

Environmental Information Regulations 2004

Decision notice

Date: 25 October 2023

Public Authority: Cornwall Council
Address: New County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information relating to the renewal of a permit for banger racing. Cornwall Council (the Council) refused to disclose the information at part 1 of the request, citing regulation 13(1) (personal information) of the EIR. The Council also stated that part 2 of the request was not seeking recorded information.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 13(1) of the EIR to withhold information within the scope of part 1 of the request. The Commissioner also finds that part 2 of the request was not seeking recorded information, therefore the Council was not obliged to respond to it under the EIR.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 26 September 2022, following on from earlier correspondence between the complainant and the Council regarding the renewal of a permit for banger racing at United Downs, the complainant wrote to the Council and requested information in the following terms:

- "1) could you please supply the names and role of each officer who discussed the renewal of licence with your Strategic Director for Sustainable Development
- 2) Lastly, could you also please advise as to whether or not the Council accepts the Brundtland definition of Sustainable Development"
5. The Council responded on 19 October 2022. It refused part 1 of the request in accordance with section 40(2) of FOIA. In response to part 2 of the request it stated:
- "The Brundtland definition of sustainable development is very broad. Ultimately this is a balance of decisions around economic, social and environmental issues and the policies within Cornwall Local Plan Strategic Policies 2010-2030 provide the framework for assessing these issues."
6. Following an internal review the Council wrote to the complainant on 17 November 2022. It conceded that it should have handled the request under the EIR rather than FOIA. Therefore it cited regulation 13(1) of the EIR to withhold information within the scope of part 1 of the request, rather than section 40(2) of FOIA. The Council also stated that part 2 of the request was seeking an opinion rather than recorded information, but provided a link to the Cornwall Local Plan Strategic Policies 2010-2030, as it considered this information to be relevant to the complainant's interests.

Reasons for decision

Regulation 13 – personal data

7. 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.
8. 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 UK General Data Protection Regulation ('UK GDPR').
9. 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.

10. 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?

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

“any information relating to an identified or identifiable living individual”.

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. In the circumstances of this case, having considered the information requested at part 1, the Commissioner is satisfied that the names and roles of officers clearly both identify and relate to any individuals who discussed the renewal of the permit with the Strategic Director. This information therefore falls within the definition of ‘personal data’ at section 3(2) of the DPA.
16. The fact that information constitutes personal data of an identifiable 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.
17. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

18. 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”.

19. 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.

20. 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

21. 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”¹.

22. 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 legitimate interests override the interests or fundamental rights and freedoms of the data subject.

23. 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

24. In considering any legitimate interests in the disclosure of the requested information under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

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 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”.

25. 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.
26. The Council explained that the complainant has a private legitimate interest in the information at part 1 of the request as they are dissatisfied with the process behind, and the resulting decision, to lease an area of land for banger racing in close proximity to their property. The complainant wishes to know the names and job titles of officers in an attempt to understand who was responsible and obtain a greater understanding of how and why the lease was renewed, so that they can challenge the decision that was made.
27. The Council also acknowledged that there is a wider legitimate interest in transparency, openness and accountability regarding how the Council reaches decisions such as this one.

Is disclosure necessary?

28. '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.
29. The Council explained that it is not necessary to disclose the personal information of non-senior officers to provide an understanding of a how a process has been completed, nor does maintaining the exception inhibit the complainant's ability to challenge or raise concerns about the decision to go ahead with granting the lease. The Council also stated that it has further met the complainant's legitimate interest by already disclosing the name and job title of the senior Council officer who had ultimate responsibility for the decision, and as such is the accountable officer.
30. The Council further explained that it considers it has met the wider legitimate interest regarding transparency surrounding its decision making, through the provision of significant amounts of information in response to requests for information.
31. Disclosure of information in response to a request under the EIR is essentially a disclosure to the world at large. It is not a private transaction between the public authority and the requester. In this case the Commissioner is satisfied that information already disclosed meets

the identified legitimate interests. The Commissioner is further satisfied that it would not be a proportionate or appropriate step to disclose the personal information of junior officials when the name and role of the senior official who takes ultimate accountability for the decision has already been disclosed.

32. As the test of necessity has not been met, the Commissioner does not need to go on to consider the balance between the legitimate interests and the interests or fundamental rights and freedoms of the data subjects.
33. As disclosure is not necessary, there is no lawful basis for the disclosure of the information sought by part 1 of the request. Disclosure would be unlawful and would therefore breach the first DP principle. The Commissioner concludes that the Council was entitled to rely on regulation 13(1) of the EIR to refuse to comply with part 1 of the request.

Regulation 5 – duty to make available environmental information

34. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request.
35. The EIR provides a right of access to environmental information which is held by, or on behalf of, a public authority in recorded form at the time when it receives the request. This does not extend to the right to ask questions, or to seek explanations, opinions or clarifications, unless that information is already held by the public authority in recorded form. Public authorities are not obliged to create new recorded information in order to comply with a request.
36. The Commissioner is satisfied that part 2 of the request is asking for the Council's opinion on the Brundtland definition of sustainable development, which is not held in recorded form. As such, he finds that the Council was not obliged to provide any such opinion under the EIR.
37. However, the Commissioner notes that the Council provided a link to its Local Plan Strategic Policies which are likely to capture its approach to sustainable development.
38. The Commissioner does not require the Council to take any further steps on this matter.

Right of appeal

39. 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

40. 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.
41. 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

Roger Cawthorne
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