building which showed that no complaints had been received in 2015. There were complaints in 2016 which have been withheld. Any contact with Derbyshire Constabulary in relation to fire

¹ <https://www.legislation.gov.uk/ukxi/2005/1541/contents/made>

² <https://www.legislation.gov.uk/ukpga/2004/21/contents>

³ <https://www.gov.uk/workplace-fire-safety-your-responsibilities>

⁴ <https://www.legislation.gov.uk/ukxi/2005/1541/contents/made>

safety at the Copper Building would have been recorded on EIS. There was a manual review of each record and filed document on EIS and no record of any such contact was located. DFRS does not record the name of the employers of designated 'Responsible Persons'. A manual search of each record and filed document on EIS did not locate any information.

48. The Commissioner asked DFRS about the complainant's point that they had seen several versions of the building control certificate that had been requested. He asked DFRS to confirm that it did not hold any other version. DFRS stated that a request was made for a copy of a building control certificate, dated 8 October 2015. It holds information with the same reference provided by the complainant and with the same date. This is the only version of a document for that date that DFRS holds and it has been withheld.
49. The Commissioner also asked DFRS about whether it held what the complainant described as a 7 July 2015 Building Control 'Initial Notice' to include 'description of work'. DFRS stated that it had originally neither confirmed or denied whether this information was held. Information falling within scope has now been withheld under this exception.
50. The Commissioner asked DFRS to thoroughly describe any searches of relevant paper and electronic records and details of staff consultations. DFRS responded by saying that, in consultation with staff on 8 June 2022, a request was made for a copy of all casework to that date on the two addresses specified in paragraphs 45 and 46. Any casework property is recorded in the EIS and a case number allocated. Hard copy documents are scanned to the case and held electronically and emails are added to it. The EIS holds a record of all consultations, complaints, inspections, audits, checks, contact and correspondence on a particular property.
51. All the information DFRS holds is held electronically on EIS. No recorded information has been deleted or destroyed. DFRS explained that it has a Policy on Document Retention (March 2022) and a Service Procedure: Document Retention Guidance (March 2022) which provides guidance on retention periods for Prevention and Protection documents. There is a business purpose to hold this information in line with its statutory duties – fire safety audits, operational risk reviews, site specific risk information, and building consultation. Regarding the latter, after a local planning application authority has received a planning application, it undertakes a period of consultation where views on the development can be expressed. The formal consultation period normally lasts for 21 days. The local planning authority identifies and consults with several

different groups. The Derbyshire Fire and Rescue Authority (DFRA) is a statutory consultee and responds to provide advice on the proposal.

52. DFRS has a law enforcement statutory duty. Under the Regulatory reform (Fire Safety) Order 2005 DFRA (as controlling body for DFRS) is the enforcing authority for Derbyshire with the power to prosecute. Inspectors have the power (amongst other things) to inspect premises and issue Alterations Notices, Enforcement Notices, or Prohibition Notices to protect residents. Any prosecution has serious implications for all the parties concerned. A case file is produced whenever a prosecution is being considered.
53. There are no statutory requirements on the DFRS to retain the requested information. The Document Retention Guidance (March 2022) provides guidance on retention periods for Prevention and Protection documents. In line with its statutory duties under the Regulatory Reform (Fire Safety) Order 2005 and the Fire and Rescue Services Act 2004 DFRS carries out Fire Safety Audits, Operational Risk Reviews, and Site Specific Risk Information checks of non-domestic buildings in order to check fire safety provisions. Casework on a property is recorded on EIS which holds a record of all consultations, complaints, inspections, audits, checks, contact and correspondence on the property.

The complainant's view

54. The complainant has expressed the view that they have "bent over backwards to assist DFRS". They consider that, "having recently secured two different versions of the requested 'Final Certificate' from other sources," the complainant has concluded "that DFRS is attempting to conceal unlawful conduct by one or more of its officers in relation to Building Control/Fire Safety and the complete absence of a fire escape in a six storey university law school building".

The Commissioner's view

55. It is beyond the Commissioner's remit to consider what information should be held by a public authority. He can only consider what information a public authority actually holds. There have been many opportunities for DFRS to search due to requests/clarifications made over a protracted period of time. DFRS has been able to give further consideration to the searches that have been carried out in response to the Commissioner's investigation, most recently in June 2022. The Commissioner considers that DFRS has now carried out thorough searches of its systems with appropriate search terms. On the balance of probability, the Commissioner accepts that no further

information is held than has already been provided to the complainant or is being withheld under an exception.

Regulation 12(2) – Presumption in favour of disclosure

56. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

Regulation 12(5)(b) – course of justice

57. Regulation 12(5)(b) states that:

“For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.”

58. The Commissioner’s published guidance⁵ explains that the course of justice element of this exception covers a wide range of information. DFRS has provided the withheld information to the Commissioner.

59. Under regulation 12(5)(b), a public authority cannot refuse to confirm or deny whether it holds information.

60. DFRS stated that under the Regulatory Reform (Fire Safety) Order 2005 the DFRA (its controlling body) is the enforcing authority for Derbyshire with the power to prosecute (see paragraph 52). Inspecting properties is part of DFRS’s duty to keep people safe. People may be prosecuted and fined if premises are not safe.

61. DFRS maintains that, as a regulatory body and enforcing authority, there is a real risk of prejudice to its investigative and regulatory functions if it was to disclose information it receives which is not in the public domain. DFRS argues that its investigative and regulatory functions are dependent on confidentiality and openness in its communications with organisations.

⁵ [Regulation 12\(5\)\(b\) – The course of justice and inquiries exception | ICO](#)

The Commissioner's view

62. The exception in regulation 12(5)(b) is broad in coverage; it covers police investigations but could also include information about other types of civil and criminal investigations and proceedings, such as those carried out under planning or charity law, or those related to tax collection, immigration controls, and health and safety regulations. The Commissioner accepts that the withheld information relates to one of the factors described in the exception.
63. Regulation 12(5)(b) allows a public authority to refuse to disclose information "to the extent that its disclosure would adversely affect" the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. By "adversely affect" there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is high, since it is necessary to establish that disclosure **would** have an adverse effect.
64. Had the information been recent at the time the request was made, the Commissioner would have agreed with DFRS that disclosure would have an adverse effect on its investigative and regulatory functions. However, the original request was made in August 2020, making this particular information between three and six years old at that point. If there is a less than 50% chance of the adverse effect occurring, the exception is not engaged. In view of the length of time the information had been held when the request was made, the Commissioner considers that disclosure would have a less than 50% chance of an adverse effect occurring in this instance. Consequently, the exception is not engaged.
65. As the exception is not engaged he has not gone on to consider the public interest in this matter.

Regulation 12(5)(e) - Confidentiality of commercial or industrial Information

66. 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".

67. This exception was applied to exactly the same information that had been withheld under regulation 12(5)(b) and which was provided to the Commissioner.
68. There are several conditions that need to be met for this exception to be applicable. They are as follows –
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

DFRS's view

69. DFRS, as an enforcing authority, maintains that there is a real risk of prejudice to its investigative and regulatory functions if it was to disclose information it receives which is not in the public domain. DFRS's view is that its investigative and regulatory functions are dependent on confidentiality and openness in its communications with organisations.
70. DFRS highlighted a report that was specifically marked as having been prepared in commercial confidence and was not intended to be provided to any other party without the approval of the client for whom it was produced. DFRS contends that it does not have the authority to disclose this information and maintains that it is outside the parameters of the complainant's request. However, it did acknowledge that the report was old and that, if it was in the public domain, it could be released. DFRS did not provide argument for the remaining withheld information, other than that set out in paragraph 69.

The Commissioner's view

71. The Commissioner does not consider that DFRS has made a sufficient link to an adverse effect, only highlighting prejudice to its own regulatory and investigative function, should organisations be less open for fear of loss of confidentiality if information is disclosed. The purpose of this exception is to protect any legitimate economic interests underlying commercial confidentiality.
72. His view is that the report referred to in paragraph 70 is within the parameters of the original request and that DFRS had cited an exception to withhold it. The Commissioner accepts that a particular organisation referred to by DFRS specifically stated 'commercial confidentiality' and

that their economic interests could have been affected if a request had been made close to the provision of the information. However, the Commissioner is not persuaded that environmental information from several years previously, where a third party is exchanging information with a public authority in a professional capacity, is any longer protecting a legitimate economic interest or would have an adverse effect of sufficient significance. The exception is not engaged.

73. As the exception is not engaged the Commissioner has not gone on to consider the public interest in this matter.

Regulation 13 - personal data

74. 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.
75. In this case the relevant condition is contained in regulation 13(2A)(a)⁶. 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') as it was at the time of the request.
76. 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.
77. 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?

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

“any information relating to an identified or identifiable living individual”.

⁶ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

79. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
80. 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.
81. 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.
82. DFRS has provided the Commissioner with the withheld information. This consists of names, contact details, signatures and what DFRS refers to as "opinions".
83. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to various data subjects' names, contact details, qualifications and signatures which are personal data but does not accept that their opinions are personal data as these individuals were acting professionally on behalf of an organisation. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
84. 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.
85. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

86. 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".

87. 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.

88. 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

89. 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.

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"⁷.

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;

⁷ Article 6(1) goes on to state that:-

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

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

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

- 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. DFRS considers that there is a legitimate interest being pursued in the request for information. The Commissioner agrees with this view and considers that the matter is not a purely private concern or trivial.

Is disclosure necessary?

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. DFRS does not, however, see the need for the personal details and signatures of third party individuals to be disclosed. It contends that non-disclosure protects their right to privacy and a private life and that they have a reasonable expectation that their information will not be disclosed to the world.
98. The Commissioner does not consider that it is necessary to disclose the names, job roles, contact details and signatures of junior employees, either at DFRS or externally and agrees that they would have no reasonable expectation that this information would be disclosed.
99. As the Commissioner has decided in respect of junior employees that disclosure is not necessary to meet the legitimate interest in disclosure, he 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).

100. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent in respect of junior employees.
101. However, the Commissioner does consider that the disclosure of the names and job roles of more senior employees is necessary for the legitimate interest of the complainant (and other interested members of the public) in order that they can see who was involved in this matter in their professional capacity. He considers the disclosure of employee name/s is necessary for accountability, although he acknowledges that the information exchanged is on behalf of their employers. The Commissioner does not consider it necessary to disclose the personal contact details or signatures of senior employees as this is not a legitimate interest.

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

102. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
103. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
104. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

105. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

106. The Commissioner's guidance⁸ states that, although an employee may regard the disclosure of their personal data as an intrusion into their privacy, often this may not be a persuasive factor on its own, particularly if the information is about their public role rather than their private life. This implies that the employee has some responsibility for explaining the views, assessments, policies or actions of the organisation.

107. The Commissioner has considered this personal data and his view is that the role of all these individuals is professional, they are representatives of their organisations and their names are in the public domain. He does not accept that the disclosure of their personal data would be beyond their reasonable expectations when dealing professionally for or with a public authority. The Commissioner is not persuaded that they would expect confidentiality. His view is that the named individuals are the public face of the parties concerned and that this means that the processing is necessary for the interests of the complainant regarding this information request and the concerns expressed, or those of any other individual making the same request.

108. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

109. Even though it has been demonstrated that disclosure of the requested information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).

110. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

111. The requirement for transparency is met because as a public authority, DFRS is subject to the EIR.

⁸ [Requests for personal data about public authority employees \(ico.org.uk\)](https://ico.org.uk)

The Commissioner's view

112. In respect of the personal information set out in paragraph 101, the Commissioner has decided that DFRS has failed to demonstrate that the exception at regulation 13(1) is engaged.

113. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As the original request was received before the end of that transition period, the application of regulation 13(1) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

Regulation 5(3) – personal data of the requester

114. The Commissioner has applied the exception at regulation 5(3) of the EIR to some of the withheld information.

115. Regulation 5(3) of the EIR provides an exception from disclosure for information that is the personal data of the person requesting it.

116. The complainant had correspondence with DFRS and is identifiable from some of the withheld information. The Commissioner therefore considers that this information is the complainant's own personal data and therefore exempt from disclosure under the EIR.

117. Regulation 5(3) is an absolute exception and there is no requirement for DFRS to consider the public interest.

Regulation 5(2) - duty to make environmental information available on request

118. Regulation 5(2) of the EIR says that the public authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.

119. The complainant submitted their original request on 9 October 2020. DFRS did not respond until 10 December 2020. They made a new request relating to the same matters on 2 February 2021 that DFRS did not respond to until 5 May 2021. DFRS therefore breached regulation 5(2) of the EIR in responding late to both these requests and disclosing information after the statutory timeframe.

Right of appeal

120. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

121. 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.

122. 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

Janine Gregory
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Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF