

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 19 September 2017

Public Authority: Lancashire County Council
Address: County Hall
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information relating to an application to extinguish a right of way. The council provided some information however it applied section 12(4)(d) to other information. During the course of the investigation the council withdrew its reliance upon Regulation 12(4)(d) and provided further information to the complainant. It also applied Regulation 13 to withhold the identities of individuals from the information. The complainant considers that further information must be held, that the council was incorrect to apply Regulation 13 and that the council failed to comply with the time requirements of Regulation 5(2) when responding to the request.
2. The Commissioner's decision is that on a balance of probabilities the council had provided all of the information which it holds to the complainant. She has however decided that it was not correct to apply Regulation 13 to the names of the applicant but that it was correct to apply it to the identity of council officers from correspondence. Finally she has decided that the council did not comply with the requirements of Regulation 5(2) in that it did not provide the information to the complainant in response to his request within 20 working days.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose copies of the information with the name of the applicant unredacted.
4. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 16 August 2016 the complainant wrote to the council and requested information in the following terms:

"Application for Extinguishment of Part of Width of Public Footpath 3-46-FP5 at BB1 9HY

 - a. *A copy of all application documents along with a copy of all related communications received by and sent out Lancashire County Council.*
 - b. *The name of the LCC officer in charge of the application and the progress of the application and the progress of the application."*
6. The council responded on 14 September 2016. It provided the complainant with a document but applied Regulation 12(4)(d) (unfinished documents) to other information and applied Regulation 13 (personal data) to redact the names and identities of third parties and council officers from correspondence. In response to part b of the request it said that he should write to the Definitive Map Modification Orders Officer and provided a general email address for the Public Rights of Way team which he could write to.
7. During the course of the Commissioner's investigation the council wrote to the complainant in December 2016. It withdrew its reliance upon Regulation 12(4)(d) (although it did not specifically state this to the complainant) and provided further information to him in response to his complaint. It provided further information to him in a CD on 26 January 2017. It maintained its position that Regulation 13 was applicable to withhold the personal data of council officers and third parties. It said however that all of the information it holds had now been provided to him, other than that withheld via the redactions. It confirmed to the

Commissioner that it was no longer seeking to rely upon Regulation 12(4)(d) to withhold any information.

8. Although this was not specifically stated by the council to the complainant, the Commissioner has taken these further responses to be the council's review of its decision.

Scope of the case

9. The complainant contacted the Commissioner on 28 October 2016 to complain about the way his request for information had been handled. His main points of contention regarding the council's response to his request were that the council was withholding information under Regulation 12(4)(d) and Regulation 13 and that not all of the information which he had requested had been disclosed to him.
10. As stated above, during the course of the Commissioner's investigation the council disclosed further information to the complainant in December 2016 and January 2017. It also confirmed to the Commissioner that it was no longer relying upon Regulation 12(4)(d) to withhold the information. The Commissioner has not therefore considered the application of this exception further in this decision notice.
11. Following the disclosure on January the complainant wrote to the Commissioner on the 10 February 2017 and outlined the remaining areas of his complaint as:
 - Some information provided to him had previously been provided to him before. This is not however a matter for the Commissioner to consider.
 - The names of third parties and council officers had been redacted by the council under Regulation 13.
 - There is evidence within the disclosed document that further information should be held, however this was not disclosed by the council, including a letter in which a correspondent stated 'I will get back to you', and the complainant noted minutes of a Wiltshire Parish Council meeting which referred to letters having been sent by residents to the council about the extinguishment application.
12. The complainant also complained about the council's failure to provide him with the information he has requested within 20 working days as required by Regulation 5(2).

13. The complainant has also drawn attention to data protection issues which he personally has had with the council and compared this with its management of other third parties personal data in this situation. However the complainant's suggestion that the council has not handled data relating to the complainant in accordance with the Act does not, and cannot, place an obligation on the council to act in the same way with other parties personal data in order for him to obtain information under the EIR. For the avoidance of doubt, any data protection issues which the complainant has with the council are a matter for a separate complaint to the Commissioner, (or for the courts) and are not an issue which she can consider in terms of a disclosure of information under the FOI Act or the EIR.
14. The Commissioner considers that the complaint is therefore that the council has failed to provide him with all of the information he has requested, and that it has incorrectly applied Regulation 13 to withhold information. She will also consider the complaint that the council was late providing the information to the complainant.

Reasons for decision

Regulation 13

15. Regulation 13 of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
16. In order to rely on the exemption provided by 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."

17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether the disclosure of that data would breach any of the data protection principles under the DPA. The council said that disclosure would breach the first data protection principle.
18. The Commissioner has therefore considered the likelihood that a disclosure of currently redacted sections of the information would disclose personal data under conditions failing to comply with the requirements of the Data Protection Act 1998 (the DPA), and in particular any of the data protection principles.

Is the withheld information personal data?

The names of private individuals and council officers

19. Some of the redacted information relates to the name of the applicant for the extinguishment. The name and identity is clearly personal data for the purposes of the Act.
20. The council has also redacted the name and contact details of council officers. Again this information is personal data relating to these individuals.

Does the disclosure of the information contravene any of the data protection principles?

21. Having decided that the information which has been redacted under section 13 is personal data the Commissioner has considered whether a disclosure of this information would contravene the first data protection principle.
22. 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.”
23. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects.

24. She has also considered the requirements of schedule 2 DPA Schedule 2 condition 6 of The Data Protection Act 1998. This provides the conditions for a disclosure of personal data. The test in condition 6 is, broadly, whether a disclosure of the information is necessary for the purposes of legitimate interests pursued by the applicant or by the public as a whole, balanced against whether the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the individuals.
25. If those requirements are not met, disclosure would be unfair, regardless of other considerations, and would breach the first data protection principle, hence satisfying the requirements of Regulation 13.

Nature of the information and reasonable expectations

Council officer's information

26. The council has redacted information of council officers corresponding with the applicant and others over the issue. It argues that the disclosure of the information would not be expected by the individuals and may lead to unwarranted contact from the complainant. It argues that the officers are representing the County Council, are not acting in an individual personal capacity, and would not expect to have contact with the complainant about his complaints, which it argues are numerous and burdensome. It says that the complainant has the ability to ask questions through its normal processes and routes and therefore the refusal to disclose the information does not affect his ability to ask questions of the council.
27. The Commissioner notes that this response specifically takes into account the complainant when considering whether the information should be disclosed. Requests under both the FOI and the EIR should be considered 'applicant blind' however, and so these arguments are, in this respect, irrelevant and cannot be taken into account insofar as they relate specifically to the complainant himself.
28. Nevertheless the arguments do apply more widely. The council has a set process for contact with the department and that process could be undermined by the disclosure of the individuals officers contact details to the whole world.

The applicant for the extinguishment

29. The council argues that the information is the identity of the applicant for the extinguishment of the right of way. It argues that disclosure would be against their legitimate expectations and therefore unfair for the terms of the first data protection principle.

30. The Commissioner notes however that in the document "*Lancashire County Council, Extinguishment of a public right of way – guidance notes for applicants*" the following paragraph is included on the first page:

"If you make an application, the details of your proposal and contact details will be held on the public rights of way database and on file and a copy may be provided to interested parties. In addition details of the applicant and the owners of the land are included in the report to the Regulatory Committee and other formal documents associated with the proposal that will be publically available".

31. The complainant notes that no definition of 'interested parties' was provided, however in its widest scope this would include objectors and supporters of the extinguishment as well as landowners who may be affected by the change which the applicant has applied for.
32. Further to this, it is clear to the applicant that his details will be available to any person once the application has gone to the Regulatory Committee. The individual cannot therefore have an expectation that their details would remain withheld throughout the decision making process. It should be noted however that the council argues that it considers that the application has a low priority and so it said that it has carried out no further work on the application. The application had not therefore gone before the Regulatory Committee at the time that the request was received.

The consequences of disclosure

33. The council did not provide any information in response to this as regards the applicant however it is clear that, as a member of the public, a disclosure of their information, provided for the purposes of considering the extinguishment order could be considered to be an intrusion into their privacy. The Commissioner considers however that they would expect this to be the case given that at the time that they made the application the guidance form was clear that their information was likely to be made available to interested parties.
34. For council officers, as set out above, a disclosure of the information could result in unwarranted contact from individual members of the public when there is already a set contact route for contacting the department as a whole. Whilst the council argued this specifically in terms of the complainant in this case, the Commissioner has discounted this argument for the reasons outlined above, but has taken into account the wider context of unwanted contact when there are set, published means to contact the department as a whole.

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

35. The council effectively argued that the legitimate interests of the public in accessing the requested information is not sufficient to outweigh the right to privacy of the data subject, particularly given that he is a member of the public who would not have expected that his information would be disclosed in response to an FOI request. It said disclosure would be against his legitimate expectations and thus unfair.
36. The Commissioner has noted above however that the applicant was warned on the application that their information, including their identity and their address may be provided to interested parties and that it would be made public as the application went further into the process of decision making. The Commissioner is not therefore persuaded by the council's argument in this respect.
37. The individual whose information has been redacted provided the information for the purposes of the extinguishment application. A disclosure of the information in response to the request would not be seen by him as an invasion of privacy however as the application form guidance notes informed him that his information could or would be disclosed publically should he submit an application.
38. As regards council officers, the information is their work contact details. The Commissioner notes that the individuals work details will be made public as a matter of course during their daily work. It would not provide details of their private lives other than of their role within the council itself. The Commissioner has noted above that the detriment to them from a disclosure of their details may be unwarranted contact from members of the public regarding applications or complaints and a general loss of privacy.

Conclusion on the analysis of fairness

39. The Commissioner is satisfied that in reading the notification of the potential uses of the information the council was clear with the applicant that he should not consider the information he was providing to be confidential, and that that information may need to be disclosed to the public.
40. The Commissioner therefore considers that the disclosure of the data would have fallen within the expectations raised in the guidance form, and that it was therefore fair for the purposes of the first data protection principle.
41. The Commissioner therefore considers that the council was not correct to apply Regulation 13 to the name of the applicant.

42. As regards the council officers, the Commissioner does not consider that the council's arguments hold merit as regards personal contact from the complainant. However more widely the expectation would be that a disclosure of council officers names would only be disclosed where the individuals are senior or in public facing roles, or where it was necessary during general correspondence relating to actual casework or relevant complaints received by the council.
43. The council argued that there is a difference between providing their details in respect of an individual applicant or through general correspondence, and that of disclosing it publically in response to an FOI request. It also argues that it is not necessary for that information to be disclosed in order for individuals to be able to contact relevant officers within the department. The Commissioner accepts that that is the case. Not all of the officers will be either senior, or have a public facing role generally. For these officers there will be far less of an expectation that their details would be provided in response to an FOI request.
44. The Commissioner notes however that the redacted officer's names belong to a Senior Public Path Orders Officer and a Public Rights of Way Manager. These are not senior officers within the council.
45. The Senior Public Paths Officer role is not a senior position within the council, and whilst they may have regular contact with members of the public within that role the Commissioner considers that they would have no expectation that their details would be disclosed more widely in response to an FOI request.
46. However as regards the Public Rights of Way Manager the Commissioner has found evidence that council officers in this role have previously made public statements to the press when representing the council regarding actions it has taken previously. Clearly therefore this individual would have an expectation that their information would be associated with the council and may be disclosed. She therefore considers that a disclosure of the identity of this individual would be fair for the purposes of the first data protection principle.
47. As regards the requirement for a condition under schedule 2, condition 6 requires balancing the Commissioner to consider whether "*The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*".

48. The remainder of the email which holds the Public Rights of Way Manager's identity has been disclosed. The council has only redacted the names of the correspondents from this email. The email itself simply provides advice to the applicant and informs him of what will happen next. The disclosure of the remainder of this email therefore still leaves the situation transparent and a reader can fully understand the nature of the correspondence without the requirement to know the specific identity of the Public Rights of Way Manager.
49. The complainant did not provide the Commissioner with a substantive reason for wishing the specific identities of the officers concerned, and given that the case has yet to be allocated to an officer for consideration the general contact details provided would allow the complainant to ask for updates on the case more generally. The Commissioner can therefore see no overriding reason which would necessitate the disclosure of the specific identity of the Public Rights of Way Manager in response to this request.
50. The Commissioner does not therefore consider that it is necessary for the complainant (or the public as a whole) to have the details of the Public Rights of Way Manager when balanced against the unwarranted intrusion into the rights and freedoms of the individual.
51. Balancing the above, the Commissioner considers that the council was correct to apply Regulation 13 to the identities of the individuals.

Is further information held?

52. Section 1(1) of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
53. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
54. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

55. The Commissioner made detailed enquiries to the council in order to assess whether further information is held.

Land registry plan

56. The complainant said that there was evidence that a further document, a land registry plan had been received by the council but this had not been disclosed to him. The council said that it had already explained to the complainant that it did not say that it was providing him with a copy of a land registry plan. One of the documents which it disclosed to him was received by the council and incorrectly refers to the writer providing the council with a land registry plan. It says that a plan was not received and that had it received it would have had no reason not to disclose this given that they are, in any event, public documents.
57. The Commissioner has considered this further with her analysis of the searches which the council had described to locate further information.

The name of 'paths officer' responsible for the relevant case

58. The council said that the matter was not being dealt with by the council at the time that the request was received. Because of this, no specific paths officer had been assigned to the specific case. It said, therefore, that it could not provide a specific name to the complainant because no specific officer was currently responsible for dealing with the application. The complainants request was for a specific paths officer dealing with the issue of the public footpath 3-46-FP5 at [postcode redacted] and at the time of the request no officer had been assigned.
59. The council said however that since the request it has published a register of application which has details of a contact phone number and email address which can be used regarding relevant issues over paths.
60. The Commissioner is therefore satisfied that no information is held by the council falling within the scope of this part of his request.

Other information

61. The complainant had provided further examples of information which he considered should be held by the council given evidence within the documents which had already been provided to him. For instance he highlighted that the minutes of Wilpshire Parish Council for 29 Jun 2016 (available at <http://www.wilpshireparishcouncil.org.uk/wp-content/uploads/2012/03/WPCminutes-290616-V-2.docx> state):

"Min 4389 PROW extinguishment of footpath 5 Wilpshire – Cllr Gaffney reported that the residents of The Glen had applied for an extinguishment order which had been sent to LCC [Lancashire County Council]. People had already written to LCC confirming the path had been that way since 1970. The claimants were asking for the PC to confirm that it had no objection to this."

62. The Commissioner recognises therefore that insofar as the parish council was concerned letters supporting the application had been written to the council by third parties. The council says that this minute is incorrect and that in fact it was owners not residents who had written to the county council. It said that it cannot speculate on whether one third party did what another third party said they were going to do, and could only provide a response based upon the information it actually located; it had provided the information it had located to the complainant, subject to the redactions it had made.
63. The Commissioner therefore asked the council what searches it had carried out to determine whether further information was held.
64. The council said that all information it holds on public rights of way is held on a server. All Public Rights of Way files are arranged on the server by path reference and the extinguishment application relates to only one path; this includes emails which are also stored on the path files and deleted from the mailbox. Therefore a search of the corresponding folder and its subsidiary folders can reasonably be expected to locate all of the information relevant to that particular application. It has not therefore carried out searches of laptops or personal computers as information would not be held on these.
65. The council said that it did not need to use search terms to locate relevant information. Essentially all of the relevant information would be in the relevant folder and its subsidiaries; any information within the appropriate folder would potentially be relevant to the request. Information would only be held in electronic form, in this manner.
66. The Commissioner asked whether any information was previously held and may have been deleted. The council confirmed that courtesy emails with no substantive contact may have been deleted but that no record would be made of this. It is not aware of any other records being deleted but confirmed that in effect information of no importance to the case may not be recorded.
67. The council considered that it did not think that it has any statutory duty to retain information of the sort requested but confirmed that it does however have a statutory power to process applications of this sort.

68. It therefore confirmed to the Commissioner that it had provided the complainant with all of the information it holds falling within the scope of the request (other than the information redacted under Regulation 13).

Conclusions

69. The Commissioner has considered the council's arguments above. The first point would appear to be that there appears to be little reason why the council would not disclose the information (albeit with names and identities redacted) were it to have actually located further relevant information. The extinguishment request is still active, however the council considers it of low priority given that the right of way has not been fully obstructed and is still passable both on foot and by vehicles. Effectively the extinguishment seeks to narrow the current recognised route by a small margin due to a fence encroaching on to it. The applicant for the extinguishment order argues that the fence has been in situ for over 40 years without complaint.
70. The second point is that the council has described the searches which it has carried out, and based upon the electronic filing system it has described it appears to the Commissioner that if further information were held then it would be held within the file location described by the council, particularly as at the time of the request no further action had been taken on the application given its low priority.
71. It is not the Commissioner's role to determine beyond a shadow of a doubt whether information is held. Based upon the arguments of the council and those of the complainant she must make a decision whether information is held on a balance of probabilities. Essentially, if an authority can demonstrate appropriate searches have been carried out then the Commissioner will accept that on a balance of probabilities no further information is held by it.
72. Based upon the council's description of the searches it has carried out for the information and had described both how, and where the information would generally be held, and confirmed that all of the information within that file was considered relevant to the request, the Commissioner's decision is that on a balance of probabilities no further information is held by the council.

Regulation 5(2)

73. Regulation 5(2) provides that:

"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."

74. The complainant made his request for information to the council on 28 August 2016
75. The council initially withheld information under Regulation 12(4)(d) and Regulation 13. It subsequently withdrew its reliance on Regulation 12(4)(d) and provided further information to the complainant on 22 December 2016. It provided some information by attachment and later sent a CD containing further information which was too large to send by email attachment. This was provided to the complainant by letter dated 26 January 2017.
76. It subsequently confirmed to the Commissioner that the council was no longer relying upon Regulation 12(4)(d) for any of the relevant information and had only relied on Regulation 13 to withhold the remaining redacted sections of information.
77. This disclosure falls outside of the time period of 20 days provided by Regulation 5(2).
78. The Commissioner's decision is therefore that the council did not comply with Regulation 5(2) in respect of this request.

Regulation 11

79. Regulation 11 of the EIR provides that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge –*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.*

(5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –*

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.”

80. The complainant requested a review of the council's initial decision on 15 September 2016. The council did not respond to this until its letter to the complainant in December 2016. The council therefore failed to comply with the requirements of Regulation 11(4).
81. Further to this, in its letter of December 2016 the council did not include the statements required of it by Regulation 11(5) when providing its review to the complainant and amending its position by no longer relying upon Regulation 12(4)(d) to withhold information.
82. The Commissioner therefore considers that the council also failed to comply with the requirements of Regulation 11(5).

Right of appeal

83. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

84. 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.

85. 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
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