

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 June 2022
Public Authority: City of York Council
Address: Station Rise
York YO1 6GA

Decision (including any steps ordered)

1. The complainant requested from City of York Council ("the Council") copies of correspondence between the Council and a named individual or their agent relating to the dualling scheme for the York Outer Ring Road ("YORR").
2. The Council relied on regulation 13(1) of the EIR (personal information) to withhold the information.
3. The Commissioner's decision is that all the withheld information engages regulation 13 of the EIR.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 1 June 2021, the complainant made the following request:
"Under the Freedom of Information Act I am requesting that you provide me with copies (electronic or paper) of **all** correspondence and recorded communications between xxx or xxx appointed agent(s) as it relates to the dualling scheme for the York Outer Ring Road (YORR)."
6. The Council responded on 15 June 2021 citing regulation 13(1) of the EIR (personal information) as the basis upon which to withhold the information.
7. Following an internal review, the Council wrote to the complainant on 16 August 2021. It confirmed its view that the information had been

correctly withheld under regulation 13(1) of the EIR (personal information).

Scope of the case

8. The complainant contacted the Commissioner on 7 October 2021 to complain about the way their request for information had been handled.
9. The complainant is concerned that the Council made changes to the proposed scheme for the dualling of the YORR based on incorrect information.
10. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exception at regulation 13(1) of the EIR (personal information).

Reasons for decision

Regulation 13 personal information

11. 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.
12. In this case the relevant condition is contained in regulation 13(2A)(a). 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").
13. 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.
14. 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?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. As the request names a specific individual, the Commissioner is satisfied that such information both relates to and identifies the individual in question. 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). Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
22. 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.
23. 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 GDPR

24. 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”¹.

25. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, 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.
26. 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

27. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
28. The Council identified a legitimate interest in promoting greater transparency and public understanding of an environmental issue. However, it is the Council’s view that information already provided to

¹ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

the complainant and available on its website addresses the legitimate interest identified.

29. The Commissioner recognises that the complainant has a legitimate interest in trying to determine the veracity of the information provided to the Council based on a previous incident, details of which have been provided to the Council. In particular, the complainant is concerned that, following consultation with landowners, the location of the proposed additional carriageway of the YORR was moved from land owned by the named individual to land owned by a neighbour, lessening considerably the impact of the new dualling scheme on the named individual's land. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the withheld information and has therefore gone on to consider the necessity test.

Is disclosure necessary?

30. '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.
31. Following the intervention of the Commissioner, the Council wrote to the complainant on 25 May 2022 and explained that "the design of the scheme in this location is based on factual site information and not on information provided by members of the public". In the same email, the Council directed the complainant to the record of the Executive Meeting dated 30 September 2021 (where the proposed changes to the scheme were presented) which could be viewed on the Council's website:

<https://democracy.york.gov.uk/ieListDocuments.aspx?CIId=733&MIId=12795&Ver=4>

One of the documents presented to the Executive Meeting which can be viewed via the link above was a Report of the Director of Place which states that "some changes are proposed to the consulted scheme as a natural consequence of further design development and survey work over the past six months... Having settled on these revisions, the project team are seeking a resolution from the Executive to take the revised scheme proposals forward to be submitted for a planning application (subject to Member approval)." Furthermore, the Stakeholder and Public Engagement Report also available via the link above states further information on the scheme would continue to be published during the

project development and there would also be an opportunity for members of the public to submit comments on the scheme as part of the planning process.

32. The Council argues that the information provided to the complainant and available on its website was sufficient for the purpose of promoting greater transparency and public understanding of an environmental issue and that viewing the specific communication between the Council and the named individual was not necessary in order to achieve the legitimate interest identified.
33. Having viewed the information available via the link provided by the Council and the withheld information, the Commissioner has decided in this case that disclosure of the withheld information to the world at large is not necessary to meet the legitimate interest in disclosure. The Commissioner understands the complainant has concerns about the information provided by the named individual. However, even if the information provided was not accurate, the decision to move the carriageway appears to have been taken as a result of survey work and design development rather than solely because of information provided by landowners. Furthermore, the decision to move the carriageway has been scrutinised by the Council Executive and will also be subject to additional scrutiny via the planning process and further public comment.
34. Therefore, the Commissioner 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).
35. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1) of the EIR (personal information).

Right of appeal

36. 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

37. 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.
38. 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

Michael Lea
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