

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

Decision notice

Date: 4 May 2020

Public Authority: Carmarthenshire County Council
Address: foia@carmarthenshire.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about a planning enforcement case. Carmarthenshire County Council ('the Council') applied the exception at regulation 13(5) to neither confirm nor deny whether any information is held, and maintained its position in its review of the decision. The Commissioner's decision is that the Council was correct to apply section 13(5) of the EIR. The Commissioner does not require any steps to be taken.

Request and response

2. On 7 June 2019 following an email exchange between the complainant and the Council about a specific planning enforcement case, he requested information in the following terms:

"1. I want to know the circumstance of his [Planning Enforcement & Monitoring Officer] investigation, what was done? when it was done and by whom ? Any and all conclusions?"

3. On 11 June 2019, the complainant sent a further email to the Council requesting additional information in the following terms:

"2. I want to see who he [Planning Enforcement & Monitoring Officer] has been engaging with and anything said, written or done with these third parties".

"3...I want to know how he [Planning Enforcement & Monitoring Officer] made these strange decisions, who he consulted, when etc. ? Full details of the decision making process".

4. The Council responded on 17 July 2019 and advised that it had initially dealt with the requests informally as normal course of business. However, as the complainant was dissatisfied with this approach, the requests had been referred to the Information Governance department. The Council confirmed that, as the request related to planning matters, it had considered it under the provisions of the EIR as opposed to the FOIA. The Council stated that, if held, the information requested would relate to a planning enforcement case involving an identifiable individual. As such, the Council confirmed that it was relying on regulation 13(5) to neither confirm nor deny whether the requested information was held.
5. On 17 July 2019 the complainant wrote back to the Council expressing dissatisfaction with its refusal to provide the information requested.
6. The Council provided the outcome of its internal review on 6 August 2019 and upheld its position that regulation 13(5) applied to the requested information.

Scope of the case

7. The complainant first contacted the Commissioner on 17 July 2019 to express his dissatisfaction with the Council's handling of the request. He contacted the Commissioner again following receipt of the Council's internal review response to reiterate his dissatisfaction.
8. The scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied regulation 13(5) to the request.

Reasons for decision

Regulation 13 personal data

9. Regulation 13(5)¹ of the EIR provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
10. Therefore, for the Council to be entitled to rely on Regulation 13(5) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Is the information personal data?

11. Section 3(2) of the Data Protection Act 2018 ('DPA') defines personal data as:

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

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. The Council advised that all of the information requested in this case, if held, would relate to involvement of its Planning Enforcement Team with

¹ As amended by Schedule 19 Paragraph 307(6) DPA.

a private individual (the complainant's neighbour) and that individual's actions in relation to his property and home. The information, if held, would therefore not be held in relation to a 'normal', public facing planning matter, such as a planning application. The specific matters concern:

- Whether the complainant's neighbour was allowed to bring a work lorry home and issues around the time of day he leaves for work, and
 - The installation of some Velux windows at this neighbour's property.
16. Whilst the complainant did not name the individual concerned in his request, it is clear from the evidence that both the Council and the complainant are fully aware of the individual referred to. As the information requested relates to a specific individual, the Commissioner is satisfied that the information would be personal data relating to that individual. This type of information would both relate to, and identify the individual concerned, and would provide a degree of biographical information about the individual and their property.
17. Due to the nature and wording of the request, the Commissioner is satisfied that if the Council confirmed whether or not it holds the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
18. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the council from refusing to confirm whether or not it holds relevant information.
19. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".
21. 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

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

22. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
23. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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.

24. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA 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 confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) 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”.

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

31. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

25. In considering any legitimate interests in confirming whether or not the requested information is held in response to an EIR request, the Commissioner recognises that such interests 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. The Commissioner accepts that the complainant has a legitimate interest in understanding what action, if any, the Council has taken in relation to concerns he has raised about his neighbour's actions in terms of vehicle parking and the installation of velux windows as he may have been adversely affected by these actions.
28. The Commissioner also accepts that there is a legitimate interest in increasing the public's understanding of how the Council undertakes its planning enforcement activities. A confirmation or denial that information is held by the Council falling within the scope of the request in this case could highlight whether any planning enforcement action has been taken by the Council.

(ii) Is confirming whether or not the requested information is held necessary?

29. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
30. The Council confirmed that individuals who are subject to planning enforcement action investigations are not advised through contact or

correspondence that information regarding the matter would be made available to the public at large. The Council also advised that its privacy notice in relation to planning enforcement confirms this position. An extract from the privacy notice is below:

"5. Who has access to your information?"

We share the minimum amount of personal data required and only where it is necessary to do so. We share information with the following:

- *The Council's Council Tax Service when we need to find out the name of an occupier of a property*
- *The Council's Legal services, for advice on cases*
- *Other Council Services/Departments where relevant*
- *Planning Inspectorate"*

31. The Council confirmed that there is no statutory obligation upon it to disclose or publish information regarding individual planning enforcement cases, other than in respect of notices served. Certain types of planning enforcement notices are recorded as local land charges on the Public Land Charges register, but this does not apply in this particular case. There is a general understanding that some information relating to planning enforcement cases may be inspected as part of the register of notices, where these are served and extant. However, again this does not apply in respect of this particular case.
32. Whilst the public may have a legitimate interest in knowing whether the Council has properly undertaken any planning enforcement activity, it has far less of a necessity for the Council to confirm or deny whether any information is held relating to the request in this case in order to meet that legitimate interest. The complainant's request relates to a specific property and a specific individual.
33. In this sense, the complainants request is too narrow to allow the public to scrutinise the Council's planning enforcement activities. By specifying an individual and property the Council has to consider the specific effects of confirming or denying whether information is held about a specific individual. The Commissioner is satisfied that in order to respond to the specific request which the complainant made it would be necessary for the Council to confirm or deny to the public at large whether information is held falling within the scope of the request. Confirming or denying whether information is held is the only way in which public could ascertain whether the specific property/individual

named by the complainant has been the subject of any planning enforcement action.

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

34. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
35. The Council considers that confirming whether or not it holds the information requested would substantiate, to the public at large, that the individual concerned was subject to a planning enforcement investigation. In the Council's view this would result in an unwarranted intrusion of privacy and result in some distress arising from this.
36. In reaching a view in this case the Commissioner is mindful that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
37. However, the EIR is motive and applicant 'blind', and the test is whether the information or as in this case, confirmation or denial as to whether the requested information is held can be disclosed to the public at large, not just to the requester. Therefore, an authority can only confirm or deny it holds information under the EIR if it could do so to any member of the public who requested it.
38. The Commissioner accepts that any reasonable individual would hold an expectation that the Council would not confirm or deny that information relating to any enforcement action about their private property would be put into the public domain.
39. The Commissioner also accepts that an individual would not like it to be public knowledge that any enforcement action has been taken against his or her property and this would represent an intrusion into their private life and could cause distress to the individual.

40. The Commissioner accepts that there is a legitimate public interest in the planning enforcement process to determine whether planning laws are being applied properly. However, the Commissioner considers that the process has been introduced with the aim of entrusting the Council to apply use its planning enforcement powers appropriately. This, in turn, creates a greater interest in protecting the integrity of the planning enforcement process.
41. The Commissioner accepts that the complainant has a private interest in the information in question as he lives near to the individual referred to in the request. However, the Commissioner can only consider whether information should be released into the public domain without restriction rather than whether the complainant alone should have access to it. The Commissioner notes that the Council has written to the complainant outside of information rights legislation in an attempt to address some of the concerns he has raised.
42. In light of the reasonable expectations of the individual and the consequences of disclosure, the Commissioner is satisfied that confirming or denying if the requested information is held could potentially cause distress to the individual concerned. The Commissioner has determined that there is insufficient legitimate interest to outweigh the individual's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful. The Commissioner therefore considers that the Council was correct to apply Regulation 13(5) to refuse to confirm or deny whether information falling within the scope of the request.

Right of appeal

43. 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

44. 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.
45. 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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