

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

Date: 11 October 2022

Public Authority: Allerdale Borough Council
Address: Allerdale House
Workington
Cumbria
CA14 3YJ

Decision (including any steps ordered)

1. The complainant has requested information regarding a public health investigation.
2. The Commissioner's decision is that Allerdale Borough Council was correct to withhold some information on the basis of regulation 13 (personal information) of the EIR; and that, on the balance of probabilities, it does not hold any further information in scope of the request. However it breached regulation 5(2) (time for compliance), because it provided some information later than the statutory 20 working day time period.
3. The Commissioner does not require any steps.

Request and response

4. On 24 December 2020, the complainant wrote to Allerdale Borough Council ("the council") and requested information in the following terms:

"Re Solway Holiday Village, Silloth, Cumbria – E-coli August 2020

...I request all information held in relation to this case, including Reports, Lab Results, all investigations undertaken and rational for the conclusion of the case by Public Health..."
5. The council responded on 15 February 2021. It provided some information within the scope of the request but refused to provide the remainder on the basis of the exception at regulation 13 (personal information) of the EIR.
6. The complainant requested an internal review on 17 February 2021.
7. The council wrote to the complainant with the outcome of an internal review on 17 March 2021. The council disclosed some further information, being references to the chalets and lodges in the materials provided. However it maintained its position to withhold the remaining information on the basis of regulation 13.

Scope of the case

8. The complainant contacted the Commissioner on 21 August 2021 to complain about the way their request for information had been handled. Specifically that the council was incorrect to withhold information on the basis of regulation 13, and that further information may be held which is in scope of the request.
9. The scope of this case is to determine whether the council was correct to withhold information on the basis of regulation 13, and whether, on the balance of probabilities, it holds any further information in scope of the request.

Reasons for decision

Regulation 13 personal data

10. 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.

11. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
12. 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.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The council provided a large volume of information to the complainant, comprising emails, letters and reports. However it redacted names, email addresses, and telephone numbers. The council advised that the information relates to non senior council staff, external experts, private individuals and other practitioners.

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

19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information identifies and relates to the individuals involved in the environmental health investigation which is the issue of concern for this request. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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".
23. 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.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

25. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
26. 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.

² Article 6(1) goes on to state that:-

27. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - 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.
28. 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

29. 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.
30. 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.

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

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

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

31. The complainant hasn't provided any arguments specifically in regard to the regulation 13 redactions. However the complainant has expressed a legitimate interest in transparency of all of the information held by the council in relation to the public health case.

Is disclosure necessary?

32. '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.
33. The complainant has expressed that their main concern is that the council is withholding information "due to their lack of investigation into the poisoning and they are trying to cover up their incompetence." They are concerned that further information was gathered as part of the investigation, and has not been released.
34. The Commissioner does not consider that releasing names of people involved in the investigation and members of the public with their contact information will further inform the complainants legitimate interest. The complainant is requesting further details of the investigation rather than the details of the individual parties involved.
35. The Commissioner has therefore decided that disclosure of the names and contact details is not necessary to meet the complainants legitimate interest in transparency.
36. As the Commissioner has decided in this case 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).

The Commissioner's view

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

Regulation 12(4)(a) – information held/not held

38. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.

39. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
40. 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 First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
41. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any or additional information which falls within the scope of the request (or was held at the time of the request).

The complainant's position

42. In their complaint to the Commissioner, the complainant stated that they consider the council holds further information within the scope of their request which has not been disclosed because:
 - The information provided does not reflect the totality of information that would have been gathered during the public health investigation.
 - The provided 29 page report is supposed to be "independent" but reads like a "defence statement for Solway."
 - The council is withholding information due to their lack of investigation into the public health incident.
 - The council has referred to "speaking to numerous employees within Solway but no documentation has ever been produced to myself about these conversations and procedures."

The council's position

43. As is the practice in a case where there is some dispute over the amount of information located by a public authority and the amount of information that a complainant believes the public authority to hold, the Commissioner asked the council to provide him with a detailed explanation of the searches it had conducted for information within the scope of the request.
44. The council advised that searches were carried out on the electronic data management system, shared drives, personal drives and officer emails. It confirmed that all information would be held electronically as the department became paperless in 2012.

45. Officers involved in the case would have been consulted, and key terms such as "Solway Holiday Village" and "[redacted name]" would have been searched on.
46. The council advised that "it was not aware" that any information relevant to the request has been destroyed. It stated that all information is retained in accordance with the corporate records retention schedule, which would be 6 years in this case. It stated that records of destruction are kept where information is deleted. It confirmed that any records pertaining to the request would be retained for the purpose of "Public Protection" and "Health and Safety."

The Commissioner's position

47. The Commissioner has considered the complainant's and the council's positions in relation to whether further information is held within the scope of the request.
48. The Commissioner appreciates the points made by the complainant regarding why they consider further information should be held. However the Commissioner has not been able to establish any tangible evidence of further information which has not been disclosed to the complainant.
49. The Commissioner is satisfied that the council has carried out adequate searches for information within the scope of the request. Therefore, his decision is that on the balance of probabilities, the council does not hold any further information within the scope of the request and so the exception provided by regulation 12(4)(a) is engaged.

Regulation 12(1)(b) – the public interest test

50. Regulation 12(1)(b) of the EIR requires a public interest test to be carried out if a request is refused under any of the exceptions set out under regulation 12 of the EIR.
51. However, as no further information has been found to be held, the Commissioner can only find that the public interest in maintaining the exemption at 12(4)(a) of the EIR outweighs any public interest in disclosure, simply because there is no further information to disclose.

Regulation 5(2) – time for compliance

52. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request."

53. Regulation 5(2) of the EIR states that: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
54. The complainant submitted their request for information to the council on 24 December 2020. As the council did not provide the complainant with all of the information it holds within the scope of the request until the internal review on 17 March 2021, the council has breached regulation 5(2) of the EIR.
55. As the council has now disclosed the information it holds within the scope of the request, the Commissioner does not require any steps.

Right of appeal

56. 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

57. 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.
58. 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

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