

Environmental Information Regulations (EIR)

Decision notice

Date: 6 November 2023

Public Authority: Lewes District Council and Eastbourne
Borough Council

Address: Town Hall
Grove Road
Eastbourne
BN21 4UG

Decision (including any steps ordered)

1. The complainant requested a copy of a complaint sent to the Council in relation to a specific planning application. The Council withheld the information requested under regulation 13 of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 13 to the request. He does not require any steps to be taken.

Request and response

2. On 24 March 2023 the complainant wrote to the Council and requested information in the following terms:

"Please would you provide us with a copy of the complaint received by the Council on this matter. It was clearly made public who this was from at the Committee meeting and it should therefore now be shared with us. Please regard this request as a formal request for the provision of information under the Environmental Information Regulations 2004".
3. The Council responded on 21 April 2023 and stated that the information requested was exempt under regulation 13 of the EIR.
4. On 12 May 2023 the complainant requested an internal review of the Council's refusal to provide the information requested. They asked the Council to consider redacting any personal information from the complaint correspondence.

5. The Council provided the outcome of its internal review on 6 June 2023 and upheld its decision that regulation 13 applied to the request.

Scope of the case

6. The complainant contacted the Commissioner on 14 July 2023 to complain about the way their request for information had been handled.
7. The scope of the Commissioner's investigation is to determine whether the Council correctly applied regulation 13 to the request.

Reasons for decision

Background information

8. The request in this case relates to a complaint which was submitted to the Council that its planning committee was not properly constituted at its meeting on 15 February 2023. At this meeting the Committee approved a particular planning application.
9. At the next planning committee meeting on 15 March 2023 the Council confirmed that a complaint had been made. It also confirmed that the complaint had been investigated and it was determined that the appointment which was in dispute had been made fully in accordance with its constitution. However, the Council also stated that the planning application that had been approved at its last meeting was being brought back to the committee for determination and would need to be considered wholly afresh.
10. At its meeting on 15 March 2023 the Committee resolved to defer the application and at a later meeting the application was refused. The planning application is now subject to an appeal.

Regulation 13 – third party personal data

11. Under regulation 13(1) of the EIR, information is excepted from disclosure if it's the personal data of someone 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 (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 General Data Protection Regulation (GDPR).
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(1) cannot apply.
14. 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?

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 comprises a letter which an individual wrote to the Council about the constitution of its planning committee. The letter contains the name and address of the individual concerned and represents their views on a particular issue.
20. The Commissioner is satisfied that contact details of the third party who wrote to the Council relates to a living individual who may be identified from that data. In addition, the Commissioner accepts that the content

¹ As amended by Schedule 19 Paragraph 58(3) DPA

of the withheld information could lead to the identification of the individual concerned. The Commissioner has also taken into account the fact that the complainant has alleged that they are aware of the identity of the individual and that there is publicly available information which suggests the identity of the individual concerned.

21. In light of the above, the Commissioner is satisfied that the withheld information falls within the definition of personal data as set out in the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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”.

25. 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.
26. 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

27. 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”.

28. 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.
29. 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

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, 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.
31. 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.
32. The Commissioner is satisfied in this case that the complainant has a legitimate interest in knowing the full details of the complaint which was made to the Council.

Is disclosure necessary?

33. '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

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".

disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

35. 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 FOIA 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.

36. 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.

37. 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.

38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

39. The Commissioner considers that individuals who write to the Council in circumstances such as this would have a reasonable expectation that their complaint would not be disclosed to the public at large in response to a request for information.

40. The Commissioner accepts that the existence of the complaint, the nature of the complaint and the outcome of the complaint is in the public domain. Furthermore, the Commissioner notes that the

complainant has alleged that they are aware of the identity of the individual and suggested that the identity of the individual is in the public domain.

41. However, whilst the individual concerned may be content for brief details of their complaint, and the outcome to be made public, the Commissioner has seen no evidence to suggest that they would have had any expectation that their detailed letter of complaint would be disclosed into the public domain.
42. The Council stated that disclosure of the withheld information would "create a precedent likely to severely damage the freedom of individuals to submit representations and complaints to the Council. People will consider the lack of anonymity surrounding submissions to the council and could make them vulnerable to negative reactions especially in the age of social media (trolling)".
43. The Council does not consider disclosure of the withheld information is necessary as the complaint was not upheld. In addition, it does not accept that disclosure of the withheld information will provide any benefit to the complainant or the wider public in light of the information in the public domain about the nature and outcome of the complaint within its webcast and meeting minutes. However, the Council considers that disclosure could be used to target the individual for raising the complaint.
44. In the circumstances of this case, the Commissioner considers that the individual would have the reasonable expectation that the letter they wrote to the Council would not be disclosed to the world at large in response to an information request. The Commissioner also agrees that disclosure would be likely to cause them harm or distress. Disclosure might also deter other people from raising similar concerns in the future, if they thought their personal data might be disclosed.
45. The Commissioner considers that the complainant's legitimate interest and the wider interest in transparency have been met to an adequate degree through the information which is already publicly available about the complaint as recorded in the minutes and the video recording of the planning meeting on 15 March 2023.
46. Based on the above factors, the Commissioner is satisfied that the complainant's legitimate interest is not sufficient to outweigh those of the data subject and their 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.

47. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
48. The Commissioner's decision is that the Council is entitled to withhold the information under regulation 13(1) of the EIR, by way of regulation 13(2A)(a).

Right of appeal

49. 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

50. 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.
51. 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

Joanne Edwards
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