

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

Date: 23 January 2023

Public Authority: Kirklees Metropolitan Borough Council
Address: Civic Centre
3 Market Street
Huddersfield
HD1 1WG

Decision (including any steps ordered)

1. The complainant has requested information from Kirklees Metropolitan Borough Council regarding a warehouse planning application. The council withheld the requested information under regulations 12(5)(f) (interests of the information provider) and 13 (personal data) of the EIR.
2. The Commissioner's decision is that Kirklees Metropolitan Borough Council was entitled to withhold the information under regulations 12(5)(f) and 13, and that all other information has been disclosed. However the council breached regulation 5(2) of the EIR because it did not meet the statutory 20 working day time limit for responding to a request.
3. The Commissioner does not require any steps.

Request and response

4. On 25 January 2022, the complainant requested information from Kirklees Metropolitan Council ("the council") in the following terms (numbering added by the ICO):

"[1] I would be interested in any/all information held by your organisation regarding all but not limited to 'files/documents/emails about what was exchanged/asked/visits between the planning department and KC highways and the developer and those acting on the behalf off of the developer relating to local plan ID ES6 / Warehouse development

[2] Particularly interested why there was 2 Highways Development Management (HDM) reviews and [3] why the manager left"

5. The council responded on 9 June 2022. In relation to each part of the request it:

[1] provided information in scope of the request but redacted some information on the basis of regulation 12(5)(f) (interests of the person providing the information) and regulation 13 (personal information) of the EIR.

[2] provided this response: "It is not uncommon for applicants to provide updated information throughout an application and for several consultation responses to be provided reflecting assessment of the new information each time...."

[3] withheld the information on the basis of regulation 13 of the EIR.

6. Following an internal review the council wrote to the complainant on 5 August 2022 and stated that it upheld it's original position.

Scope of the case

7. The complainant contacted the Commissioner on 5 August 2022 to complain about the way the request for information had been handled. Specifically disputing the application of regulations 12(5)(f) and 13 of the EIR. The complainant stated that they were also concerned whether the council held further information in scope of question [1], furthermore they were dissatisfied with the time taken to respond to the request.

8. The scope of this case is to determine: whether the council was correct to withhold information on the bases of regulations 12(5)(f) and 13; whether any further information is held in scope of question [1]; and if the council complied with regulation 5(2) (time limits) of the EIR.

Reasons for decision

The withheld information

9. The withheld information in scope of [1] comprises of redactions made to a number of documents and emails, which the Commissioner has reviewed in relation to the exceptions cited.
10. The Commissioner has also reviewed the information in scope of [3] which is withheld in its entirety, on the basis of regulation 13.

Regulation 12(5)(f) – interests of the information provider

11. Regulation 12(5)(f) of the EIR states that information is exempt if it would adversely affect the interests of the information provider.
12. Regulation 12(5)(f) is an adverse-affect exception. This means that there is a requirement to consider whether disclosure would result in a harmful consequence in order to engage the exception. The exception is subject to a public interest test under regulation 12(1)(b), and the exception can only be maintained should the public interest test support this.
13. The council has stated that the information was provided in the pre-planning phase by the planning applicant voluntarily, and that it is not information which is required to support a planning application.
14. The council has confirmed that there is no formal or legal requirement for the applicant to make a request for pre-application advice.
15. The council states that the information was provided without any expectation that it would be made public. The council has consulted with the third party regarding the request who confirmed that they do not consent to public disclosure.
16. The council states "whilst they would have a reasonable expectation that information they were required to provide could be the subject of an EIR request, they would equally have a reasonable expectations of confidentiality in respect of documents that were provided on a voluntary basis."
17. In respect of the adverse affect on the third party the council states:

"... To disclose such contributions would discourage third parties from providing information to the Council for its consideration, for fear of disclosure of confidential information.

The details being made public (including other parties respective association with the pre-application at this stage) would have a significant commercial and likely detrimental affect impact on those parties as plans progressed.

... Disclosure of this and the associated details would risk significant additional interference and obstruction to the project, resulting in additional costs."

18. The Commissioner has reviewed the information to confirm that it comprises of information that was provided to the council by the applicant. The Commissioner is also satisfied that the disclosure of the information would adversely affect the interests of the applicant. As such, the Commissioner is satisfied that regulation 12(5)(f) is engaged.
19. When considering whether the public interest favours maintaining the exception or disclosing the requested information, the Commissioner has taken into account that there is a public interest in openness and transparency by the council. Disclosure of the information would provide transparency about the information that had been provided by the applicant to the council.
20. However, the Commissioner has taken into account that it represents information provided by a third party in relation to pre-application advice, the purpose of which is to address any potential issues or difficulties with development proposals at an early stage of the planning process, and prior to submitting a formal planning application. The Commissioner recognises that the ability for planning applicants to provide information to the council is integral to the pre-application process, which ultimately serves to save both council and planning applicant from spending unnecessary resources on planning applications that are not likely to succeed due to unrealised issues.
21. The public's right to challenge a planning application is not affected by the non-disclosure of the requested information. That right can be properly exercised during the formal planning process. In this case the planning application has now been submitted and is available to the public. The council's planning website holds the details of a high volume of neighbour representations which have been made in this respect.
22. The Commissioner does not consider that it is the purpose of the EIR to circumvent existing procedures within planning law and the mechanisms for public scrutiny which already exist. Whilst he acknowledges that

facilitating public engagement with environmental issues is one of the general principles behind the EIR, he does not consider that, in this case, disclosure of the withheld information would assist in furthering this principle, at least not to the extent that any public benefit would outweigh the public interest in protecting the interests of the information provider.

23. Having considered the public interest arguments, the Commissioner finds the public interest in protecting the applicant's provided information to be the stronger argument.
24. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*: "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
25. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(f) was applied correctly.

Regulation 13 - personal data

26. 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.
27. 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').
28. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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

Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.

29. 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.

Is the information personal data?

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

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

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. 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.
34. The withheld information in respect of [1] comprises the names and contact details of third party individuals, and junior officers of the council, who have been involved in the planning application. In respect of [3] it is the personal circumstances of a person regarding their employment with the council.
35. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to identifiable individuals. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
36. 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.
37. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

38. 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".

39. 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.
40. 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 UK GDPR

41. 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.
42. 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.
43. 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:-

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".

- 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.
44. 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

45. 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.
46. 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.
47. The complainant is pursuing a legitimate interest in openness and transparency. They state "The blocking of information denies the public transparency and the ability to call the council to account." Furthermore the complainant states that the person referred to in [3] left suddenly, which indicates there could have been a dispute internally about the actions of the planning department.

Is disclosure necessary?

48. '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.
49. The Commissioner notes that, whilst the personal data of officers of the council and third party individuals have been redacted, the council has otherwise disclosed the remainder of the requested information. The Commissioner considers that transparency has been provided to an acceptable degree.

50. However the complainant is pursuing full transparency in terms of the officers and individuals involved in the planning application, the complainant states that this legitimate interest could only be met by disclosure of the withheld information.

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

51. 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.
52. 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.
53. 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 individuals, and the purpose for which they provided their personal data.
54. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
55. The Commissioner notes that whilst the personal data of junior officers and third party individuals has been redacted, the council has otherwise disclosed the remainder of the information in scope of [1] (with the exception of that withheld under regulation 12(5)(f)).
56. The Commissioner considers that the need for accountability and transparency is met through the statutory planning process, as part of which the public are able to view, and challenge, a planning application.
57. Having considered this, the Commissioner is not satisfied that disclosure of the personal data in scope of [1] is necessary, as the legitimate interests in accountability and transparency have been met by alternative measures.

58. As the Commissioner has decided that disclosure is not necessary to meet the legitimate interest in disclosure of [1], 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).
59. Regarding [3], the Commissioner considers that any person would expect details regarding why they left an employment to remain confidential. It is clear to the Commissioner that disclosure of the requested information would result in unwarranted stress to the data subject. The public requirement for transparency is met through the statutory planning process as previously discussed.
60. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms in regard to [3]. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
61. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

62. 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).

Regulation 12(4)(a) – information not held

63. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
64. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request)
65. The complainant believes that further information may be held because the documents received indicate that there is missing information. Furthermore that this is the largest development in the council's history therefore more information must be held.

66. The Commissioner referred the council to the complainants concern. It confirmed that all information held by the Planning department is kept in a digital format and within specific files relating to the relevant planning matter. Searches through these files were carried out, also in the interest of completeness, relevant officers were consulted and asked to search their email accounts for any additional information that may not have been held on the digital file. These searches would have been sufficient to capture all the information available.
67. It stated that the information held on the digital file is held in an order dependant upon when the document was saved to file. Officers sequentially checked each document within the file to retrieve any relevant information. Email accounts were searched by subject matter and via email addresses of known contacts including developers and their agents.
68. The council advised that the officers consulted did not report any deleted information from their email accounts that would have been relevant to the request. Furthermore that the Planning department digital document management system flags any document deleted from the system. In this instance no flags relating to the subject matter were detected on the file.
69. It stated that the digital planning records are held for both statutory and business audit purposes. However the information within the scope of this request relate to communications between the council and the developer and or agent and that these would not be held on the digital file for any statutory purpose.
70. Having considered the above, there is no compelling evidence available to the Commissioner that suggests that further recorded information is held.
71. The Commissioner has concluded that, on the balance of probabilities, no further information is held.

Procedural matters

72. The Commissioner notes that the council took 107 working days to respond to the request. This was a breach of regulation 5(2) of the EIR, which sets a time limit of 20 working days for complying with a request for information.
73. As the response has been provided, no further action is required.

Right of appeal

74. 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

75. 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.

76. 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

Janet Wilson
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