

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 October 2020

Public Authority: West Lancashire Borough Council
Address: 52 Derby Street
Ormskirk
L39 2DF

Decision (including any steps ordered)

1. The complainant has requested from West Lancashire Borough Council ("the Council"), copies of all correspondence relating to advice given regarding the development brief for land between specific areas.
2. The Commissioner's decision is that the Council was entitled to withhold the requested information under regulation 13 of the EIR.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 2 December 2019, the complainant wrote to the Council and requested information in the following terms:

"The development brief for this land (August 2014) included advice given by LCC Highways regarding accesses into the site and, presumably, reasoning behind that advice.

Under the Freedom of Information Act, I am asking the Borough Council for copies of all correspondence relating to that advice, including memos of telephone calls."
5. The Council responded on 20 December 2019. It provided three documents, which it advised provided the correspondence with Lancashire County Council Highways (LCC), that it held on file. The

Council explained that it had redacted personal information from the documents.

6. On 14 January the complainant requested an internal review. The Council responded on the same day, asking the complainant to clarify what it was they were dissatisfied with, so that it could respond to the request for an internal review.
7. Following the complainant clarifying their complaint, the Council provided an internal review on 12 February 2020. It upheld its original position, advising that the names had been redacted to protect their personal data.

Scope of the case

8. The complainant contacted the Commissioner on 20 February 2020 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of the investigation is to establish whether the Council is entitled to withhold the requested information under regulation 13 of the EIR.

Reasons for decision

Regulation 13 – personal data

10. 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.
11. 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 General Data Protection Regulation (GDPR).
12. 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) of the Data Protection Act 2018.

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. In the circumstances of this case, the Commissioner is satisfied that the information (names, email addresses and job titles) relates to several third parties. She is satisfied that the information both relates to, and identifies, the third parties concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The Council has explained that it has provided the names of the officers who are the equivalent to Senior Manager level within the Council. It has not provided any other officers names, as they are not of a senior level and therefore, they do not have the expectation that their personal data would be disclosed.
20. The Council has also provided, to the Commissioner, the job role specifications for the employees who are not at a senior management level. These show the requirements and expectations for the job itself. The Commissioner is satisfied that the job roles do not fall under a senior management position.
21. 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.

22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. 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".

24. 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.

25. 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

26. 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.

27. In considering the application of Article 6(1)(f) of the 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;

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".

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. 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

29. 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.
30. 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.
31. In this case, it is clear that the complainants are seeking access to the withheld information for a specific reason: the complainants want to know why different advice had been given in the recent application. They want to understand how the situation arose and why the officers involved did not challenge the comments made by the highways officer.
32. The Commissioner considers that there may be a wider legitimate interest, i.e transparency about the Council's environmental considerations. There is also a general legitimate interest in the Council being accountable for its functions.

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 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 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.

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. The Commissioner is mindful that disclosure under the EIR is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The Council has explained that the information, whilst not special category data, is information that is particular to the individual staff members and that, in its view, there is a reasonable expectation that this information would remain out of the public domain.
41. The Council further explained to the Commissioner that not all the staff involved in the original application/response are employed by it anymore and as such, the Council cannot ask them if they consent to their personal data being disclosed.
42. The Commissioner notes that the Council has disclosed the relevant emails to the complainants. However, it has only redacted the names of the staff involved. She considers that the complainants have sufficient information to make a complaint to the Council, should they wish to, without having individuals identified.

43. The Commissioner has viewed the withheld information and is satisfied that it contains personal information about the members of staff, both past and present, at the Council.
44. The Commissioner considers that disclosure of the withheld information would be distressing to those involved, as they had no expectation that their personal information could be made public. Disclosure under the EIR would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
45. The Commissioner accepts that there is some interest to the public in the withheld information. However, she does not consider that this outweighs the rights and freedoms of the third parties identified in the information requested.
46. Based on the above factors, the Commissioner has determined that 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.
47. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2) of the FOIA.

Right of appeal

48. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.

50. 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

Phillip Angell
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