

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 28 July 2022

Public Authority: Wigan Metropolitan Borough Council

Address: Town Hall
Library Street
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant requested information from Wigan Metropolitan Borough Council ("the Council") about the Tree Preservation Order (TPO) relating to a specific address. The Council disclosed information in response, after redactions were carried out on the information - on the basis that it was third party personal data. Its position was that no other information was held, falling within the scope of the request and cited Regulation 12(4)(a) and Regulation 13 of the EIR to do so.
2. The Commissioner's decision is that he is satisfied that on the balance of probabilities, the Council holds no further relevant information, and that the information disclosed was correctly redacted under the exception for third party personal data: regulation 13 of the EIR.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. In October 2021, the complainant wrote to the Council and requested information in the following terms:

“Tree preservation orders were on this land in the eighties to stop future development your officer REDACTED informs me. I seek all information internal memos, borough solicitor notes in regards to this application.

As above legal due process that was followed amenity value submission on what basis submission made.”

5. The Council responded on 18 October 2021. It provided information within the scope of the request and advised the complainant that some of the information was redacted under the exemption at regulation 13 of the EIR.
6. On 8 December 2021 at internal review, the Council upheld its decision in its response to the initial request, reiterating it had supplied all information held within scope, and explained that the Council no longer holds certain information due to its retention policy given some information dated back to 2006. It did disclose some further information that was held electronically which had been missed due to a technical issue with the original searches.

Scope of the case

7. The complainant initially contacted the Commissioner on 27 October 2021 to complain about the way their request for information had been handled. They were advised that they had not exhausted the Council's complaints procedure and needed to request an internal review.
8. The complainant contacted the Commissioner on 8 December 2021 to express their dissatisfaction with the outcome of the internal review conducted by the Council.
9. The Commissioner's investigation has focussed on whether the Council is entitled to rely on regulation 13 of the EIR to withhold the redacted information. He has also considered whether the Council holds further historical recorded information within scope of the request.

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 UK General Data Protection Regulation ('UK GDPR').
12. 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.
13. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosing 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.

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

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 this case the complainant is seeking the unredacted TPO and related correspondence associated with a specific property which includes the names, addresses and some contact details of third-party individuals and lower-level Council employees involved at the time of the order and subsequently in the 1980's.
19. Having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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."

23. 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.
24. 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.
25. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

26. Information relating to special category data is given special status in the UK GDPR.
27. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious, or philosophical beliefs, or

trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

28. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does not include special category data.
29. As none of the withheld information is special category data, the Commissioner has gone on to consider whether there is an Article 6 basis for disclosing the withheld information.

Lawful processing: Article 6(1)(f) of the UK GDPR

30. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
31. 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".

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".

32. 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.
33. 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

34. 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.
35. 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.
36. The Commissioner accepts that there is a legitimate interest in transparency about how the Council handled this particular planning issue.

Is disclosure necessary?

37. '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.
38. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

39. As the Commissioner has decided in this case that disclosure is necessary to meet the legitimate interest, he has gone on to conduct the balancing test.

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

40. 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.
41. 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.
42. 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.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. In this case the individuals concerned would have a reasonable expectation of privacy, they would not expect their contact with the Council to result in their personal data being disclosed to the world at large.
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 information would not be lawful.

46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

47. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 12(4)(a) – information not held

48. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
49. The complaint under consideration in this part of the notice relates to the Council's assertion that no further information within the scope of the request is held, beyond that which it has already identified and either disclosed or withheld under regulation 13.
50. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
51. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

The complainant's view

52. The complainant believes that the Council holds further information about site visits and communications with neighbours of the property. They also believe that the Council has wilfully destroyed information in order not to disclose this to the complainant. No evidence has been provided to support these allegations by the complainant.

The Council's view

53. The Council has explained that its retention policy has been followed with regard to archiving of paper documents and electronic files. It confirmed there is no business purpose nor statutory requirement for it

to hold any information relating to site visits or verbal communication with any interested party beyond the retention period.

54. The Council believes that it has carried out appropriate searches likely to retrieve any relevant information. It used both the address of the property and relevant references to search the relevant paper and electronic records, it explained that recent information associated with a TPO would usually be held in the electronic case file, but additional searches were conducted for historical paper documents produced before the electronic system was used, as the original TPO goes back several decades.
55. The Council confirmed that paper/hard copy records held by their Legal Services relating to the TPO were destroyed in accordance with the terms of their retention schedule, an exception to this was the sealed TPO which they have a statutory obligation to retain. It explained that under its internal document retention policy all paper information was to be disposed of on or around 7 years after last significant action on the file / file closure pursuant to the retention schedule. They also advised that electronic information is held by Legal Services on a historic case management system. That system was checked at the point of internal review. The information held electronically, and which fell within the scope of the request was then supplied.

The Commissioner's decision

56. The Commissioner's remit is to establish whether, on the balance of probabilities, further information falling within the scope of the request is held.
57. He is satisfied by the Council's explanations as to how it has ensured that all information within the scope of the request has now been identified and as to why no further recorded information is held.
58. The Commissioner's decision is that, on the balance of probabilities, the Council is correct to state that it has identified all of the information it holds falling within the scope of the request.

Right of appeal

59. 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

60. 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.
61. 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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