

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 4 November 2021

**Public Authority:** Amber Valley Borough Council  
**Address:** Market Place  
Town Centre  
Ripley  
DE5 3BT

### **Decision (including any steps ordered)**

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1. The complainant has requested information from Amber Valley Council ("the Council") regarding an image that has been provided in relation to a complaint about their property.
2. The Commissioner's decision is that the Council has correctly applied regulation 13 – personal data, of the EIR.
3. The Commissioner does not require the public authority to take any further steps.

### **Request and response**

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4. On 14 December 2020, the complainant wrote to the Council and requested information in the following terms:  
*"Information about a complaint made about land at [address]. A letter and photographs, sent to planning enforcement."*
5. The Council responded on 5 January 2021. It provided a redacted copy of the letter that had been received but withheld the remainder of the information under regulation 13 of the EIR – personal data.
6. Following an internal review the Council wrote to the complainant on 1 March 2021. It stated that it upheld its original position – regulation 13 of the EIR is applied to the withheld information.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 3 March 2021 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of this complaint is to determine whether the Council was correct to withhold the requested information under regulation 13 of the EIR.

## **Reasons for decision**

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### **Regulation 13 - personal data**

9. 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) of the Data Protection Act 2018 is satisfied.
10. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>1</sup> of the Data Protection Act 2018. 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').
11. 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.
12. 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?***

13. Section 3(2) of the DPA defines personal data as:
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<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case the Commissioner is satisfied that the information (an image which shows parts of the complainant's property, along with other properties, two individuals and the surrounding area) clearly relates to a third party. She is satisfied that this information both relates to and identifies the third party concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. 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.
19. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

20. 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".*

21. 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.
22. 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**

23. 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"<sup>2</sup>.

24. 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;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

25. 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

26. 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.

27. 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

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<sup>2</sup> 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) 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".*

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.

28. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason: to understand why a complaint has been made about their property.
29. The Commissioner considers that there is a legitimate interest in the disclosure of this information., i.e transparency about how the Council considers complaints around properties. There is also a general legitimate interest in the Council being accountable for its functions.

### **Is disclosure necessary?**

30. '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.
31. The Commissioner accepts that the complainant would have no other means of getting the requested information and that, therefore, disclosure by the Council would be necessary to satisfy the complainant's legitimate interests in this case.

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

32. 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.
33. 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.

34. In the Commissioner's view, a key issue is whether any 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.
35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
36. 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.
37. The Council has explained that the image that was taken was done so to raise a complaint about the way in which the land (which had received planning permission) was being used.
38. The Council has provided the Commissioner with copies of the withheld information.
39. Within the withheld information, the Commissioner can see two individuals, along with being able to determine where the photograph was taken from. As such, this could lead to several people being identified; those in the image and the person who made the complaint. To release this photograph could cause unwarranted damage or distress to these individuals.
40. The Council explained that it considers the image to be personal data and as such, could not be released as it would identify living individuals, from whom they did not have the consent to share the image.
41. The Council also explained that they did not consider the image to be relevant to the planning application, which is why the image was kept on file but not processed or released.
42. Whilst the Commissioner understands the complainant's reasoning for wanting to receive this information, she must consider the impact of disclosure to the world at large, rather than to an interested party.
43. Against the complainant's interests is the reasonable expectation of the data subjects, who are in the image/the individual who took the photograph, and their right to confidentiality to be maintained.
44. She therefore considers that disclosure of the remainder of the information would be disproportionately intrusive to the data subjects as it would reveal information about these third parties which is not

otherwise in the public domain and, as such, disclosure could cause unwarranted damage or distress to the individuals involved.

45. 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 vast majority of the information would not be lawful.
46. 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.
47. She therefore finds that the council was correct to rely on regulation 13 of the EIR to withhold the requested information.

**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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**