

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 March 2022

Public Authority: Winchester City Council
Address: City Offices
Colebrook Street
Winchester
Hampshire
SO23 9LJ

Decision (including any steps ordered)

1. The complainant requested a copy of a complaint that neighbours of a property they own had made to Winchester City Council ("the Council"). The Council refused to disclose the information under regulation 13(1) of the EIR as it considered the complaint to be the neighbours' personal data.
2. The Commissioner's decision is that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 9 February 2021, the complainant wrote to the Council and requested information in the following terms:

"Please deliver to me... a copy of [content redacted]'s complaint."

5. The Council responded on 3 March 2021. It refused to disclose a copy of the complaint email. However, it did provide a summary of the complaint and confirmed it had received the complaint on 9 January 2021. It provided the following explanation to the complainant:

"In normal circumstances, under the Freedom of Information Act legislation, a complaint from a named person is exempt from disclosure because it contains their personal data. In this instance, with their consent, in the letter of 5 February, I informed you that the complaint about the condition of [content redacted] had come from [content redacted].

Therefore, we do not consider it to be unfair or unlawful to disclose details of the complaint to you – as a summary of that information has already been disclosed to you (in my letter of 05 February). You are entitled under Freedom of Information legislation to have the information in the complaint letter – not a copy of the letter itself"

6. Following an internal review the Council wrote to the complainant on 19 March 2021. It stated that it was upholding its original position of refusing to provide a copy of the full complaint. It clarified that the requested information was environmental information and that the specific exception under which it was refusing to provide the information was the personal data exception under regulation 13 of the EIR. The council explained its position as follows:

"A letter from a named individual is their personal data which engages the above exception and would not usually be disclosed under EIR (or FOIA). It would also be a breach of data protection legislation to confirm to you that a named individual has made a complaint. This is particularly because disclosure under FOI or EIR is, in effect, disclosure to the world at large. On this occasion, although the named individuals agreed to their name and the details of their complaint being disclosed to you in relation to the matter, they were not asked and did not agree to their letter of complaint being disclosed in full under EIR and to the world at large. There is no other lawful basis to disclose this information under EIR."

7. The complainant made a subsequent request for environmental information to the Council on 29 May 2021:

"To confirm my verbal request to please supply copies of the "representations from the Parish Council and local ward councillors" as per Page 1 para 2 of WCC letter dtd 28th May 2021."

8. The Council responded on 11 June 2021. It disclosed a series of emails about the complainant's property. The name and contact details of third parties who were not employees of the council or councillors were redacted. Within the email chain the body of the complaint email received by the Council on 9 January 2021 which it had refused to disclose in response to the complainant's earlier request was fully redacted as was the sender's name and email address.

Scope of the case

9. The complainant contacted the Commissioner on 21 May 2021 to complain about the way their request for information had been handled. Specifically about the Council's refusal to disclose a copy of the complaint in response to their request of 9 February 2021 and its redaction in the information disclosed to them on 11 June 2021 in response to their request of 29 May 2021.
10. This decision notice covers whether the withheld information, a copy of a complaint email that neighbours of a property that the complainant owns sent to the Council, is exempt from disclosure under the EIR on the basis of the personal data exception under regulation 13 of the EIR.

Reasons for decision

Regulation 13 personal data

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)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').

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

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. The withheld information in this case is a complaint that neighbours of a property that the complainant owns made to the Council. The focus of the complaint is the impact that the poor state of the complainant's property has had on their own property, their lives and their health.
20. Having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the neighbours concerned. 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 EIR. 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 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.

25. 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.

26. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

27. Information relating to special category data is given special status in the UK GDPR.

28. Article 9 of the UK GDPR defines ‘special category’ as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.

29. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that the complaint sent by the neighbours includes details of the impact on their health.

30. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

31. The Commissioner considers that the only conditions that could be relevant to a disclosure under the EIR are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

32. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being

disclosed to the world in response to the EIR request or that they have deliberately made this data public.

33. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under regulation 13(1) of the EIR.
34. As not all of the withheld information is special category data, the Commissioner has gone on to consider whether there is an Article 6 basis for disclosing the withheld information that is not special category data.

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

35. 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.
36. 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:-

“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”.

37. 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.
38. 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

39. 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.
40. 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.
41. In this case the Council is taking enforcement action against the complainant regarding the condition of their property. The withheld information is a complaint that relates to the condition of the property.
42. The Commissioner accepts that interest in the evidence on which the decision to take enforcement action was based constitutes a legitimate interest in wanting to access the information and therefore this criterion is met.

Is disclosure necessary?

43. '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.

44. In this case, although the Council has refused to disclose a copy of the complaint under the EIR it has, outside of the EIR, provided the complainant with a summary of the issues about their property raised in the complaint and, with their consent, the names of the neighbours who made the complaint.
45. The Commissioner's decision is therefore that disclosure is not necessary to meet the legitimate interest in disclosure.
46. 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

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

Right of appeal

48. 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

49. 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.
50. 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

Ben Tomes
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