

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

Date: 9 November 2022

Public Authority: Dover District Council
Address: Council Offices
White Cliffs Business Park
Whitfield
CT16 3PJ

Decision (including any steps ordered)

1. The complainant requested a copy of letters relating to a planning complaint concerning their own property. Dover District Council (the Council) withheld the information requested under regulation 12(5)(b) (course of justice) and regulation 12(3) (personal data) of the EIR. The Commissioner has investigated and found that the information is exempt from disclosure under regulations 5(3) and 13(1) as it contains the personal data of the complainant and the personal data of third parties. The Commissioner does not require any steps to be taken.

Request and response

2. On 17 May 2022, the complainant wrote to the Council concerning a planning complaint made in respect of their own property and requested information in the following terms:

"Copy of hand written letter and printed letter given to building control falsely accusing us of having unauthorised building works at our property, [address redacted]. We were visited by building control who inspected, investigated and found proven that no unauthorised work had been carried out. We received that confirmation to my email [email address redacted] on May 13, 2022. If not possible to see copies of

those letters then at least could we have the address of other properties mentioned including ours”.

3. Following an internal review the Council wrote to the complainant on 14 June 2021 and stated that the information requested was exempt under regulations 12(5)(b) and 12(3).

Scope of the case

4. Having considered the information which the Council held relevant to the request and in light of the fact that the planning complaint relates to the complainant’s own property the Commissioner considers that some of the information requested constitutes the complainant’s own personal data. For clarity, a requester’s own personal data is exempt under regulation 5(3) of the EIR. Personal data is defined by the Data Protection Act 2018 (the DPA) as any information relating to a living and identifiable individual. The separate right of access provided by article 15 of the General Data Protection Regulation (the GDPR) therefore applies.
5. In light of the above, the scope of the Commissioner’s investigation into this complaint is to determine whether the Council should disclose the information held relevant to the request.

Reasons for decision

Is the information environmental?

6. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

“any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.
7. In this case the withheld information relates to a planning enforcement matter at the complainant’s property. The Commissioner considers that planning rules (and the enforcement of those rules) are “measures” affecting the elements of the environment and therefore the EIR is the correct is the correct legislation to apply.

Regulation 5(3) – the exemption for personal data - the complainant's own personal data

8. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.
9. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
10. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
11. The withheld information in this case comprises complaints submitted by third parties concerning alleged unauthorised development at the complainant's property. The correspondence mentions the address of the complainant's property and is therefore linked to the owner of the property. The complainant is clearly identifiable from the information and the information is significant and biographical to them. In addition some of the withheld information contains details of third parties including those who submitted complaints to the Council about the alleged unauthorised developments. The withheld information also contains complaints about unauthorised development in respect of other neighbouring properties.
12. In his published guidance¹ on personal data of both the requestor and others the Commissioner makes it clear that in circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
13. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA or regulation 5(3) of the EIR.

¹ <https://ico.org.uk/media/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>

14. Taking the above into account, the Commissioner is satisfied that the information is the complainant's own personal data. This is because the requested information relates to complaints concerning their property. The Commissioner therefore finds that regulation 5(3) applies to all the withheld information, other than that which he has considered under regulation 13, which is described at paragraph 15 below. As regulation 5(3) is an absolute exception there is no public interest test to apply.
15. Having viewed the withheld information, the Commissioner notes that some of the information could be released without disclosing the complainant's own personal data, namely personal data relating to the person(s) who complained to the Council and details of planning complaints relating to other neighbouring properties. The Commissioner has gone on to consider whether regulation 13 of the EIR applies to the information contained within the withheld information which does not constitute the complainant's own personal data.

Regulation 13 – third party personal data

16. 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.
17. 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.
18. 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.
19. The Commissioner is satisfied that the contact details of third parties who wrote to the Council about the alleged unauthorised development relates to living individuals who may be identified from that data. In addition the withheld information contains other references relating to third parties, namely complaints about unauthorised development at other neighbouring properties. The Commissioner is satisfied that this information also falls within the definition of personal data as set out in the DPA.
20. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

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

Would disclosure contravene principle (a)?

23. 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".

24. In the case of an FOIA 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.

25. 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

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.

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

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

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

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

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

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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 in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests 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.
31. In this case, the Commissioner accepts that the complainant has a legitimate interest in knowing the identity of any individuals who wrote to the Council about an alleged breach of planning at their property and whether complaints have been made about other neighbouring properties.
32. The Commissioner considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are conducted and that they are adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

33. '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.
34. The Commissioner notes that it is also important to acknowledge that Regulation 13 of the EIR is different from other exceptions in that its

consideration does not begin with an expectation of disclosure. As Regulation 13 is the point at which the EIR and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.

35. As disclosure under the EIR is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
36. In this case, the Commissioner understands that whilst certain planning information is required to be made available to the public this does not extend to planning enforcement cases including the identity of any individuals who raise potential planning enforcement matters with the Council.
37. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and he accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure. The Commissioner is also satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

38. 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.
39. 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.
40. 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 private individuals, and the purpose for which they provided their personal data.

41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The Commissioner is of the view that individuals who raise planning matters with the Council would have a reasonable expectation that their personal data would not be disclosed into the public domain. The Commissioner is also satisfied that the owners of other properties referred to in the withheld information would have a reasonable expectation that any allegations of unauthorised development at their property would not be made public.
43. The Commissioner is of the view that planning matters can be quite controversial and as such he considers that disclosure of the identity of individuals who raised planning concerns in this case is likely to cause harm and distress to those individuals. The Commissioner also considers that individuals would be less likely in the future to raise planning concerns if they were aware that their identity would be made public. In addition, the Commissioner accepts that disclosure of allegations of unauthorised development at a property is likely to cause the owners of those properties harm and distress.
44. Whilst the Commissioner accepts that the complainant has a legitimate interest in disclosure of the information in question, he has been unable to identify any wider legitimate interest that would outweigh the fundamental rights and freedoms of the individuals in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. 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.
46. 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) of the EIR.

Other matters

47. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Correct access regime

48. Article 15 of the GDPR gives an individual the right to request copies of personal data held about them – this is referred to as the right of subject access. When the Commissioner viewed the information in

question, it was immediately apparent that it contained personal data relating to the complainant.

49. In the Commissioner's opinion, responsibility for applying exemptions and determining whether a request should be considered under the FOIA, EIR or the DPA rests with the public authority and not the requestor. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In this case the Council should have instigated its own procedures for handling subject access requests much earlier in its dealings with the complainant. Ideally, this should have been at the time it received the request.
50. The approach of the Commissioner where a request is made for information which is the requester's own personal data is that the public authority should deal with the request as a subject access request. This action should be taken without it being necessary for the requester to make a further request specifying article 15 of the GDPR.
51. The Commissioner therefore recommends and expects the Council to now consider whether the information requested, which is exempt from disclosure under regulation 5(3) of the EIR, could be disclosed to the applicant in accordance with its obligations under article 15 of the GDPR.

Right of appeal

52. 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

53. 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.
54. 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

Joanne Edwards
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