

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

Date: 2 June 2021

Public Authority: Cornwall Council
Address: Council Offices
Dolcoath Ave
Camborne
TR14 8SX

Decision (including any steps ordered)

1. The complainant requested information relating to a planning enforcement case. Cornwall Council (“the Council”) variously relied upon Regulation 12(5)(b) (administration of justice), Regulation 12(5)(f) (voluntary supply) and Regulation 13 of the EIR to withhold information.
2. The Commissioner’s decision is that the Council has correctly relied upon Regulations 12(5)(b) to withhold information and that the balance of the public interest favours maintaining that exception. She also finds that the Council has not demonstrated why Regulation 12(5)(f) is engaged and is therefore not entitled to rely on that exception. In respect of Regulation 13, the Commissioner only finds that this is engaged in respect of some of the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose all the photographs it has withheld. The Council must take appropriate steps to obscure the identity of any individual pictured in any of the photographs.
 - Disclose the information identified in the confidential annex.
4. The Council 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

Request One

5. On 4 December 2019, the complainant wrote to the Council and requested information in the following terms:

"[1] Copies of Cornwall planning department correspondence to and from the developers [redacted] of [redacted] in the months of April and May 2019 in relation to Planning Approvals [redacted] and [redacted]."

"[2] Copies of Cornwall planning department correspondence to and from the agents of [redacted] in the months of April and May 2019 in relation to Planning Approvals [redacted] and [redacted]."

"[3] Copies of any Cornwall planning department internal working documents, notes of telephone conversations and notes of meeting in the months of April and May 2019 in relation to Planning Approvals [redacted] and [redacted]. This should include notes associated with site visits taking place in this period."

"[4] Copies of communications to/from case officers [redacted] and [redacted] in the months of April and May 2019 in relation to Planning Approvals [redacted] and [redacted]."

6. The Council responded on to that request on 6 January 2020. It provided some information, but withheld the remainder. It relied on Regulation 12(5)(b), Regulation 12(5)(f) and Regulation 13 of the EIR to withhold information.

Request Two

7. On 10 December 2019, the complainant contacted the Council and made a request for information in the following terms:

"[1] Copy of report from Cornwall Planning Enforcement Section under reference [redacted] in relation to the meeting of the Central Sub-Area Planning Committee on 28 October 2019."

"[2] Copy of section of minutes of this Committee meeting relating to [redacted]."

8. The Council responded to this request on 9 January 2020. In relation to element [2], it noted that the information was already in the public

domain. In relation to element [1], it relied on Regulation 12(5)(b) of the EIR to withhold the requested information.

9. The complainant separately sought internal reviews of both responses on 25 January 2020. The Council completed internal reviews of both responses on 20 March 2020. It upheld its original position in respect of both requests.

Scope of the case

10. The complainant contacted the Commissioner on 2 April 2020 to complain about the way his request for information had been handled.
11. Following receipt of the Council's submission, the Commissioner noted that there was a mismatch between the content of the Council's arguments, the withheld information itself and the way that the Council had applied the exceptions. She therefore asked the Council to confirm that it was content with both the exceptions it had selected and the manner in which they were applied. She also challenged the Council to relate its arguments more closely to some of the individual items of information it had withheld.
12. The Council responded to the Commissioner on 24 May 2021. As well as providing some more detailed arguments about the exceptions, it confirmed that it was content to rely on the exceptions in the manner that it had done.
13. The Commissioner considers that the scope of her investigation is to determine whether the Council has correctly relied upon the cited exceptions in the manner that it has done and, where necessary, whether the public interest favours maintaining the exception.
14. The Commissioner will only be considering the exceptions in the manner that the Council has applied them.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being 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, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment 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)...as well as measures or activities designed to protect those elements;*
 - (d) reports on the implementation of environmental legislation;*
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
16. As it is information relating to the enforcement of planning regulations, the Commissioner believes that the requested information is likely to be information about a "measure" affecting the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

The withheld information

17. The withheld information in this case can be sorted into five categories:
- [a] Several chains of emails between the Council and the developer's agent.
 - [b] A copy of a report presented to the Council's Planning Committee and considered in private session on 28 October 2019.
 - [c] Emails from members of the public reporting a potential planning breach.
 - [d] Site photographs supplied by the developer's agent.
 - [e] Site photographs taken by Council officers.

[f] the covering email and Council's response to the information in category [d]

18. Although all the information appears to form part of an Enforcement file, the Council has confirmed that it only wishes to rely on Regulation 12(5)(b) to withhold information falling within categories [a], [b] and [f]. It wishes to rely on Regulation 12(5)(f) and Regulation 13 to withhold the information within categories [c] and [d]. Finally, it wished to rely solely on Regulation 13 to withhold the information falling within category [e].

Regulation 12(5)(b) – adverse effect on the course of justice

19. Regulation 12(5)(b) states that:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature..."

20. The Commissioner's public guidance on this exception¹ explains that the exception is fairly broad and covers a wide range of judicial or quasi-judicial processes. The ability of a local planning authority to determine whether a breach of planning consent has occurred and, if so, whether remedial action is necessary would fall under the definition of "an inquiry of a criminal or disciplinary nature."
21. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

The Council's position

22. In its initial submission, the Council explained to the Commissioner that:

"Disclosing the requested information would prejudice the Councils [sic] legal position which is ongoing, this could in effect affect the procedures and integrity of enforcement investigations. By engaging this exemption, the Council is able to conduct its investigations in an efficient and timely manner and can effectively carry out its investigation without the unnecessary use of public money and dilution of resources for its citizens.

"For clarity the identifiable harm is that the information, should it be disclosed, would be the hinderance to the Council's ongoing investigations."

23. It added that:

"Enforcement is reliant on the public reporting alleged breaches – it is a reactive service that operates on an anonymous system for complainants (to the general public) if this was made public this would have a negative impact on the amount reports received and would discourage people from making reports."

24. When challenged by the Commissioner to be more specific about why disclosure would have an adverse effect, the Council noted that:

"Disclosure would likely impede the gathering of information and evidence in future investigations as those under investigation would be less willing to provide information voluntarily if they thought it would be placed within the public domain ahead of planning enforcement decisions. The Council acknowledges that it can obtain information through its statutory power (Planning Contribution Notices – PCN) however, the Council tries to seek information from those under investigation voluntarily..."

"If the information were to be disclosed it would more than likely adversely affect ongoing and future processing the course of justice as disclosure would provide an indication of the arguments, strength or weaknesses which the council has in relation to ongoing enforcement investigations and legal proceedings. In this instance there are compelling arguments that the council's investigations in this matter require certain information to remain confidential in order to be effective during "live" and "future" investigations. There is a strong public interest in the local authority being able to effectively carry out its legal obligations and planning enforcement investigations without damaging the integrity of any investigations

harming the course of justice and the ability of a person to receive a fair trial.

"It would be unfair to the developer/owner should disclosure go ahead, as should no breach of planning be found, reputational damage could be caused to the individuals concerned. As planning enforcement is a legal matter, the developer/owner has the complete expectation that information relating to their property, would not be shared within the public domain."

25. The Council noted that, whilst the particular enforcement file referred to in request two had been decided and closed at the time of the request, there had been a number of complaints related to the particular site – some of which remained open at the time the request was responded to.
26. Finally, the Council argued that the information within category [b] had been lawfully withheld from publication by virtue of paragraph 3 of Part 1 of Schedule 12A of the Local Government Act 1972.

The Commissioner's view

27. Whilst the Commissioner considers that the Council's arguments could have been more closely linked to the actual content of the withheld information, she nevertheless accepts that disclosure, at the time of the request, would have had an adverse effect on the ability of the Council to investigate and determine alleged planning breaches both, in relation to this particular site and more generally.
28. The Commissioner has disregarded two of the Council's arguments. She cannot consider, as part of this exception, the possibility of an adverse effect on the supply of information from the public – reporting potential planning breaches. The Council made clear to the Commissioner that it did not wish to rely on Regulation 12(5)(b) to withhold the actual complaints from the public. The Council is entitled to apply exceptions as it sees fit, but the Commissioner considers it illogical to assume that disclosing correspondence between the Council and the *developer* would dissuade *members of the public* from coming forward. She considers it particularly illogical to assume that such an outcome would result from disclosure of this information when the Council has, by implication, argued that disclosure of the complaints themselves would not adversely affect its ability to investigate planning breaches.
29. Secondly, the Commissioner is not sure what point the Council was aiming to make by reference to its legal right not to publish a report presented in a closed session. The Commissioner accepts that the Council has a right to do this in certain circumstances and it is not within her power to determine whether the Council should or should not have

already published the report. The Commissioner's role is to determine whether the Council is obliged to disclose the report in response to an EIR request. In so far as it may be relevant, the Commissioner notes that Regulation 5(6) of the EIR states:

Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

30. However, the Commissioner recognises that planning matters, by their very nature can often be contentious. Rules exist to prevent the wrong development in the wrong place. It is important that those rules are adhered to and that they are applied consistently. Where allegations of a breach of consent are made, the local planning authority has a duty to investigate those concerns and, where appropriate, order remedial steps to be taken to bring a development back within similar terms to those on which consent was granted.
31. In deciding whether enforcement action is necessary, the Commissioner also accepts that a local planning authority will need to engage with the developer and that this conversation is usually more productive if it is kept confidential.
32. Not every planning breach requires the Council to take remedial action. Early, informal, engagement with the developer (particularly if works are still ongoing) can be a much more effective method of bringing a development back into compliance than if the Council were to deploy enforcement notices.
33. Whilst the Council noted that it has powers to require information and to require developers to take remedial steps, the Commissioner accepts that these are blunt instruments.
34. The information within categories [a] and [f] shows the Council engaging with the developer (and vice versa) to ensure that the development met the planning consent that had been granted. The Commissioner considers that the content of that correspondence would have been very different if the parties had been expecting the correspondence to be published.
35. The Commissioner is aware, from her own regulatory work, that private informal conversations, to nip potential problems in the bud, can be highly effective. However, where a developer has been publicly "accused" of having breached their planning consent – even if it is a relatively minor breach – they are likely to take a defence stance and focus on protecting their own legal position and public image – instead of engaging to resolve the matter.

36. Equally, some complaints may be without merit or even malicious. Revealing that the Council was considering a breach complaint would risk implying that the complaint had merit. Disclosing details of enforcement complaints that had not been upheld or had not been investigated would deny the developer the right to due process of law and the right to have any complaint fairly investigated before a judgment is passed.
37. In respect of the report to the Council's sub-committee, the Commissioner accepts that, although that particular complaint had been resolved at the time of the request, the site itself remained the subject of ongoing investigations up to and beyond the point that the request was responded to. The Commissioner accepts that disclosing the Council's internal thinking in relation to a previous enforcement case would prejudice its ability to adjudicate on active cases in a way that was not just fair, but seen to be fair.
38. The Commissioner therefore accepts that disclosure of information of this type would adversely affect the ability of the Council to enforce planning laws, because developers would be more reluctant to engage with the process and the Council would therefore have to use its formal powers (which are more cumbersome) more frequently – draining its resources.
39. The Commissioner therefore accepts that Regulation 12(5)(b) is engaged.

Public interest test

40. Like most EIR exceptions, even where Regulation 12(5)(b) is engaged, information can only be withheld if the public interest favours maintaining the exception.
41. In support of disclosure, the complainant noted that this particular development had been particularly contentious. It had been the subject of numerous complaints and, the complainant alleged, whilst most of these complaints had found breaches, none had resulted in enforcement action. He believed that this demonstrated maladministration on behalf of the Council and thus increased the usual public interest in transparency – as well as ensuring that the Council was properly enforcing the law.
42. However, the Council argued that there was a considerable public interest in allowing it to investigate breach allegations in a confidential environment so as to ensure that all parties are treated fairly.
43. The Council noted that, once it had concluded its investigation of a breach complaint, it would provide a summary of the investigation

findings to both the person who made the complaint and the developer who was the subject of the complaint. It argued that this was a proportionate approach to this issue, balancing the need for transparency against the rights and reasonable expectations of those who found themselves the subject of breach complaints.

44. Having considered the matter, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exception.
45. A mere allegation of wrongdoing does not tip the balance of the public interest in favour of disclosure. The Council is entitled to take decisions to enforce or not enforce breaches and it will not be proportionate to require remedial action for every breach. Whilst the Council should be accountable for the decisions it makes, nothing within the withheld information suggests obvious maladministration on behalf of the Council.
46. The Commissioner has considered the EIR's presumption in favour of disclosure, however she does not consider that the public interest for and against the exception are evenly balanced.
47. The Commissioner is therefore satisfied that the Council is entitled to rely on Regulation 12(5)(b) of the EIR to withhold the information within categories [a], [b] and [f].

Regulation 12(5)(f) – voluntary supply of information

48. Regulation 12(5) of the EIR states that:

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

- (f) the interests of the person who provided the information where that person—*
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;*
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*
 - (iii) has not consented to its disclosure*

49. The Council has relied on this exception to withhold two categories of information: firstly the original grounds of the breach complaint (and two other emails referring to the content of those grounds) and secondly a set of photos supplied by the developer's agent.

The Council's position

50. When asked to justify its reliance on Regulation 12(5)(f), the Council explained that:

"Fundamentally and crucially, investigations and cases are fully reliant upon members of the public raising their concerns and submitting complaints of where suspected planning control has potentially been breached. The Council receives around 2000 requests each year which officers are obliged to investigate. It is important to note that planning enforcement cases are not planning applications and are therefore not subject to the normal formal reporting as planning applications are. The following are key points:

- Disclosing the complaints into the public domain could lose the public's trust to investigate their concerns in confidence and would likely inhibit the Council's ability to conduct further investigations effectively if third parties are less willing to volunteer information.*
- The information shared by the developer and members of the public was without any legal obligation to do so and was completely supplied on a voluntary basis to identify and investigate any possible breaches in planning. The authority would not have had the right to require members of the public to provide complaints about possible breaches in planning control.*
- The Council would not be entitled to disclose this information other than in response to a request under EIR/FOI – complaints are made by members of the public with the complete expectation that the information would not be disclosed more widely by the Council.*
- The Council considers that we do not have a fair and lawful basis for putting that information into the public domain, either by statutory duty or by way of consent of the individual involved (which is the requirement of the first data protection principle under article 5 of the GDPR).*
- In submitting this information, it is clear that the developer or the complainants have not consented to the information being disclosed.*

- *It would be unfair to the developer/owner should disclosure go ahead, as should no breach of planning be found, reputational damage could be caused to the individuals concerned. As planning enforcement is a legal matter, the developer/owner has the complete expectation that information relating to their property, would not be shared within the public domain."*

The Commissioner's view

51. The Commissioner does not consider that the Council has adequately explained why disclosure of this information would adversely affect the persons who originally supplied it.
52. It is not clear to the Commissioner why the Council has treated these items – which appear to form part of the broader enforcement file – separately from the information falling within categories [a], [b] and, [f]. However, it is the Council's responsibility to determine which exceptions it wishes to rely on to withhold information – not the Commissioner's.
53. The exception sets out a four-stage test: first the public authority must consider the interests of the supplier of that information; next it must consider whether the person could have been compelled to provide the information; thirdly it must consider whether there was an expectation of disclosure and; finally it must establish whether the person has consented to disclosure.
54. The Commissioner's guidance on this particular exception states that the starting point to determining whether this exception applies should be to consider the interests of the third party who supplied the information to the public authority in the first place.² A public authority cannot and should not assume that if the other three steps of the test are met, that an adverse effect would automatically result.
55. The Council's arguments have failed to demonstrate the adverse effect on the individual, because its starting point has been itself. All the arguments it has put forward revolve around why the Council's functions would be inhibited by choking off the free flow of information.
56. Whilst the Commissioner recognises that these are valid arguments in explaining why the public interest ought to favour maintaining this

² https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

exception, she does not consider that these arguments alone demonstrate why the exception is engaged.

57. The Commissioner does not consider that the Council has put forward any arguments that demonstrate why disclosure would have an adverse effect on either of the suppliers of the particular information it is relying on this exception to withhold.
58. In addition, whilst the Commissioner accepts that members of the public cannot be placed under a legal obligation to submit breach complaints, the Council's arguments in respect of Regulation 12(5)(b), noted that it had the power to compel a developer to provide information. Whilst the Commissioner need not make a formal determination on this point (as she considers the Council has failed to demonstrate an adverse effect) it seems likely that the developer could have been put under a legal obligation to supply the information within category [d].
59. The Commissioner therefore considers that the Council has not demonstrated that Regulation 12(5)(f) is engaged and it is therefore not entitled to rely on this exception.

Regulation 13 – third party personal data

60. 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.
61. In this case the relevant condition is contained in regulation 13(2A)(a). 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').
62. 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.
63. 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?

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

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

65. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
66. 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.
67. 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.
68. Turning first to the photographs (categories [d] and [e]), the Council has withheld these photographs because it considers that they are the personal data of the developer.
69. The Council has noted that those with local knowledge would be able to identify the location at which these photographs were taken and, if they did not already know, link that location back to the developer – through information (such as planning applications) already in the public domain.
70. The Council also drew attention a previous decision notice, the Commissioner had issued, in which she determined that a building control file was the personal data of the owners of that property.³ The Council argued that there was a direct equivalence between the two cases.
71. The Commissioner accepts that photographs can, in certain circumstances, be personal data. Whether or not they are will be determined by the content of the photograph (ie. what it depicts), the purpose for which the photograph was taken and the purpose for which it is now being used.
72. According to public documents available on the Council's planning portal, the developer of this particular property is a limited company – although the Commissioner accepts that one individual is listed on Companies House as owning in excess of 75% of that company.

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259515/fs50713311.pdf>

73. However, even if the Commissioner were to agree that these photographs could be linked back to an individual, she does not accept that the photographs "relate to" the developer in any meaningful way.
74. When asking for clarification on this point, the Commissioner pointed out to the Council that, based on the available information, the development pictured contained more than one dwelling, the developer did not live in any of those dwellings and there was no suggestion that they intended to do so in future. The Council did not dispute this assessment of the facts.
75. The Commissioner has also checked Google Street View to see what information is available through that source. She notes that the shots available from Google Street View are almost identical to some of the photographs being withheld (including the build stage of the development). Whilst the Commissioner accepts that Google Street View may have been updated since the request was responded to, any individual could have stood on the public highway at the time of the request and taken similar images to some of those now being withheld.
76. Furthermore, whilst some of the withheld images have been taken from within the curtilage of the development, in the Commissioner's view they contain very little that would not be visible from the public highway.
77. Equally, the Commissioner does not consider that the decision notice the Council has cited is a relevant precedent. Firstly, that decision notice related to a single dwelling with an owner/occupier. Secondly, the bulk of the withheld information contained details about the *interior* of the property, not the exterior. The Commissioner accepted in that case that the building control file (unlike a planning file) was not open to public inspection and disclosure would therefore place details of the property into the public domain that would not be widely known – affecting the privacy of the people who lived there.
78. In this case, the photographs depict the exterior of the property. The details of the design would already be recorded in the planning consents that had been granted – and would therefore be available for public inspection. The images only record what would already have been visible to the public at the time.
79. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746, Lord Justice Auld commented that:

"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it

falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

80. Having considered the matter, the Commissioner is not persuaded that the photographs that the Council has withheld fall sufficiently close to the developer on the "continuum of relevance or proximity" outlined in the *Durant* ruling.
81. The photographs themselves do not reveal anything about the developer's personal or professional life. They do not, on their own, even reveal that it is the developer and no one else that owns this particular site – that information is already in the public domain. Information about the progression of the build, to the extent that it is revealed in the photographs, would already be visible to any passer-by.
82. The Commissioner therefore does not accept that the information relates to the developer and it is thus not the developer's personal data. As the information is not personal data it follows that Regulation 13 of the EIR cannot be engaged.
83. Whilst the Commissioner is ordering disclosure of these photographs, she notes that some depict workers on the site. Whilst the workers are mostly pictured at a distance, the Commissioner cannot rule out the possibility of the images being enhanced to enable those workers to be identified. The Commissioner cannot see any legitimate interest that would require the identities of the individual workers on the site to be placed on the permanent public record. She therefore requires the Council to take appropriate steps to obscure the identities of those workers.
84. Finally, the Commissioner must consider the contents of the emails reporting the original breach allegation (category [c]).

85. In their unredacted form, this email chain clearly identifies the individuals involved in bringing the complaint. Not only would they be identifiable from the email headers and footers, but also from the content of the emails themselves which contain specific references which, in the Commissioner's view, would risk identification even if all names were redacted. The Commissioner therefore takes the view that the emails are the personal data of the individuals involved in submitting the complaint.
86. 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.

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

Would disclosure contravene principle (a)?

88. 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".

89. 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.
90. 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.
91. 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*" lawful bases for processing listed in the Article applies.
92. 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"⁴.

⁴ Article 6(1) goes on to state that:-

93. 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.

94. 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

95. 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.

96. 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.

97. In this case there is a legitimate interest in transparency and in dissuading individuals from submitting malicious complaints.

"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".

Is disclosure necessary?

98. '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.
99. In the circumstances, the Commissioner considers that, whilst the Council has other methods of minimising malicious complaints, transparency cannot be achieved by any less-intrusive means. She has therefore gone on to carry out a balancing exercise.

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

100. Finally, even where disclosure is necessary to satisfy a legitimate interest, the Commissioner must 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.
101. 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.
102. 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.
103. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

104. In the circumstances of this case, the Commissioner is satisfied that the rights of the data subjects would outweigh any legitimate interests in transparency.
105. When making a complaint about a potential planning breach, a person should have a reasonable expectation that the Council will protect their identity. Whilst the person makes the complaint in the expectation that the *substance* of their concerns will be addressed, they also expect that their identity (which, in most circumstances, will not form part of the substance) will be withheld – in particular from the subject of the complaint.
106. The nature of planning enforcement cases is such that those most likely to submit complaints are those living in the immediate vicinity of development where the breach is alleged to have occurred. Providing the subject of the complaint with the identity of the person who submitted it is likely to sour relations between neighbours. In extreme cases, it could put the neighbours at risk of retaliation.
107. There is no suggestion that the individuals involved in submitting this complaint have consented to their personal data being disclosed. The Council is not required to seek their consent and the Commissioner considers it unlikely that consent would be forthcoming anyway.
108. Disclosure of this personal data could therefore only take place without the consent of the subjects of that data and contrary to their reasonable expectations. The Commissioner considers that such disclosure would be distressing to the individuals involved and would intrude into their privacy.
109. The Commissioner is therefore satisfied that, in unredacted form, the emails within category [c] are the personal data of at least one third party and that the rights of the data subjects outweigh any legitimate interest in disclosure.
110. The Commissioner next considered whether the emails could be redacted in such a way as to make them completely anonymous and, if that could be achieved, whether the remaining information would still be coherent.
111. Whilst removing all identifying information does not leave much behind, the Commissioner considers that what is left would still be of some limited use. She is therefore satisfied that Regulation 13 will only apply to some of the information within category [c].
112. The confidential annex to this decision notice has been prepared to explain the redactions that are necessary in order that the information can be disclosed. It is not possible to do this properly without references

to the content of the material that is actually being withheld. Although some of it refers to information she is ordering be disclosed, the Commissioner is mindful that she must preserve a meaningful right of appeal for the Council – in the event that it wishes to exercise it.

113. The confidential annex contains some reasoning as to why individual elements of the information contain identifying features. It does not contain any further analysis on why any other exception does or does not apply.

Other matters

114. In his grounds of complaint, the complainant explained to the Commissioner that the Council should be required to disclose the information because:

"It seems to me that a distinction should be drawn between an individual who makes a FOI Request about a matter he has already raised with the Council for legitimate reasons, and the public more generally. I therefore consider that such an individual should be provided with a copy of the enforcement section's report, redacted in part(s) where appropriate. I also consider that the individual should be provided with updates on the progress of enforcement investigations where they are long-lasting."

115. The final sentence of this paragraph is not a matter for the Commissioner to consider as it does not fall within her jurisdiction.

116. In respect of the remainder of the paragraph, the complainant is entitled to hold this view, but it is not one with any basis either in the legislation or in case law. On the contrary, the principle that requests (whether made under FOIA or EIR) should, in most circumstances, be motive-blind and applicant-blind is one of the fundamental principles of the legislation and one which has repeatedly been upheld by both the Commissioner and the Tribunal.

Right of appeal

117. 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

118. 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.

119. 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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