

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 June 2019

Public Authority: Sandwell Metropolitan Borough Council

Address: Sandwell Council House
Freeth Street
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information about the public conveniences at Adkins Lane, Smethwick and negotiations regarding their sale. Sandwell Metropolitan Borough Council ("the council") responded by providing information but withholding some of the requested information under section 40(2) of the FOIA. The council also stated that it did not hold some of the requested information. During the Commissioner's investigation the council agreed that the request should have been considered under the Environmental Information Regulations 2004 and that it wished to rely on regulation 13 for the information it had withheld.
2. The Commissioner's decision is that the council is entitled to rely on regulation 13 to refuse to provide the information it withheld. However, the council breached regulation 5(2) by disclosing information beyond the statutory timeframe. She does not require any further action to be taken.

Request and response

3. On 20 October 2017, the complainant wrote to the council and requested information based on his understanding as follows:

"In April, 2012 [named councillor] and Chief Executive Jan Britton demanded to know of [named individual] why the public conveniences at Adkins Lane, Smethwick had been included in a deal with Central Property Line/[named individual] who were also negotiating to purchase other redundant public conveniences.

1 Please disclose all correspondence and records of communications passing between those three persons on this subject.

In November, 2012 [named individual] was reported in local media saying that he was negotiating a 15 year lease for the lavatories to turn them into a food outlet although this transaction did not proceed.

2 Please disclose all documents relating to the advertisement of this site for sale/lease;

3 Please disclose all documentation held by SMBC relating to the lease negotiations.

In 2013 an unknown applicant made a planning application to SMBC for change of use to A5 use (hot food takeaway). For reasons unknown the Council's website have taken this application down.

4 Please restore planning application DC/13/55524 to the website and tell me you have done so or disclose to me the entire planning file. (As ever and to save time I am very happy to attend your offices in Oldbury to view the file if more convenient).

In 2015 J C Decaux put in a planning application to demolish the lavatories and replace them with automatic ones. In the remarkably sparse planning application DC/15/58534 J C Decaux signed a certificate of ownership of the site.

5 Please disclose all adverts for sale of the site and state when the sale/long lease was made and at what consideration. Please disclose all documentation relating to the alleged transfer of ownership.

In planning application DC/15/58534 J C Decaux say they had pre-application advice from [named individual] of SMBC.

6 Please disclose all documentation relating to this pre-application advice."

4. As the requester received no response he asked for a review on 18 January 2018.

5. After the Commissioner wrote to the council on 9 May 2018 it responded on 27 June 2018 (many months outside the statutory timeframe) as follows:

Part one – the council provided emails that it attached to its response.

Part two – the information was not held.

Part three – the council attached information but withheld some information under third party personal data.

Part four – the council explained that it was an invalid application that was returned to the applicant and attached a copy.

Part five – the information was not held.

Part six – the council explained that verbal advice had been given and incorporated into the Designated Access Statement which formed part of the submission.

6. On 12 July 2018 the complainant disputed the council's withholding of employee names concerned with the lease negotiations. The complainant also stated that there had been no council response to part of his request concerning the lease and its terms.
7. An internal review was provided on 14 August 2018. The council maintained its position and upheld the application of third party personal data. The review also provided the complainant with further information regarding the unsuccessful lease negotiations.
8. Although the council had originally applied the FOIA to this information, it later agreed that it should have been considered under the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to concern part three of the request alone where all documentation held by the council relating to the lease negotiations had been requested but the council withheld third party personal data.

Reasons for decision

Regulation 2(1) - Is the requested information environmental?

11. Information is "environmental" if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
12. The Commissioner has published guidance on regulation 2(1). The Commissioner's guidance states that the test that should be applied by public authorities is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a) – (f), and not whether the information directly mentions the environment or any environmental matter.
13. Regulation 2(1) of the EIR defines environmental information as information 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...emissions...and other releases into the environment, likely to affect the elements 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..."*
14. The Commissioner has considered the withheld information in this case which consists of the names and contact details of certain council employees involved with the lease correspondence. The council also withheld the name and contact details of another interested third party and certain contact details of the named individual whose planning application was disclosed.
15. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect or be likely to affect the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b).

Regulation 13 EIR – the personal data of a third party

16. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

17. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

20. Section 3(2) of the DPA 2018 defines personal data as:

"any information relating to an identified or identifiable living individual".

21. Consequently the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. The council has confirmed that all the withheld information is personal data. It consists of certain contact details of the named applicant and the name and contact details of another interested party and the individual officer names and contact details of the staff members involved with the processing of the application who the council states are not senior officers. The council says that senior officer details are provided in the disclosure made to the complainant. It emphasises that the relevant documents have been provided and that they have

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

just been redacted to remove some of the employee details such as names from which they would be clearly identifiable.

25. In the circumstances of the case, having considered the withheld information, the Commissioner is satisfied that it falls within the definition of 'personal data' in section 3(2) of the DPA.
26. She is satisfied that this information both relates to and identifies certain individuals. The fact that information constitutes the personal data of an identifiable living individual does not, however, automatically exclude it from disclosure under the EIR.
27. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

29. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".²

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA)

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) of fundamental rights and freedoms of the data subject.
33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

34. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary.

provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted."

Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

37. In the circumstances of this case the council's view is that the application made was withdrawn and not progressed further. It argues that there is no legitimate need to release personal employee details. The council's view is that the withheld names and contact details are of junior staff and should not be released because members of staff are likely to be subject to personal attacks on social media. The council's view is that transparency is served by the record itself which was provided to the complainant.

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

38. The complainant argues that disclosure is necessary to meet the legitimate interest in disclosure. His stated view is that there was fraud involved in the disposal of the toilet blocks at the material time and therefore it is legitimate for the names of any council employees involved in the lease negotiations to be disclosed. As the complainant's legitimate interest focuses on the withheld employee details, the Commissioner does not propose to consider the limited amount of personal data relating to the applicants that was not provided.
39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, the impact of disclosure has to be considered. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as

individuals, and the purpose for which they provided their personal data.

42. The council has stated that the reasonable expectation of the junior members of staff concerned is that their names would not be shared with the public. No consent has been obtained from any individual concerned. In the circumstances, unredacted disclosure would not be fair or reasonable nor would it serve the legitimate interests. This was ultimately an application that had been withdrawn.
43. However, the Commissioner notes certain factors that make non-disclosure less compelling. Firstly, the requested information relates to the professional life of employees and not their personal life. In certain circumstances the information should be disclosed. She also disagrees with the council that the employees are junior. In the Commissioner's view, this is not the case regarding the main correspondent from the council. The employee in question's name and contact details are in the public domain and on the council's website, though not in connection with this matter.
44. The Commissioner does recognise however that disclosure would be likely to result in unwarranted damage or distress to the third parties concerned. The council argues that there could be a clear impact on the third parties' home and family life as a result of potential social media attacks. The council's view is that the interests of the complainant balanced against the disclosure of the third party personal data would involve a clear breach that could impact on the third parties concerned in unknown ways.
45. The Commissioner has concluded that the complainant's focus in this complaint is the withholding of employee details involved in the lease correspondence. Having given some thought to the balancing test she has given some weight to the fact that a relatively senior member of staff's expectations might well be that their name be provided in response to an information request. However, as it would serve no legitimate purpose to do so other than allowing the third party concerned to be identified and potentially named on social media, the Commissioner accepts that this overrides the legitimate interest in disclosure in circumstances where the council has provided the substantive record of what occurred.
46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
48. The Commissioner has therefore decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(2)

49. The Commissioner also finds that the council breached regulation 5(2) by providing information to the complainant seven months beyond the statutory timeframe set out in regulation 5(1). A public authority is required by regulation 5(2) of the EIR to make environmental information it holds available on request as soon as possible and no later than 20 working days after the date of receipt. Clearly this was an unacceptable delay.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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

Pamela Clements
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