

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 May 2022

Public Authority: Newport City Council
Address: Civic Centre
Godfrey Road
Newport
South Wales
NP20 4UR

Decision (including any steps ordered)

1. The complainant requested information from Newport City Council (the "Council") regarding correspondence between an applicant and planning officers.
2. The Council initially considered the information was exempt from disclosure under Section 40(2) (personal information) of the Freedom of Information Act 2000 (FOIA). During the course of the Commissioner's investigation the Council amended its position relying on the Environmental Information Regulations 2004 (EIR) and cited Regulation 12(3) (third party personal information) and regulation 13 of the EIR to withhold the requested information.
3. The Commissioner's decision is that the Council is entitled to rely on regulation 12(3) and Regulation 13 of the EIR to withhold the requested information.
4. The Commissioner does not require the public authority to take any further steps.

Request and response

5. On 27 June 2021, the complainant wrote to the Council and requested information in the following terms:

“Could I also have sight of all correspondence between the applicant and the planning officers, case ref E20/0417 between date 8/1/21 and 24/3/21.”

6. The Council responded on 30 June 2021 citing section 40(2) (personal information) of FOIA to refuse the disclosure of the requested information and advised that any information pertinent to the planning application had been uploaded to the planning portal. The Council upheld their initial response at internal review on 13 July 2021.

Scope of the case

7. The complainant contacted the Commissioner on 15 August 2021 to complain about the way their request for information had been handled.
8. The Commissioner clarified with the Council its responses to both the initial request and subsequent internal review decisions. It appeared to the Commissioner that the Council could not rely on FOIA to withhold the information within scope of the request, as this was clearly related to the environment (planning application and decisions), and therefore subject to the EIR rather than FOIA.
9. The Council agreed, on reflection, that the information would constitute environmental data under Regulation 2(1)(c) of the EIR. They then went on to consider applicable exceptions, citing regulations 12(3) and regulation 13 of the EIR to withhold the requested information.
10. The Commissioner’s investigation has therefore focussed on whether the Council is entitled to rely on regulation 12(3) of the EIR to refuse to disclose information within scope of the request.

Reasons for decision

Is the requested information environmental as defined by the EIR?

11. Regulation 2(1) of the EIR defines environmental information as being information 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)...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)";
12. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA are different from the reasons why information can be withheld under the EIR. In addition, there are some procedural differences affecting how requests should be handled.
13. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
14. The Commissioner notes that the requested information comprises information about policies, legislation, plans, programmes, and environmental agreements. He is satisfied that the information being

requested would fall within the definition at regulation 2(1)(c) and/or 2(1)(e).

15. The Commissioner is therefore satisfied that the information is environmental, and the Council should have considered the request under the EIR. The Council has since considered the request under the EIR.

Regulation 12(3) / regulation 13(1) – 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. 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 General Data Protection Regulation ("GDPR").
18. 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.
19. 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?

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

"any information relating to an identified or identifiable living individual"

21. The two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
22. 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.

23. 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.
24. In this instance, the withheld information relates to the data of a third party and correspondence regarding their planning application.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information is regarding a third party. He is satisfied that this information both relates to and identifies the third party concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
26. 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.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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."

29. 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.
30. 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

31. 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.
32. The Commissioner considers that the lawful basis most applicable in determining whether to disclose personal data in response to a request under the FOIA or EIR 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 child¹"

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.
34. 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

35. In considering any legitimate interest(s) in disclosing 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.
36. 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.

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 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. The information in this case constitutes personal data as it is the correspondence between an applicant and planning officers regarding their planning application. The information relates to communications between the applicant and the officers handling the application.
38. The Commissioner is aware of the complainant's legitimate interest in ensuring that the Council have adhered with the planning process and regulations. However, He does not consider that there is any wider public interest in the disclosure of the applicant's personal data. The Commissioner is of the view that the disclosure of this personal data would not provide the complainant with any greater insight into the particular planning application further to that available on the planning portal.

Is disclosure necessary?

39. "Necessary" means more than desirable, but less than indispensable or of 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.
40. The Council argued that disclosure of the personal communications is not necessary, as this information is personal data of those involved in general administrative tasks in communications or recording information in relation to the application. The Council said that providing the information to the complainant would not affect the decisions or outcomes of the application. This, it said, "would affect the fundamental rights of the data subjects whose personal data would be disclosed to the world at large if included in the response to this request."
41. The Council stated that personal data i.e., email addresses of staff below service manager level is not placed in the public domain. It said that "Providing or publishing email addresses of individual staff can cause the public to contact the wrong person and delay their access to the correct department. It can also increase the workload of the named officer and on occasion can cause distress through unwarranted or unreasonable levels of contacts. The other named staff members were administrative staff logging data onto a corporate system. There is no relevance or correlation to the subject matter of the request which makes it necessary, proportionate, or justifiable to provide personal data of those staff to the world at large."
42. The Commissioner accepts the Council's argument that it is not necessary for the Council to disclose information about junior officers. He notes that the redacted information relates to the names of

employees who had provided administrative support for this application. Their names in this instance, relate to their employee status.

43. The Commissioner considers that the withheld information includes that of a third party. Therefore, his view is that the Council was correct to apply regulation 13(1) to this information.
44. The situation with a disclosure under the EIR is that that information is considered to be to the whole world, which is a far wider degree of disclosure than through general day to day business.
45. The Commissioner considers that there is no legitimate interest in the disclosure of the names of the Council's staff. At this level they are accountable to the Council, as its employees rather than to the public as a whole for their actions.
46. The Commissioner has consistently maintained in previous decision notices that, whilst it might be appropriate for senior staff to be held publicly accountable for decision-making, there is little public interest in identifying junior or mid-level staff who are ultimately responsible to the Council for such matters rather than directly to the public.
47. On consideration of the above, the Commissioner finds that, in this case, it is not necessary for the Council to disclose this information – correspondence between named Council staff, and that of the third-party applicant to the complainant in order for it to meet the legitimate interests of the public.
48. 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).
49. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

50. 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

51. 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

52. 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.
53. 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

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