

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

Decision notice

Date: 30 September 2020

Public Authority: Neath Port Talbot Council

Address: foi@npt.gov.uk

Decision (including any steps ordered)

1. The complainant requested the name of the individual who made a complaint to Neath Port Talbot Council ('the Council') about his dog barking. The Council withheld the information under regulation 13 of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 13 to the information requested. She does not require any steps to be taken.

Request and response

2. On 23 January 2020, the complainant wrote to Council in response to a letter he had received regarding a complaint made against him to the Council about his dog barking and requested information in the following terms:

"Please let me have the name of the complainant and I will request my lawyers take appropriate action".
3. The Council responded on 25 January 2020 and stated that *"Under the General Data Protection Regulation 2016/679, we cannot legally divulge the personal information of our complainants".*
4. On 28 January 2020 the complainant requested an internal review into the Council's decision not to disclose the information requested.

5. The Council provided the outcome of its internal review on 15 April 2020. It confirmed that it had considered the request under the EIR as opposed to the FOIA. The Council stated that the information requested was exempt under regulation 13 of the EIR.

Scope of the case

6. The complainant contacted the Commissioner on 15 April 2020 to complain about the way his request for information had been handled.
7. The scope of the Commissioner investigation into this complaint is to determine whether the Council was correct to withhold the information requested under regulation 13 of the EIR.

Reasons for decision

Regulation 13 personal data

8. 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) of the Data Protection Act 2018 is satisfied.
9. In this case the relevant condition is contained in regulation 13(2A)(a)¹ of the Data Protection Act 2018. 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').
10. 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.
11. 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.

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

Is the information personal data?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

14. 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.

15. 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.

16. In the circumstances of this case the Commissioner is satisfied that the information (the name of the individual who complained to the Council about the complainant's dog barking) clearly relates to a third party. She is satisfied that this information both relates to and identifies the third party concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

17. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. 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".

20. 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.

21. 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.

Lawful processing: Article 6(1)(f) of the GDPR

22. 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.

23. 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) or fundamental rights and freedoms of the data subject.
24. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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) 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".

Legitimate interests

25. 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.
26. 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.
27. In this case, the Commissioner accepts that the complainant has an interest in accessing the information requested as the complaint to the Council was about his dog(s) barking. which was made to the Council referred to his dog barking. The complainant considers that the complaint about his dog barking to be from "*a malicious serial complainant*" and believes that this is the second time the individual concerned has complained to the Council about his actions. He states that he needs the information in order for his solicitors to pursue legal action against the individual concerned.
28. Based on the evidence available, the Council does not consider the complainant is being targeted by "*a serial malicious complainant*". In its internal review response the Council suggested that, if the complainant considered he was the subject of malicious, unfounded complaints to the Council, he should refer the matter to the Police. The Council confirmed that, if required, it would provide the information requested to the Police, in confidence, in order to assist them with their enquiries.
29. In this case, the complainant is seeking information which relates to a specific concern raised by an individual to the Council concerning a dog barking at the complainant's property. Whilst the Commissioner is unable to identify any wider legitimate interest in the public accessing the information, she is satisfied that there is a legitimate interest to the complainant in receiving this information.

Is disclosure necessary?

30. '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. Disclosure under

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

31. The Commissioner accepts that the complainant would have no other means of getting the requested information and that therefore disclosure by the Council would be necessary to satisfy the complainant's legitimate interests in this case.

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

32. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. 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.
33. 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.
34. 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.
35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
36. The Council considers that any member of the public that raises concerns about a matter of public annoyance, such as a noise nuisance complaint, do so in the expectation that their identity would not be released in response to an FOIA/EIR request, essentially into the public domain.
37. The Council advised that its Environmental Health Department does not generally accept anonymous complaints and requires individuals to provide their contact details to help with the investigation process and to identify if the complainant is genuine and not a repeat and/or malicious

complaint. When Environmental Health Officers speak to individuals making complaints, they advise that their identity will not be disclosed as there is a genuine fear of retaliatory action and reprisals with the type of complaints they deal with.

38. The Council confirmed that, in cases of noise nuisance complaints, if it proposes to take legal enforcement action it will request the permission of the person making their complaint for his/her permission to progress the matter further as such action would ordinarily require them to be identified as a witness in court proceedings. The Council advised that this is a rare scenario and such matters are usually resolved without the need for legal action and identification of complainants is therefore not usual.
39. The Council advised the Commissioner that an Environmental Health officer spoke to the individual who made the complaint in this case and advised that their contact details would be required in order to investigate the matter. An assurance was given to the individual that their personal data would not be disclosed outside the Council to any third party. This assurance is also reflected in the declaration contained at the foot of the Council's complaint form, which was completed by the individual in this case, and copied below:

"Information given to Neath Port Talbot County Borough Council will only be used for the lawful purpose of joined-up services and will not be passed outside the Council without legal authority"

40. In light of the above, the Council considers that the identity of the individual who made the complaint is subject to the common law duty of confidentiality. The Council encourages members of the public to raise legitimate matters of concern and/or annoyance in their local area, and that in doing so they can have a reasonable expectation that it will not be freely publicising their identities to those complained about and/or other third parties acting on their behalf and/or individuals who are simply inquisitive.
41. The Council also confirmed that it had contacted the individual to ask whether they consented to their personal data being disclosed in response to the request. The individual confirmed that they did not want their details disclosed and they had no expectation at the time the complaint was made that their identity would be disclosed outside of the Council. Whilst the individual did not know the owner of the dog in question, they were clearly uneasy about the prospect of disclosure of their identity and concerned for their family's safety should their identity be disclosed. The Council pointed out that this feedback is not a comment on the complainant and/or his character (as the individual did not know the owner of the dog when the matter was reported), but

rather simply a concern expressed by the individual about the potential consequences of disclosure of their identity.

42. The Commissioner accepts, that any person contacting the Council with concerns about a noise nuisance in their area does so in the expectation that their identities will be kept confidential. Therefore, the individual who submitted the concern in this case would have a reasonable expectation that his/her personal information would not be disclosed. The Commissioner has seen no evidence that the individual in question was a 'malicious serial complainant' and/or that they made the complaint in order to harass or cause trouble for the complainant. The Commissioner notes that the Council has advised the complainant of the correct course of action in terms of contacting the Police if he feels that he is the subject of malicious, unfounded complaints.
43. The Commissioner also accepts that disclosure of the identity of the individual is highly likely to cause damage or distress to them, which would be unwarranted. Whilst the Commissioner accepts that the complainant has a legitimate interest in disclosure of the information in question, she has been unable to identify any wider legitimate interest that would outweigh fundamental rights and freedoms of the individual in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
44. 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.

Right of appeal

45. 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

46. 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.
47. 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

Joanne Edwards
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