

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

### **Decision notice**

**Date:** 12 April 2012

**Public Authority:** Solihull Metropolitan Borough Council  
**Address:** Council House  
PO Box 18  
Solihull  
B91 9QS

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

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1. The complainant has requested the name of the proposer of a specific piece of land for development as a Gypsy/Traveller site. The Commissioner's decision is that Solihull Metropolitan Borough Council has correctly withheld the requested personal data.

#### **Request and response**

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2. On 8 December 2011, the complainant wrote to Solihull Metropolitan Borough Council ('the council') and made a request for the name of the individual/organisation who proposed the land between Old Waste Lane and Waste Lane as a Gypsy/Traveller site. He provided reasons why he believed disclosure of this information is necessary and fair.
3. The council responded on 13 December 2011 withholding the information under regulation 13 of the Environmental Information Regulations 2004 ('the EIR'). It stated that disclosure would contravene the fairness element of the first Data Protection principle. It explained that people who were asked to contribute and suggest locations were told that suggestions would be treated in confidence in that the personal information provided would be used by the council and partner organisations to identify planning issues they are interested in and consult with them on these specific issues. Such people were also told that their information may be shared with other council services and partner organisations to ensure records are kept accurate and to help

identify services they may be entitled to or interested in. The council explained that the people who took part in the consultation therefore had no expectation that their information would be shared with members of the public.

4. The council also stated that an additional consideration is regulation 12(5)(d) which provides an exception from releasing information if doing so would breach confidentiality. The council provided reasons why it would not be in the public interest to disclose the requested information in this case.
5. An internal review was requested on 18 December 2011 in which the complainant expanded on the reasons why the information should be in the public domain. The council responded on 28 December 2011 upholding its decision to withhold the requested information under regulation 13. The council provided further reasoning for the application of regulation 13 but did not make any reference to regulation 12(5)(d).

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated several reasons why the information should be disclosed. It appears that his main contention is that the public interest is best served if the names of those seeking to achieve a de-designation of a piece of greenbelt are publically available if they stand to make significant financial gain as a result of their proposal.
7. The Commissioner considers whether the council were correct to withhold the information under regulation 13. Although this regulation is not subject to a public interest test, the Commissioner will consider 'legitimate interests in disclosure' as part of the analysis as to whether disclosure of the requested information would be in accordance with the first data protection principle.
8. As the council did not seek to rely on the exception at regulation 12(5)(d) in its internal review response or correspondence with the Commissioner, that particular exception is not considered in this decision notice.

## Reasons for decision

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### Is the information environmental?

9. As the complainant expressed concern that the request was dealt with under the EIR rather than the FOIA, the Commissioner has considered whether the information is environmental.
10. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

"...namely any information in written, visual, aural, electronic or any other material form on –

  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

11. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
12. The council maintains that because the original document (Gypsy and Traveller Site Allocations Development Plan 'Options' Paper), and the subsequent results from the initial survey, are an integral part of a consultation process which may, or may not, form future planning proposals relating to Gypsy and Traveller sites within the borough, the request clearly relates to planning matters and, therefore, the request should be dealt with under the provisions of EIR.
13. The Commissioner considers the requested information to be information on a measure likely to affect the elements and factors referred to in Regulation 2(1)(a) and 2(1)(b) and is therefore satisfied that this constitutes environmental information by virtue of Regulation 2(1)(c).

### **Regulation 13 Personal data**

14. Regulation 13 states that a public authority shall not disclose information which is the personal data of a third party where its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
15. In order to rely on Regulation 13, the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"“personal data” means data which relate to a living individual who can be identified –

  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
16. 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 data protection principles under the DPA. The Commissioner notes in this case that the council argued that

disclosure of third party personal data would breach the first data protection principle.

17. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

18. As explained above, the first consideration is whether the withheld information is personal data. The Commissioner believes that an individual's name is clearly personal data as such information relates directly to identifiable individuals.

19. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.

20. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

### **Reasonable expectations**

21. As detailed in paragraph 3, the council explained that people who were asked to contribute and suggest locations were told that suggestions would be treated in confidence and their personal data was obtained for the purpose of enabling the council to correspond with the proposers if necessary.

22. On the form used to propose sites for consideration as Gypsy/Travellers sites, the council provided the following 'fair obtaining statement' at the top of the first page:

“The information you provide will be used by the Council and partner organisations to identify planning issues that you are interested in and consult with you on these specific issues. It may be shared with other Council services and partner organisations to ensure our records are

kept accurate and to help us to identify services you may be entitled to or interested in.”

The council pointed out that the statement quite clearly indicates how the information will be used and who that will be shared with but makes no mention of individual’s personal data being placed in the public domain.

23. In addition, the council also submitted that given the highly controversial and emotive nature of the subject, it would not be unreasonable for those wishing to take part in the initial survey to have assumed that their personal data would not be shared with members of the public.

### **Consent**

24. The issue of consent is dealt with in the Commissioner’s specialist guidance ‘Consent’<sup>1</sup>. The guidance states that the Commissioner will take the data subject’s comments into account insofar as they represent an expression of the views of the data subject at the time of the request had they given any thought to the issue at that time. These views will help to inform the analysis of fairness. This is because the data subject may have provided additional and valuable information about the impact of the disclosure on them including any circumstances unique to the data subject and/or the circumstances in which the information was initially obtained and how this established their expectations as to its further use.
25. In this case, notwithstanding its view that given the contentious nature of the overall subject matter, it is highly unlikely that the proposer would agree to disclosure, or that the proposer would have had more than a reasonable expectation that their personal information would not be placed in the public domain. Also it is under no obligation to seek consent if it reasonably believes it is unlikely to be given. Nonetheless, the council contacted the proposer with a view to seeking consent.
26. The proposer was very distressed when it was put to them that their personal data may be disclosed to members of the public (in particular members of the action group who had been created to oppose any such development). The proposer expressly refused permission for their personal data to be disclosed on the grounds that they feared retaliation.

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<sup>1</sup> <http://icoportal/foikb/PolicyLines/FOIPolicyConsent1.htm>

27. The Commissioner is satisfied in this case that the data subject would not have had a reasonable expectation that their personal data would be released.

### **Consequences of disclosure**

28. In order to assess the impact of the consequences of disclosure on whether disclosure would be fair, it is necessary to consider whether release of the information would cause unwarranted damage or distress to the data subject.
29. The council felt that had it not provided the assurance that individuals who made proposals would not have their identities disclosed it is highly likely that members of the public would be less likely to engage on the basis that they may well become the subject of ridicule or reprisals given the contentious nature of the subject.
30. It stated that the whole topic of Gypsy and Traveller's sites is both highly controversial and emotive and this is most certainly the case within the Borough of Solihull which has been fighting through the Courts for the past 18 months to have an illegal Travellers site removed. This illegal site is approximately three miles from the site that had been proposed in Waste Lane.
31. As explained above, the proposer was very distressed when it was put to them that their personal data may be disclosed to members of the public in that they feared retaliation. The council stated that although the proposer did not provide the council with a formal section 10 notice under the Data Protection Act 1998, the content of their email was sufficient for the council to consider that they may suffer serious damage and distress.
32. The council stated that the decision to not release the name of the proposer was not taken lightly and given the controversial and emotive strength of feeling within the Borough over the matter of Gypsy and Travellers Sites, the experience of officers lead them to believe that disclosure of the proposers personal details would place that person at risk of harassment.
33. It further explained that shortly after the council announced that the Waste Lane site was being considered, they were contacted by the land owner who informed that they had been subjected to considerable harassment. The council submitted that the behaviour of some members of the public toward the land owner clearly vindicates the council's decision to withhold the personal data of the proposer.



34. Taking the above into account, the Commissioner's view is that disclosure of the proposer's identity could cause significant unwarranted damage or distress to the data subject.

### **Legitimate interests in disclosure**

35. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with case specific interests.
36. In this case, the complainant stated that the council's Planning Department's review of the site for housing gave one of the reasons for rejection as that it would create an indefensible green belt boundary and explained that this piece of land could have been nominated in order to create such an indefensible boundary by someone who's green belt land nearby would then stand more chance of gaining planning permission. He then set out his reasons as to the legitimate interests in disclosure of the name of the proposer as follows:
- "It is obvious that there is a very significant financial implication for land to be de-designated as Green Belt. Landowners/developers stand to gain hugely if such de-designation can be achieved.
  - It is a fundamental principle of our society that decisions by public authorities are taken in public. All council meetings on financial and planning issues are held in public, indeed the UK legislature meets in public. This allows the people to see that things are undertaken fairly and is a major bulwark against corruption. I need only to point out that it was the disclosure of MPs expense claims that lead to reform of the expense system.
  - Allowing those with vested interests to make suggestions anonymously as part of the LDF process can clearly allow for all kinds of corruption to take place.
  - Whilst Solihull MBC state that their consultation process is designed to encourage open debate, it makes no attempt to differentiate suggestions from those with vested financial interests in having land de-designated as Green Belt compared to those who are making suggestions for wider community benefit.
  - It is my contention that the public interest is best served if the names of those seeking to achieve a de-designation of Green Belt are publically available if they stand to make significant financial gain as a result of the community agreeing to their suggestion.



- There are only 9 suggestions within the process for identifying sites for Gypsy/Traveller accommodation. One of these sites is council owned and another at Eves Green Lane Meridan has already been rejected as a potential site following a Planning Inquiry and subsequent decision by the Secretary of State. Hence, there are only 7 sites where truly independent suggestions have been received. No attempt has been made by the council to identify those suggestions where the proposer has a significant financial objective in making the suggestion (a developer or landowner), versus those whose motives are more community minded.
  - The checks and balances in the planning system will not work to their fullest extent if anonymity is granted to those seeking a change of status from Green Belt where those people will financially or personally benefit from a positive decision. Such secrecy can lead to corruption and this overrides the need for protection of the names of such under the Data Protection Act."
37. The council stated that these concerns may or may not have a bearing on any planning application. However, in order to address them it is not necessary to release the identities of the individuals into the public domain. It explained that these concerns can and should be addressed as part of the planning process which has numerous checks and balances built into it to ensure that public views and concerns are heard and addressed. Alternatively, any concerns can be brought directly to the attention of council officers as the complainant has done or via a local councillor. It stated that in this way the public interest is served.
38. The Commissioner considers that although there could be a legitimate interest in knowing the names of those seeking to achieve a de-designation of a green belt land if they are likely to make significant financial gain, in this case it is not known whether or not the proposer is in such a position therefore, this potential interest does not outweigh the rights and freedoms of the data subject.

### **Assertion that already in public domain**

39. During the Commissioner's investigation, the complainant informed him that council minutes stated the site has been withdrawn from consideration by the landowner. The complainant asserted that the landowner is a matter of public records at the Land Registry and therefore the council has disclosed who nominated the site.
40. In response to the Commissioner's enquiries on this point, the council accepted that the personal data of the land owner can be readily

obtained via the Land Registry Office and, therefore, the personal data of the land owner is in the public domain. However, it stated that it cannot accept the assumption on the part of the complainant that the land owner and proposer are one and the same and that because the land owner's information might be in the public domain, so should the proposer(s).

41. The Commissioner is aware that it was possible for anyone to have put forward any land for consideration, not just a land owner. He agrees that the complainant has made an assumption that the landowner and proposer are one and the same and therefore the complainant's assertion that the information is already in the public domain is not valid.

### **Conclusion**

42. The Commissioner concludes that the council has correctly applied regulation 13 to the requested information because disclosure would be unfair. The Commissioner considers that the data subject would not have a reasonable expectation that their personal data would be disclosed, that disclosure could cause significant unwarranted damage or distress to the data subject and that any potential legitimate interest in disclosure does not outweigh the rights and freedoms of the data subject.
43. As the Commissioner has decided that disclosure would be unfair, and therefore in breach of the first data protection principle, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

## Right of appeal

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44. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

45. 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.
46. 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** .....

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**