

Environmental Information Regulation 2004 (EIR)

Decision notice

Date: 26 January 2023

Public Authority: Reading Borough Council
Address: Civic Offices
Bridge Street
Reading
RG1 2LU

Decision (including any steps ordered)

1. The complainant's representative has requested details of objections made to Reading Borough Council (the council) about her client's planning application. The council withheld the information under Regulation 13(1) of the EIR (personal information) and Regulation 12(5)(f) (interests of the person who provided the information).
2. The Commissioner's decision is that some of the information is exempt under Regulation 5(3) as it is personal data belonging to the applicant, (i.e., the complainant). He has also decided that the council was correct to withhold the information under Regulation 13(1). However, he has also decided that the council did not comply with the requirements of Regulation 5(2) and Regulation 14(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 February 2022, the complainant's representative wrote to the council and requested information in the following terms:

"It has since come to our client's attention from the recent Committee Report in this matter that some 91 objection letters have been received in respect of his planning application.

Section 5.3 of the Committee Report states that "91 letters of objection have been received". We are instructed that these objections are not available on the Council's planning portal and that they have not been made available to our client.

The purpose of this letter is to request that our client is provided with copies of each of the objection letters pertaining to his planning application."

5. The council responded on 28 March 2022. It said that the information was available online. However, the complainant's representative requested that the council carry out a review of its decision, arguing that only 12 of the 91 objections were available online.
6. Following an internal review, the council wrote to the complainant's representative on 13 May 2022. It confirmed that there were 98 objections, and provided redacted copies of these. It redacted some sections of information under Regulation 13(1), stating that this information was personal data relating to third parties. It also applied Regulation 12(5)(f).
7. On 8 June 2022 the council provided further information having reviewed its earlier disclosure, however the complainant remains unhappy with the level of redaction which the council made to this disclosure.
8. The complainant's representative believes that the personal data of the authors of the objections should be disclosed. She clarified that she is only seeking the information relating to the authors of the objections, not to other third parties who have been identified within the objections.

Reasons for decision

Regulation 5(3) – personal data of the applicant

9. This analysis concerns the redactions from the materials disclosed by the council. It analyses whether some types of information are personal data belonging to the applicant, and therefore exempt from disclosure under the EIR under Regulation 5(3), and whether the remaining redactions are personal data of third parties and exempt under Regulation 13(1).
10. The complainant's representative is acting on behalf of her client, who submitted the planning application. As she is acting on behalf of her client, the request is therefore treated as if it has been requested by the client. Some of the information will therefore be personal data relating to the applicant for the information, as it relates to his own planning application.
11. Regulation 5(3) provides that personal data relating to the applicant for the information is exempt from disclosure under the EIR. The complainant, however, has rights to request copies of their own personal data under the provisions of the Data Protection Act 2018. These rights are subject to exemptions.
12. Some of the requested information was disclosed to the complainant under these rights, however, other personal data was exempted as it also contains personal data relating to third parties. The council explained that the complainant's personal data was inextricably linked with that of the third parties to the point that it cannot be disclosed without disclosing the third parties' personal data.
13. Whilst this information was not disclosed to the complainant as it is the personal data of third parties, the Commissioner's decision is that this content is also the personal data of the complainant. This means that this information is exempt under Regulation 5(3).
14. The complainant's representative specifically argued that some of the objectors may have made defamatory statements about her client. She identified one published objection which she argued was defamatory, and which she therefore asked the council to remove from its website. She also alleged that defamatory statements had been posted online which had damaged the reputation of her client.
15. The Commissioner notes that, as such statements would be personal data relating to the applicant for the information, Regulation 5(3) would apply to exclude these from disclosure under the EIR.

Regulation 13(1) - personal data of third parties

16. The following analysis explains why the Commissioner is satisfied that the council was entitled to apply Regulation 13(1) of the EIR to withhold information that is solely the personal data of third parties. The Commissioner's view is that the information covered in this part of the analysis is not also the personal data of the complainant.
17. Regulation 13(1) of the EIR allows a public authority to withhold information if it is personal data, (information falling within the scope of the definitions provided in sections 3(2) and (3) of the Data Protection Act 2018), and none of the conditions listed as a lawful basis for processing listed in Article 6(1) of the UK GDPR is satisfied.
18. The first question is whether the withheld information is personal data relating to third parties. The Commissioner is satisfied that the requested information is personal data relating to the objectors to the planning application. This is because they can be identified from the information, and because it relates directly to their views about the application. The majority of the views were disclosed; however, some sections of information relate to the name and contact details of the objectors, information about their situation and how that might be affected by the proposal, or other general comments which relate to them, rather than to the planning applicant.
19. The next question is whether any of the conditions listed as a lawful basis for processing would be met, as required by Article 6(1) of the UK GDPR.
20. Principle (a) requires that personal data is "(a) processed lawfully, fairly and in a transparent manner in relation to individuals".
21. The Commissioner has therefore assessed whether there is a lawful basis for processing the requested information under Article 6(1)(a) and 6(1)(f) of the UK GDPR.

Article 6(1)(a) – consent

The complainant's argument

22. The complainant's representative argues that the objectors submitted their objections online, and in doing so were provided with a notification that their objections would not be confidential and could be read by other people. The notification on the council's website states that:

"IMPORTANT: Any correspondence we receive about an application (or telephone conversations which are noted) are NOT CONFIDENTIAL and can be seen by anybody, including the applicant or other neighbours.

Therefore, please avoid writing anything you do not wish to be available for public inspection...”

23. The complainant’s representative therefore argues that having read the notification, by continuing to submit their objections the individuals provided their informed consent that the details they were submitting could be provided to the planning applicant and to the wider public.
24. Therefore, the complainant’s representative argues that the exception in Regulation 13 does not apply because the individuals have consented to disclosure, and disclosure would not contravene the data protection principle (a).

The council’s argument

25. The council accepts that the objectors have been advised that their objections to the planning application will be published on the website, but it argues that they have not consented to a disclosure in terms of a response being disclosed to the whole world via an information access request.
26. It argues that publication on the website is at the council’s discretion, and that it does not automatically follow that all information submitted is therefore published. The Commissioner understands from this argument that there is no legal duty to publish all of the objections received.

The Commissioner's analysis

27. The Commissioner accepts that the individuals had received a notification that their objections may be made available for public inspection, and not held in confidence. He accepts that they chose to submit their objections even after reading the notification of the intended uses of the data submitted.
28. However, as regards consent, the Commissioner's guidance on the UK GDPR¹ states, amongst other things, that:
 - The UK GDPR sets a high standard for consent. But you often won’t need consent. If consent is difficult, look for a different lawful basis.

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/consent/>

- Consent means offering individuals real choice and control. Genuine consent should put individuals in charge, build trust and engagement, and enhance your reputation.
 - Consent requires a positive opt-in. Don't use pre-ticked boxes or any other method of default consent.
 - Explicit consent requires a very clear and specific statement of consent...
 - Avoid making consent to processing a precondition of a service.
 - Be specific and 'granular' so that you get separate consent for separate things. Vague or blanket consent is not enough...
 - Make it easy for people to withdraw consent and tell them how.
29. Where individuals wish to object to planning applications, they were required to submit details of who they were via the online planning submission form. Although they were notified of the potential for their information to be disclosed, the Commissioner has seen no evidence that there was a specific consent tick box or clauses provided for them to provide their consent to this form of processing. Nor is there any information given on a means to remove consent should the individuals wish that to occur.
30. The Commissioner therefore considers that the council does not have the specific consent to disclose the information required by the UK GDPR to the standards necessary for it to disclose the information in response to an EIR request.
31. He must therefore consider whether any of the other forms of lawful basis for processing the requested information under Article 6(1) of the UK GDPR apply.

Article 6(1)(f) – legitimate interests

32. 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.

33. 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:-
- 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.
- i) *Legitimate interests*
35. The Commissioner has determined that the complainant has a legitimate interest in disclosure, and disclosure would be necessary to satisfy that interest. The complainant submitted a planning application to the council which received a large number of objections, and these have not all been disclosed via the council's website. The council has provided the complainant's representative with the text of the majority of these objections; however, the complainant wishes to know the individuals who submitted the objections, together with their unredacted submissions to the council.
36. The wider public has a legitimate interest in the disclosure of the information as the planning process is intended to be transparent and open to scrutiny.

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".

37. However, the Commissioner recognises that the legitimate interests in question in this case relate primarily to the private interests of the complainant.

ii) Is disclosure necessary?

38. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

39. The council argues that that the legitimate interest is met by the disclosure of the information which demonstrates the substantive planning issues, and which help to demonstrate why the council reached the decision it did on the planning application. It argues that this has already occurred via the normal open planning committee, its published decision, and via the disclosure of information, both generally via its website, and via disclosure in response to the request. It argues, therefore, that it is not necessary for the identities of individuals or their personal views about the applicant to be disclosed in order to meet the legitimate interests which have been identified.

40. It notes that the officer report to the committee on the relevant planning application did not refer to any of the withheld information, and the decision did not take these into account. The report refers to the objections, and says "91 letters of objection have been received. Some of the responses received contain personal statements and are not relevant to the consideration of this planning application." A summary of the relevant objections was also included within the published decision report.

41. It argues therefore that the withheld information was not used for the purpose of making the decision on the planning application beyond that noted in the report, and therefore, it is not necessary for further details to be disclosed in order to demonstrate why the decision was made. The council has fully explained the reasons why the decision was made to refuse the planning application, and has disclosed the majority of the objection statements to the complainant.

42. The Commissioner accepts the council's argument that a disclosure of the majority of the text of the objections meets the legitimate interests identified, that the reasons for the planning decision have been disclosed openly and transparently, and that the parts of the objections relevant to the planning decision were made public or disclosed in response to the FOI request. Put together, the planning committee documents,

together with the redacted copies of the objections provides a substantive disclosure of the reasons why the council reached the planning decision it did.

43. The Commissioner has therefore decided that it is not necessary for the personal data of objectors to be disclosed in order to meet the legitimate interests identified. As such, he has not found it necessary to consider the balancing test set out in iii) above. He also does not need to go on to separately consider whether disclosure would be fair or transparent.
44. The Commissioner therefore considers that there is no Article 6 basis for processing, and so the disclosure of the information would not be lawful.

Regulation 12(5)(f) – interests of the person who provided the information

45. As the Commissioner has decided that the council was correct to apply Regulation 13(1) to withhold the information, he has not found it necessary to consider the application of Regulation 12(5)(f) to the information further.

Regulation 5(2)

46. Regulation 5(2) requires that a public authority disclosed information in response to a request within 20 working days after the date of receipt of the request.
47. The complainant's representative made her request for information on 2 February 2022. The council provided its response, disclosing some information, however wrongly stating that all of the information was online, on 28 March 2022. This falls outside of the 20 working days required by Regulation 5(2).
48. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 5(2).

Regulation 14(2)

49. Regulation 14(2) requires that the authority should issue a refusal as soon as possible and no later than 20 working days after the date of receipt of the request.
50. After initially providing an incorrect response, the council issued a refusal notice citing the exception it was relying upon on 13 May 2022, with further information being provided on 8 June 2022.

51. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 14(2).

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

Ian Walley
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