

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 May 2023

Public Authority: Historic England
Address: The Engine House
Fire Fly Avenue
Swindon
Wiltshire
SN2 2EH

Decision (including any steps ordered)

1. The complainant has requested copies of all correspondence between Historic England, Bristol City Council and Bristol Zoological Society, regarding a planning application for the former zoo car park. He also asked for notes of any meetings that had taken place between the parties. Historic England disclosed all the information it held, with redactions for personal data.
2. The Commissioner's decision is that Historic England was entitled to apply regulation 13(1) of the EIR to withhold the personal data (ie the names and contact details of non-senior employees). However, he finds that Historic England breached regulation 5(2) of the EIR by failing to disclose all the information it held within 20 working days. It also breached regulation 11(2) of the EIR by failing to conduct an internal review within 40 working days.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The request concerns a planning application submitted to Bristol City Council by Bristol Zoological Society. The application sought to build houses on the former zoo car park in College Road, Bristol.

5. As part of the application process, the Council consulted Historic England on the impact of the development, before approving the application in September 2021.
6. In June 2022, a judicial review¹ found that the Council had failed to take account of Historic England's advice on the damage the development would do to nearby listed buildings, and planning permission was quashed. It was agreed that the Council could re-consult on the plans before reaching a fresh decision on the application.
7. A revised planning application was considered by the Council's planning committee in November 2022 and planning permission was granted.
8. This was one of two sites for which Bristol Zoological Society was seeking planning permission. The complainant had submitted an earlier request for information on 20 October 2022, which Historic England had responded to on 6 December 2022, disclosing information about the other location, the Zoological Gardens site.

Request and response

9. On 6 December 2022, the complainant wrote to Historic England and requested information in the following terms:

"I am writing to request information in relation to Historic England's correspondence and discussions in relation to a planning application (No. 21/01999/F - Former Car Park College Road Clifton Bristol BS8 3HX) which was submitted to Bristol City Council on behalf of the Bristol Zoological Society. Specifically, I am requesting to see all correspondence which has taken place in relation to this application between Historic England, and either or both of Bristol City Council and the Bristol Zoological Society, including any agents acting on behalf of / on the instruction of the applicant. I am also requesting records / minutes of any meetings associated with the same. For the sake of clarity, this request is made pursuant to the Freedom of Information Act (FOI Act) and Environmental Information Regulations (EIRs)."

10. Historic England responded on 23 December 2022. It mistook the request as being a repeat of the complainant's request of 20 October 2022 and said it had no further information to disclose. It advised him to

¹ <https://www.bbc.co.uk/news/uk-england-bristol-61832335>

seek an internal review of its response to that request, if he was dissatisfied.

11. On 28 December 2022, the complainant asked for an internal review of Historic England's handling of his request of 6 December 2022. He pointed out that its response to his previous request had disclosed information about a different site and that he had reason to believe information was held about the site specified in this request.
12. On 9 February 2023, Historic England provided a response to the request of 6 December 2022. It disclosed all the information it said it held which fell within scope of the request, with redactions of some personal data.
13. On 9 February 2023, the complainant sent Historic England two emails, explaining that he believed it held more information which it had not disclosed, and questioning why it had not provided an internal review of its handling of the request, as he had asked.
14. Historic England responded on 16 February 2023. It said it had located more information, which it disclosed, with redactions for personal data. It acknowledged its mistake when initially handling the request and said it had thought it better to issue a fresh response than to conduct an internal review. It said it would now conduct an internal review.
15. Historic England provided the internal review on 22 March 2023. It disclosed more information, which included copies of email correspondence, redacted to remove names and contact details, and a small amount of information which engaged the non-disclosure exception at regulation 12(4)(e) (Internal communications) of the EIR.
16. Its only comment regarding its handling of the request was as follows:

"Apologies for the method in which this information was sent to you. I can only attribute this to poor Record Management/retrieval on behalf of the organisation. I have sent the remainder of the material we hold on the above matters, which should now bring this request/s for information to a close."

Scope of the case

17. The complainant initially contacted the Commissioner on 16 February 2023 to complain about Historic England's failure to conduct an internal review. On receipt of the internal review dated 22 March 2023, he expressed dissatisfaction with Historic England's decision to withhold information. He also felt that the internal review was inadequate.

18. During the Commissioner's investigation, when examining the small amount of information to which regulation 12(4)(e) had been applied, it became apparent to him that the withheld information fell outside of the scope of the request. This is because the request was specifically for copies of communications between Historic England, the Council and Bristol Zoological Society, and the notes of any meetings between them. The information that was withheld under regulation 12(4)(e) consisted of entirely internal communications on a matter. It was not, in any way, a communication between Historic England and the other parties (indeed, had it been, Historic England could not have sought to engage regulation 12(4)(e) of the EIR as it can only be applied in respect of wholly internal communications).
19. The Commissioner's duty is to consider whether the environmental information specified in a request has been disclosed or withheld, correctly. In doing so, he cannot consider whether information which has not actually been requested, must also be provided.
20. In this case, he is satisfied that the information Historic England has withheld under regulation 12(4)(e) did not fall within the scope of what was actually requested by the complainant. Accordingly, he has excluded it from the scope of this decision notice.
21. Historic England cited regulation 12(3) of the EIR to withhold personal data. The relevant non-disclosure provisions are actually contained in regulation 13 of the EIR. The analysis below therefore considers the application of regulation 13(1) of the EIR to withhold personal data. The Commissioner has also considered Historic England's general handling of the request and the internal review.

Reasons for decision

Is the requested information environmental?

22. The Commissioner has considered the wording of the request and the information in scope, and he notes that it is on a measure (planning) likely to affect the elements of the environment (regulation 2(1)(c) of the EIR). He is satisfied that the request should be considered under the EIR.

Regulation 13 – Personal data

23. 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.

24. In this case the relevant condition is contained in regulation 13(2A)(a)². 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').
25. 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.
26. 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?

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. Historic England said it had redacted the following information under regulation 13:

"...the names and contact details of Historic England staff below director level. This is a process used by Historic England in response to every FOI or EIR request we respond to (in line with other organisations such as DCMS etc.). There is also a minimal amount of information; email/phone number of third-party individuals (Council

² As amended by Schedule 19 Paragraph 307(3) DPA 2018.

staff etc.) redacted, which is not in the public domain. I have withheld/redacted this information under personal data."

32. The Commissioner is satisfied that an individual's name and contact details is information which identifies, and relates to, them. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. 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.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

36. 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.
37. 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

38. 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"³.

³ 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".

39. 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.
40. 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

41. 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.
42. 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.
43. The complainant said there was no justification for the names of Historic England staff to be redacted, and that:

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".

"...the lack of transparency raises further questions regarding the independence of the views adopted by Historic England. What is the specific reason for redacting names repeatedly? Is [redacted] the only employee whose name is allowed to appear here? Surely that cannot be the case. If, for example, there was a conflict of interest between a Historic England employee and on [sic] of the other parties, how could we discover that?"

44. Historic England acknowledged that it is in the public interest that it is accountable and open in the way that it operates and reaches decisions.
45. The Commissioner therefore accepts that a legitimate interest is being pursued in the request for information.

Is disclosure necessary?

46. '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.
47. Having considered the complainant's comments, the Commissioner considers that, in this case, the legitimate interests identified above could only be met by the disclosure of the personal data.

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

48. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that their personal data 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.
49. 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 data subjects expressed concern about the disclosure; and
 - the reasonable expectations of the data subjects.

50. In the Commissioner's view, a key issue is whether the data subjects 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.
51. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
52. The complainant has queried why any personal data should be redacted. However, the Commissioner's guidance on personal data about public authority staff⁴ makes it clear that in some cases, employees (especially non-senior staff and those in non-public facing roles), will have a legitimate expectation of privacy, meaning that information about them should not be disclosed without clear justification.
53. Historic England argued that, in this case, no further benefit would flow from the disclosure of the redacted names and contact details. It said it was sufficiently clear from the information that had been disclosed, which correspondence had come from Historic England. It said that all the redacted personal data related to non-senior members of staff who would not have a legitimate expectation that their details would be disclosed to the world at large in connection with this matter.
54. The Commissioner notes that responsibility for planning approval rests entirely with the Council and that Historic England has no decision-making responsibilities. It was involved only to give an expert opinion on the impact of the proposals. Furthermore, when originally approached, Historic England expressed views which the judicial review found had not been properly taken into account in the initial planning decision, and which led to it being quashed. This suggests Historic England's advice was unbiased and robust.
55. There appears to be some strength of feeling among the local community about the planning decision and the Commissioner is mindful that non-senior individuals, who were not responsible for that decision, might find it disproportionate and distressing for their details to be disclosed when such information would add nothing further to the public's understanding of Historic England's involvement in the matter.

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

56. The Commissioner considers that the considerable amount of information that has been disclosed reveals the extent and nature of Historic England's correspondence and communications with the other parties specified in the request.
57. Based on the above factors, the Commissioner has determined that, in this case, there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
58. 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.
59. The Commissioner has therefore decided that Historic England was entitled to withhold the personal data under regulation 13(1), by way of regulation 13(2A)(a) of the EIR.

Procedural matters

Regulation 5 – Duty to make available environmental information on request

60. Regulation 5 of the EIR concerns the duty of public authorities to make available environmental information on request. Regulation 5(2) sets out the required timescale for this:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
61. The complainant submitted his request on 6 December 2022, but Historic England misinterpreted the request and he did not begin to receive the requested information until 9 February 2023. Historic England then made disclosures of more information on 16 February and 22 March 2023.
62. The Commissioner is satisfied that Historic England breached regulation 5(2) of the EIR by failing to disclose all the information within 20 working days.
63. The Commissioner asked Historic England to explain its handling of the request. It said:

"There was a misunderstanding ... with regards to the requestor's original request on 6th December 2022 and the particular planning application the requestor was requesting information on. This

misunderstanding only became apparent once our Legal team conducted their Internal review.”

64. The Commissioner is concerned that this mistake occurred, as the complainant clearly cited the specific planning reference number, and the location, in this request. The request was also sent to Historic England on the day it sent its response to his other request. This should have prompted Historic England to properly examine whether his correspondence related to the first request, or to a new matter.
65. The complainant has been put to some trouble, in making this request; it was necessary for him to follow it up with Historic England three times, before it located and disclosed all the information it held. This suggests that it did not, initially, conduct adequate searches for all relevant information.
66. The Commissioner expects that, on receipt of a request, a public authority will promptly and properly, identify and locate all information falling within its scope. The Commissioner has published comprehensive guidance for public authorities on request handling under the EIR on his website, at:

<https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-the-environmental-information-regulations/receiving-a-request/>
67. The Commissioner has made a separate record of this breach of the EIR, and of Historic England’s overall handling of the request, for monitoring purposes.

Regulation 11 – Representations and reconsideration

68. Regulation 11 of the EIR provides that, if a requester is dissatisfied with a public authority’s response to a request, the requester can ask for a review. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.
69. The complainant requested an internal review on 28 December 2022. Historic England responded on 9 February 2023, with a revised response, disclosing information. The complainant has queried why Historic England did not provide an internal review as requested, at that stage.
70. The Commissioner considers that a proper internal review of the handling of the request at the point the complainant first requested it should have resulted in the reasons for its mishandling of the request being properly addressed and all relevant information being located and disclosed. As it was, the complainant had to wait nearly two more

months for the last of the information to be located and disclosed.
Historic England did not explain to him why it had failed to locate all the information in the first instance, although it did apologise.

71. The Commissioner is satisfied that Historic England breached regulation 11(4) of the EIR by failing to comply with the prescribed time limit for providing the internal review. As above, he has made a separate record of this breach, for monitoring purposes.

Right of appeal

72. 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

73. 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.

74. 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

Samantha Bracegirdle
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SK9 5AF