

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

**Date:** 24 October 2017

**Public Authority:** Winchester City Council  
**Address:** City Offices  
Colebrook Street  
Winchester  
SO23 9LJ

**Decision (including any steps ordered)**

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1. The complainant requested information from Winchester City Council ("the council") relating to a planning application. The council said that it could neither confirm nor deny whether the information was held in reliance on the exemption under section 40(5) of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner considered that the request should have been considered under the Environmental Information Regulations 2004 ("the EIR") and the Data Protection Act 1998 ("the DPA"). The subject access aspect of the request has been considered separately. The Commissioner found that the exception under regulation 13(5) of the EIR applied and that the council was correct to state that it could neither confirm nor deny whether it held the information. The Commissioner found breaches of regulation 14(2) and 14(3)(a) of the EIR. No steps are required.

## Request and response

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2. On 9 May 2016, the complainant requested information from the council in the following terms:

*"Could you please send me copies of both complaints raised against Councillor [name] w.r.t the planning application for [address]? I understand that we and our property are referenced in them and I would like a official copies [sic]"*.

3. The council replied on 9 June 2016. The council said that it could not confirm nor deny whether the information was held as this in itself would breach the Data Protection Principles. The council said that as the request had been considered at a senior level, the complainant should complain directly to the Commissioner.
4. The complainant expressed dissatisfaction with the council's response on 27 July 2016. She said that she had already seen the complaint and she alleged that it makes slanderous references to her and her husband, and refers to information that she had provided.

## Scope of the case

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5. The complainant's original request asked for copies of "both complaints raised". She subsequently clarified that she was seeking a copy of only one complaint, which she believes was made by her neighbours.
6. The complainant's request concerned information that if held would represent her own personal data. To that extent, the request represents a subject access request that needs to be considered under the provisions of the DPA. The Commissioner has considered that aspect separately.
7. The complainant also complained to the Commissioner about a second request made on 5 June 2016. The Commissioner decided that it was appropriate to deal with this request as a subject access request under the DPA in its entirety. Again, a separate assessment has been undertaken regarding this as well as concerns raised by the complainant that the council may have inappropriately disclosed her personal data to third parties.
8. The council relied on section 40(5) of the FOIA, which provides that a public authority need not confirm or deny whether requested information is held if doing so would in itself breach the Data Protection Principles in the DPA. The Commissioner decided that the request should have been handled under the EIR and that it was therefore

appropriate to consider the application of the related exception under the EIR – regulation 13(5).

## Reasons for decision

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### Environmental information

9. The council considered the request under the terms of the FOIA. However, the Commissioner considers that it would be appropriate to consider the request under the terms of the EIR instead. Under regulation 2(1)(c), any information relating to plans affecting or likely to affect the environment will be environmental information. This request relates to a planning matter affecting the environment.

### Regulation 13(5) – Personal data

10. Regulation 5(1) of the EIR provides a general duty to make environmental information available. When information is not held, a public authority is obliged to issue a refusal to state that that is the case. If it is held, the general duty is to either provide it or rely on a relevant exception.
11. Regulation 13(1) is an exception under the EIR relating to personal data. Personal data is exempt if its disclosure would breach any of the Data Protection Principles set out in Schedule 1 of the DPA. The most common of these provides that personal data should be processed fairly and lawfully.
12. There are some circumstances where it would be inappropriate to confirm or deny whether requested information is held. One of these circumstances is where the giving of that confirmation or denial would in itself be unfair or unlawful and would therefore breach the Data Protection Principles. That scenario is covered by the exception under regulation 13(5).
13. The council said that it considered that it could neither confirm nor deny whether the information requested by the complainant exists in this case because to do so would breach the first Data Protection Principle that provides that personal data should be handled fairly and lawfully.

### Is the withheld information personal data?

14. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The Commissioner accepts that the requested information if held would represent personal data because it

would relate to a living and identifiable individual. Such a complaint would represent the personal data of the councillor concerned and it would also represent the personal data of the individual who made the complaint.

### **Would disclosure breach the Data Protection Principles?**

15. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

#### **Reasonable expectations**

16. When considering whether a disclosure of personal information would be fair, it is important to take account of whether disclosure would be within the reasonable expectations of the individual or individuals concerned. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
17. The council said that its procedure informs complainants that their complaint will be treated in confidence and not disclosed to the public. The council therefore argued that any person submitting a complaint to the council would similarly expect the fact of their complaint to be kept confidential. The Commissioner considers that the subject of any complaint would also have reasonable expectations of confidence. The details of complaints and if they have been made at all is not information that is generally widely disclosed.

#### **Consequences of disclosure**

18. The council argued that confirming or denying whether a complaint has been made would breach the Data Protection Principles and affect the level of trust that the public have in the council to protect personal data. This could deter people from making complaints in the future. The Commissioner also considers that the subject of a complaint as well as the individual who made a complaint could find it distressing if the council was to confirm or deny whether a complaint exists. Disclosure could cause reputational damage.

## **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

19. There is always some legitimate interest in the disclosure of information that is held by public authorities, in this case that disclosure would be a confirmation or denial that a complaint had been made. Disclosure helps to encourage the general aims of achieving transparency and accountability. It also assists people in understanding what public authorities are doing and to be more involved in that process. However, public authorities have to be mindful of their obligation to protect the right to privacy that individuals have where that is reasonable as well.
20. The council has explained that the background to this matter is that the complainant and her neighbour have been engaged in a long running dispute relating to neighbourhood planning issues. A planning application to retain a structure was submitted to the council. Officers recommended that the application be approved but the Planning Committee refused the application and authorised enforcement action. The Planning Inspectorate subsequently granted permission subject to conditions. However, the complainant has remained concerned about the process followed by the council.
21. The council acknowledges the legitimate public interest in understanding whether there have been any complaints about councillors. However it said that its processes already ensure that complaints are handled appropriately. It explained that complaints are considered and assessed, and any spurious complaints will not be published. This means that councillors can be confident that their public reputation cannot be tarnished by vexatious or baseless complaints, whilst at the same time ensuring that legitimate complaints are considered and if appropriate investigated.
22. The complainant told the Commissioner that she already knows that a complaint exists although she would not provide any details. She explained that she would like to have an "official" copy of that complaint and has alleged that the complaint was prompted by the inappropriate disclosure of some information that she had sent to the council. The complainant said that the information relates to a matter that she believes has made a material difference to the value of her home.
23. It is not relevant to the Commissioner's considerations that the complainant already believes that a complaint exists. A confirmation or denial would be to the general public under the EIR. As mentioned in the scoping section of this decision notice, the Commissioner has also conducted a separate assessment relating to the issue of inappropriate disclosure. She does not consider that there is sufficient evidence to

support this claim and even if there was a concern in this regard, public disclosure would not be a proportionate means of addressing it. The same applies to the concern that the complainant has about the impact on the value of her home. The council has complaints mechanisms to consider such issues. It is not apparent to the Commissioner why it would be proportionate to respond to this request in order for that complaint to be considered.

24. Ultimately, the Commissioner agrees with the council in this matter because it has made a convincing argument that responding to this request would reveal information that would be outside reasonable expectations. The council is correct to highlight the level of confidence that usually attaches to complaints made to public authorities and this is particularly the case in relation to complaints about individuals. The Commissioner agrees that a confirmation or denial could deter complaints in the future and it be distressing to any individuals concerned. The Commissioner's view is that a confirmation or denial would not be proportionate to the circumstances of this case. He therefore finds that the exception under regulation 13(5) applies.

### **Procedural issues**

25. The Commissioner considers that the council breached regulation 14(2) and 14(3)(a) of the EIR for not relying on regulation 13(5) within 20 working days or by the date of its review.

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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** .....

**Elizabeth Archer**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**