

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 January 2013

Public Authority: Derbyshire County Council
Address: County Hall
Matlock
Derbyshire
DE4 3EG

Decision (including any steps ordered)

1. The complainant has requested a copy of the landowner's application for the diversion of two specific footpaths. Derbyshire County Council (the council) applied regulation 13 to the information in its entirety as it considered that the information was the personal data of the applicants and it would be unfair to disclose it.
2. The Commissioner's decision is that the council was incorrect to rely on regulation 13 to withhold the requested information with the exception of the email address, telephone number and signature of the applicant which was correctly withheld.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant, with the exception of the email address, telephone number and signature.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

Request and response

5. On 12 March 2012 the complainant made the following information request to the council:

"Please send me a copy of the landowner's application and justification for this proposed diversion of the above paths [Unstone footpath 20 and 21]. Could you also let me know what the estimated cost to the landowner for the diversion of these two public paths (in total)."

6. The council responded on 13 March 2012. It stated that it considered that regulation 13 applied to all the requested information and it was therefore excepted from disclosure.
7. Following an internal review the council wrote to the complainant on 3 April 2012. It provided information regarding the costs to the landowner and also directed the complainant to the justification for the diversion contained in a consultation document, which he had been provided with in his capacity as a consultee. However, it maintained its application of regulation 13 to the application form, which contains the justification within it, in its entirety.

Scope of the case

8. The complainant contacted the Commissioner on 24 April 2012 to complain about the way his request for information had been handled. In particular he was concerned that the application form had been withheld in its entirety.
9. As the council has provided information regarding the cost to the landowner, the Commissioner therefore considers the scope of this investigation to be whether the council was correct to withhold the any part of the landowner's application form under regulation 13.

Reasons for decision

10. Regulation 2 defines what environmental information is. The first step for the Commissioner here is to consider whether the information falling within the scope of the request is environmental in accordance with this definition and so whether the council correctly dealt with this request under the EIR.
11. Environmental information is defined within regulation 2(1) of the EIR as follows:

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

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

12. The complainant requested information concerning an application to change a footpath. The Commissioner believes that any information relating to this matter would be environmental information by virtue of Regulation 2(1)(c). A decision as to whether a footpath can be moved would be a plan that would affect the state of the land or landscape as noted in Regulation 2(1)(a). Therefore, the Commissioner considers the requested information in this case to be environmental as it relates to information on an activity which would be likely to affect the land or landscape and the council was correct to respond to the request under the EIR.

13. Regulation 13(1) EIR states that:

"To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data."

14. Regulation 13(2) EIR states that:

"The first condition is –

a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

i. any of the data protection principles;"

Is the Requested Information Personal Data?

15. The Commissioner has first considered whether the requested information is personal data. 'Personal data' is defined under section 1(1) of the Data Protection Act 1998 (DPA) as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.

16. The Commissioner notes that the application form contains the contact details of the applicants including their email address, telephone number and signature. It also contains the applicant's justification for the diversion order and the details of where the current footpaths are on their property, and where they will be diverted to.
17. Based on the council's submissions and the withheld information itself, the Commissioner considers that the requested information is personal data relating to identifiable living individuals, namely the landowners who made the application for the footpath diversion (the applicants).
18. The Commissioner has therefore gone on to consider whether disclosure of personal data in this case would breach any of the Data Protection Principles.

Would Disclosure of the Information Breach any of the Data Protection Principles?

19. The first principle of the Data Protection Act 1998 (DPA) states that personal data shall be processed fairly and lawfully. The council considers that it would be unfair to the individuals concerned to disclose the requested information and that doing so would constitute a breach of the first principle of the DPA. The Commissioner has therefore gone on to consider whether disclosing the information would breach the fairness requirements of the first principle of the DPA.

Reasonable expectations

20. The council considers that the reasonable expectation of the applicants is that their personal data will not be disclosed to third parties. It has referred the Commissioner to the fact that neither the application form nor the Derbyshire County Council Diversion of Public Footpaths and Bridleways Guidance Note for Applicants (the guidance note) include any information about the disclosure of personal data.
21. The Commissioner has considered both the application form and the guidance note and has found that neither document provides any assurances of confidentiality with regard to the information provided during the footpath diversion order application process. The guidance note refers numerous times to "advertising the Order" and "the publication of the proposals". The Commissioner therefore considers that applicants are given some indication that the information they provide will be made public at some point.
22. The council has argued that the omission of an assurance of confidence does not automatically indicate that personal data will be disclosed, and that the applicants therefore have a reasonable expectation of confidentiality. The Commissioner argues that by the same token an

omission of an explicit statement that information will be disclosed does not automatically indicate that personal data will not be disclosed, particularly when taken in conjunction with the implicit indications that information about the application and the order will be "advertised" and "published".

23. The council has also explained that in the event that a diversion order is objected to, the Planning Inspector makes all the information relating to the order available to the public. In addition to this it has advised that applicant's names and addresses are also made publically available when they are included on the order. The Commissioner therefore considers that this adds to the applicants' reasonable expectation that the information they provide on the application form is not confidential and could be made available to the public.
24. The Commissioner notes that part of application form contains the applicant's justification and that the complainant specifically requested the justification. The Commissioner has therefore had regard to the council's summarised version of the justification contained in the 23 July 2012 minutes of the Regulatory Licensing and Appeals Committee. It states:

"The applicant, who is the owner of the land, seeks the Order to divert the footpaths from the immediate curtilage of their residential property, in the interests of safety, privacy and security and to allow better use of their land...the Public Footpath currently runs close in proximity to the owner's residential property and through their garden. The proposed diversion would divert users along a driveway leading around the residential property and garden".

25. The Commissioner considers that this is similar to the justification provided by the applicants in the application form. The council acknowledges that it has disclosed information about the justification for the diversion order, although it states that it took care not to identify the applicants in doing so.
26. Although the council considers that it has taken care not to identify the applicants, the complainant has explained that it is possible to identify them from publically available information such as the OS map coordinates. He also said that at the time the diversion order was applied for, there were notices up at the start and end of the footpath in question which alerted users to the landowner's application for a diversion order. The Commissioner has investigated and from the information provided on the OS map attached to the minutes, he was able to ascertain the address and the name of one of the applicants. In particular, the Commissioner has had regard to the fact that the OS map

published by the council in this case records the names of the properties in closest proximity.

27. Further to the minutes of 23 July 2012, the Commissioner has also been provided with a copy of the order that was made on 20 September 2012 as a result of the successful application. As noted in paragraph 23, the names and address of the applicants were published in the order. The council has explained that the names of the applicants are only published in the order with reference to the compensatory payment that is made for the diversion of the footpaths in line with the requirements of the Public Path Order Regulations 1993 (the Regulations). The council has sought to distinguish between the individuals as applicants for the diversion order and as those responsible for the compensatory payment.
28. The Commissioner has considered this separation and notes that the declaration section of the application form states that the applicants will bear the cost of any compensation which becomes payable if the order is made. The Commissioner therefore does not consider that the distinction the council has made holds any weight as it appears that the compensation will necessarily be paid by the applicant. Therefore the disclosure of the name and address of the individual(s) making the compensatory payment implies that they are the applicant(s).
29. The Commissioner recognises that the 23 July 2012 minutes and the order were published by the council after the complainant made his request. However, he has considered the documents as they demonstrate the extent to which information is published throughout the process and he considers that this will inform the reasonable expectations that an applicant will hold with regard to the publication of the information they provide in the application form.
30. Given that the council has not given the applicants any assurances that the information in the application form will be confidential, and as the process of making and appealing diversion orders requires the publication of the information, the Commissioner considers that the applicants will not have a reasonable expectation of confidentiality. With regard to the majority of the information in the application form. In fact when considered alongside the general expectation of transparency with similar planning matters, as well as what has been published to date by the council in relation to this order, the Commissioner considers that the applicants are far more likely than not to have an expectation that their personal data could be published in some form at some stage of the process.
31. However, with regard specifically to the email address, telephone number and signature of the applicants, the Commissioner considers that the reasonable expectations are likely to be different given the

nature of this information. In particular, the Commissioner has had regard to the PARSOL Guidance¹, paragraph 3.7 of which states that:

"Extreme care should be taken to avoid any unnecessary disclosure of telephone numbers, email addresses and signatures. The need for the local authority to hold such information is obviously of benefit to all parties. However, there is no requirement to make it publicly available on the Internet. It also has to be remembered that unsolicited telephone calls and emails can be upsetting and intrusive."

32. The Commissioner considers that the email address, telephone number and signature are not material to the footpath diversion order and the substantive matters therein. Therefore, given the acknowledgement that inappropriate and unsolicited use of telephone numbers, email addresses and signatures can be intrusive, the Commissioner finds that it would not be in the reasonable expectations of the applicants for their email address, telephone number and signature to be disclosed.

Consequences of disclosure

33. The Consequences of disclosure to be considered here are the consequences to the data subjects, not the consequences to the council.
34. The council has argued that as it does not consider that the applicants have a reasonable expectation that the information they provided in the application form will be disclosed, the consequences of disclosure should be considered in this context. However, it has then gone on to raise its own concerns regarding the wider consequences of disclosure, particularly with regard to the disclosure of information in this case setting a precedent for the disclosure of other application forms. This does not relate to the consequences to the data subjects in this case, and therefore cannot be considered in this decision notice.
35. The council has also argued that there may be consequences for third parties which may be included in the application form without their knowledge. In this specific case, the council has explained that part of the land over which footpath 21 passes is not registered with Land Registry, and the owner of that land is unknown. It has therefore argued that the release of the requested information may produce information relating to an unconnected third party. The Commissioner is not clear what the consequences of this will be, particularly in the context of

¹ <http://www.planningportal.gov.uk/uploads/pins/parsol.pdf>

regulation 13 as this relates to personal data which means information relating to an identifiable individual. In the case of the unknown third party, it is clear that there is no identifiable personal data to speak of and so the consequences of the disclosure could not be argued to affect them.

36. The Commissioner has considered that a possible consequence of disclosure is that if the application form was released at the time it was requested, i.e. before the diversion order was approved, the applicants may receive contact from parties who wish to discuss or contest the diversion of the footpath. On this point, the Commissioner notes that the names and contact details of objectors are provided to the applicant. The guidance note states that this is *"so that the applicant may, if he wishes, negotiate with the objectors with a view to resolving the objections."* Therefore, whilst it is a likely consequence of disclosure that the applicant may be contacted by parties regarding the footpath diversion, the Commissioner is not persuaded that this is likely to cause damage or distress to the applicants to the extent that it renders the disclosure of the information unfair in its own right.
37. However, the Commissioner notes that disclosure under the EIR is disclosure to the world at large, and not just to interested or related parties. In addition to this, as the Commissioner considers that the disclosure of the email address, telephone number and signature is not in the reasonable expectations of the applicants, he has separately considered the consequences of disclosure of this information to the wider world. He has taken account of the inherent privacy risks in disclosing such information such as the increased likelihood of encouraging unsolicited contact from objectors but also the increased potential of identity theft and unsolicited marketing or other correspondence. Therefore, the Commissioner recognises that the consequences of the disclosure of this information is likely to cause distress to the applicants, as suggested in the PARSOL guidance referred to in paragraph 31.

The balance of the rights and freedoms of the data subjects with the legitimate interests in disclosure

38. In order to ensure that the disclosure of personal data is not in breach of the DPA, the final issue to consider is whether the disclosure of the information is necessary for the legitimate interests. The Commissioner considers that where the information is fairly anodyne and there is no significant interference in the data subject's privacy, even if there is no strong public interest, the disclosure can still be considered as necessary in order to meet the general public interest in transparency.

39. The complainant has explained that he has concerns that the council may not be complying with its obligations under the Highways Act 1980 in relation to diversion orders, and it is for this reason that he made his request. An application for a diversion order must include reasons as to why it is in the interests of the landowner (or lessee or the public) for the path to be diverted. The complainant has indicated that the guidance note states at section 5.2 that it is the sole responsibility of the applicant to make the case for the diversion with reference to the statutory requirements. He is concerned that the council is, in some cases, making the justifications on behalf of the applicants, and therefore that diversion orders are not being made in accordance with the law or with the council's own processes.
40. The council has stated that in making his request, the complainant did not inform it that he had concerns about the council's compliance with the Highways Act 1980. However, it agrees that there is a legitimate public interest in assuring the public that the council is complying with the law and that it is following its own processes. In addition to this, the council also recognises that there is a general public interest in transparency and accountability in the decision making of public authorities. It considers that in publishing the minutes of the Regulatory Licensing and Appeals Committee online, which included a summary of the justification, it is meeting the requirement for transparency and accountability.
41. There is a legitimate interest in the information to assure the public that the council is following its own processes and that diversion orders are completed in accordance with the law. This is particularly the case given the current opaqueness of the process in contrast to the transparency which is accorded to parallel processes such general planning applications. There is therefore also an inherent general public interest in the transparency of council decision making.
42. The council has argued that the public interest is in favour of withholding the information as it considers that disclosure of the application form would discourage individuals from making applications for footpath diversions in the future, and that this in turn would prejudice the council's ability to carry out its functions as a highway authority. It appears that an application for a footpath diversion is submitted in the interests of the applicant in most cases. Therefore it is difficult to see that individuals wishing to divert a public path in their own interests would be dissuaded from doing so in the future if the application form was released in this case. In addition to this, even if individuals were dissuaded from applying for diversion orders, which seems unlikely, it is not clear to the Commissioner how this would prevent the council from carrying out its functions as a highway authority.

43. In concluding its position the council has argued that as it does not consider that it is within the reasonable expectations of the applicants for their personal data to be disclosed, it finds that the legitimate interests in disclosure are not outweighed.
44. It is considered that the information in the application form is fairly anodyne and that there is little interference with the privacy of the data subjects, with the exception of the email address, telephone number and signature. Therefore, the Commissioner considers that disclosure of the requested information is necessary for the purposes of transparency, particularly in view of the concerns raised by the complainant about the diversion order process.
45. However, the Commissioner has again considered separately the email address, telephone number and signature of the applicant and has had regard to the legitimate interest arguments with respect to this information specifically. He considers that the transparency of the process will not be overwhelmingly enhanced by disclosing the email address, telephone number, and signature. Particularly as the name and address of the applicant would be made available. The Commissioner does not consider that there is a specific legitimate interest in disclosing the email address, telephone number and signature.
46. In view of the above, the Commissioner finds that regulation 13 is not engaged to the majority of the information. However, he finds that it is engaged in respect of the email address, telephone number and signature of the applicants.

Right of appeal

47. 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
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. 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

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