

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 June 2021

Public Authority: West Sussex County Council

Address: County Hall
West Street
Chichester
West Sussex
PO19 1RQ

Decision (including any steps ordered)

1. The complainant requested correspondence regarding the purchase of land for the development of a bypass. West Sussex County Council ("the Council") initially refused the request under section 40(2) of the FOIA (personal data). The Council later issued a revised response to the complainant within which it withheld the information under regulation 13 of the EIR (personal data) and regulation 12(5)(e). The Council then issued a further revised response to the complainant within which it withheld the information under regulation 13 and regulation 12(5)(d) of the EIR (confidentiality of proceedings).
2. The Commissioner's decision is that the Council has correctly cited regulations 13 and 12(5)(d) of the EIR as a basis for non-disclosure. The Commissioner also finds that the Council has breached regulations 5(2) and 14(2) by virtue of 14(3)(a) of the EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 20 August 2019, the complainant wrote to the Council and requested information in the following terms:

"Please can you update me in regards to the land purchases required for the Lyminster Bypass and may I make a Freedom of Information request for all emails, notes and letters in relation to the purchases please?"

5. Following further correspondence between the complainant and the Council regarding potential clarification and/or refinement of the complainant's request, on 30 September 2019, the complainant wrote to the Council and submitted a clarified/refined request in the following terms:

"I am looking for the communication between yourselves and land owners where you are looking to purchase land for the Lyminster Bypass.

If I say from the beginning of 2017, can you get that to me asap?"

6. The Council responded to both requests on 1 October 2019. It refused the request of 20 August 2019 under regulation 12(4)(b) of the EIR (manifestly unreasonable) as it was considered to impose a disproportionate burden on the Council.
7. For the clarified request of 30 September 2019, the Council disclosed some information to the complainant but stated that the remainder of the information was exempt under section 40(2) of the FOIA (personal information).
8. On 1 October 2019 the complainant requested an internal review. He stated that some of the requested information was, *"to help serve decision making on the A27 Arundel Bypass options"*. He also expressed dissatisfaction with the length of time the Council had taken to respond to his request and stated, *"no attempt was made to come back to me upon my request of 20th August. You could have guided me to what is reasonable. I still wish to have that information. Maybe not everything in 57 inboxes, but I see no reason what I could not have the majority of it?"*.
9. The Council wrote to the complainant on 8 October 2019 to provide a copy of its internal review decision. It stated that on 27 August 2019 it had written to the complainant to seek clarification with a view to trying to narrow the scope of the request. It stated that in response,

the complainant said that he still required all of the information requested from 1 January 2016. The Council said that it contacted the complainant on 28 and 29 August 2019 in an attempt to narrow the scope of the request.

10. The Council upheld its position that the information was personal data but stated *"I also note that the exception under Regulation 13 EIR could also have been applied and applies to personal data in the same way as the Section 40 FOIA exemption."* It also stated that it had tried to assist the complainant, *"by providing the drawings showing the land required and a copy of the Requisitions for Information proforma"*.
11. Upon revisiting the request during the Commissioner's investigation, the Council provided a revised response to the complainant. It disclosed some further information to the complainant and confirmed that third party personal data had been redacted in accordance with the exception under regulation 13 of the EIR. The Council also confirmed that it was relying on regulation 12(5)(e) of the EIR (commercial confidentiality) and regulation 13 to withhold the remainder of the requested information.
12. When asked for its submissions regarding regulation 12(5)(e) the Council again revisited the request, and disclosed some further information to the complainant and confirmed that third party personal data had been redacted in accordance with the exception under regulation 13 of the EIR.
13. The Council, following further correspondence with the Commissioner, issued a further revised response, disclosing some more information to the complainant. It stated that previously withheld names and addresses of landowners and agents were now in the public domain and could now be disclosed. It was maintaining its reliance upon regulation 13 of the EIR in respect of other specific personal data and stated that it withdrew its reliance upon regulation 12(5)(e) and was now relying upon the exception at regulation 12(5)(d) of the EIR in order to withhold the remaining withheld information.

Scope of the case

14. The complainant first contacted the Commissioner on 22 November 2019 to complain about the way his request for information had been handled. This notice only concerns the Council's handling of the refined request of 30 September 2019.

15. The scope of this notice is to determine firstly which information access regime is appropriate for this request. It will then determine whether the Council is entitled to withhold some of the requested information 12(5)(d) of the EIR (confidentiality of proceedings). It will also consider whether the Council's redactions were appropriate in the information disclosed under regulation 13 of the EIR (personal data). It will also consider the timeliness of the Council's response.

Background

16. As part of this investigation the Council provided the Commissioner with some detail regarding the background of this request. It explained that:-

"The A284 Lyminster Bypass (North) will provide part of a new north - south link, forming the northern (1.1km) section of a new 1.8km bypass of the A284 between the A27 trunk road and then southwards to Littlehampton. The southern section between Toddington Nurseries and A259 is being delivered separately by developers.

The bypass will provide north-south access to Littlehampton for residents and businesses by improving accessibility and connectivity to the A27 at Crossbush and has been linked to the provision of an additional 700 jobs and 2,000 houses. It will also address congestion and journey time reliability issues caused by the level crossing at Wick. Safety benefits will also be realised by removing traffic from the existing congested route through Lyminster and Wick."

17. The Council said that planning permission was granted for this scheme in March 2019. It explained that, to deliver the scheme, third party land is required which will be acquired by negotiation and/or Compulsory Purchase Order (CPO). It added that a Council Cabinet Member Key Decision in July 2019 approved commencing the CPO process.
18. The Commissioner notes that further details about this construction can be located on the Council's website.¹ This states that a public consultation exercise was undertaken in September 2014 with 61% of respondents in favour of the scheme. 31% did not support the scheme and the remaining 8% did not express an opinion. Residents were also consulted on two options for the tie-in of the existing A284 to the proposed bypass.

¹ <https://www.westsussex.gov.uk/roads-and-travel/roadworks-and-projects/road-projects/lyminster-bypass-north/>

19. The Council's website states that the total estimated cost for the scheme is £21.364m and it is jointly funded by the Coast to Capital Local Economic Partnership, West Sussex County Council and private developer contributions.

20. The Council stated:-

"The scheme was granted planning on 26 March 2019 with the decision published on 9 May 2019 following the Secretary of State's decision not to call-in the scheme. Subject to completion of the necessary land acquisition, we anticipate that construction will start in early 2022.

The County Council advertised a [Compulsory Purchase Order](#) and [Side Roads Order](#) for this scheme. The objection period ran from Thursday 10 September to Wednesday 28 October 2020 inclusive and is now closed."

21. The Council stated that, following the advertising of the above Orders, the Secretary of State for Transport has announced his intention to have a public inquiry and that, *"to that end, and in response to objections received, WSCC has prepared documentation for a Statement of Case"*. This statement of case is dated February 2021.²

Reasons for decision

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

22. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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

² https://www.westsussex.gov.uk/media/15247/a284_statement_of_case.pdf

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) and (b) as well as measures or activities designed to protect those elements..."

23. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
24. The requested information in this case is for correspondence between the Council and land owners regarding the purchase of land for the development of a bypass. The Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the elements listed in regulations 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).
25. Therefore the Commissioner considers that the information is environmental in nature and should be considered under the EIR.

Regulation 13 – Personal Information

Redactions in the information disclosed

26. 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.
27. In this case the relevant condition is contained in regulation 13(2A). 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").
28. 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(1) of the EIR cannot apply.

29. 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?

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

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

31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. 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.
34. The Council have confirmed that the further disclosure of information consists of communications from the Council to various landowners and/or their land agents. The Council stated that, *"the names and addresses of the landowners and their agents are now in the public domain and in the circumstances the only redactions made are in respect of personal email addresses and specific personal data relating to the landowners"*.
35. The Commissioner has received an unredacted copy of the withheld information and considered the redactions made under regulation 13(1). She notes that this consists of, as stated above, personal e-mail addresses and other personal data relating to the landowners that is not in the public domain.
36. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals concerned, that is the landowners. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
37. The fact that information constitutes the personal data of identifiable living individuals 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.

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

Would disclosure contravene principle (a)?

39. 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".

40. 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.

41. 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

42. 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.

43. 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"*³.

³ 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

44. 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.
45. 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

46. 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.
47. 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.
49. The Commissioner accepts that plans to develop a new bypass and the acquisition of land via negotiation and Compulsory Purchase Order are very much a matter of public interest and that the complainant has a legitimate interest in the requested information as a whole. However, in relation to the information redacted under regulation 13(1), the Commissioner does not consider that there is a legitimate interest in disclosure of this, as it consists of specific personal details relating to the landowners. If there is a public interest in knowing who the landowners are, this would have been satisfied by the

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 of their names and addresses, and those of their agents, into the public domain.

50. As the Commissioner has concluded that there is no legitimate interest in disclosure of the information redacted under regulation 13(1), she has not gone on to consider the necessity test and she is satisfied that the Council has correctly engaged regulation 13(1) as a basis for redaction.

Regulation 12(5)(d) – Confidentiality of Proceedings

51. Regulation 12(5)d 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 –

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.”

52. There is no definition in the EIR as to what exactly is covered by regulation 12(5)(d), but the Commissioner has issued guidance to assist public authorities in determining when the exception might apply. For regulation 12(5)(d) to be engaged, a three stage test must be met, which is as follows:-

- Are the proceedings presented by the authority legitimate?
- Is the confidentiality of those proceedings provided by law?
- Would disclosing the information adversely affect that confidentiality?

53. The Commissioner considers that ‘proceedings’ implies a level of formality and may include formal meetings that considers matters within the authority’s jurisdiction, situations where an authority is exercising its statutory decision making powers, and official legal proceedings.

54. The Commissioner does not consider that all meetings or activities, just because they are deemed formal, would be covered by the regulation. The fact the proceedings must be covered by a confidentiality of law not only supports the formality of those proceedings, but also requires that they are subject to either statute or common law that imposes a necessary confidence. It is important to note that the regulation protects the confidentiality of the proceedings, not the confidentiality of the information.

55. The Council has applied the regulation to the remainder of the information it has withheld. The Council have stated that this consists of communications and records of meetings with the various landowners and/or their agents to the Council.
56. The Council has explained that its position is that, *"a formal compulsory purchase order process has the necessary element of formality and that communications from land owners to the Council prior to such a process is not required by statute, but to assist the Council and landowners to discuss proposals prior to the formal statutory process and with a view to potentially save time and money where it is possible to have successful negotiations."*
57. Some of the withheld information consists of correspondence between the Council and landowners and agents which is part of the pre-negotiation process which eventually informed the formal compulsory purchase order process. The Commissioner considers that, although provided prior to the beginning of the formal process, it assisted discussions prior to the formal statutory process and would have affected that process as information provided in the course of either successful or unsuccessful negotiations would have influenced how the formal process unfolded. That information would also have been used during the compulsory purchase order process.
58. The Commissioner accepts that the compulsory purchase order process, including the pre-process negotiations, constitutes legitimate formal proceedings, and therefore the first part of the test is met.
59. The next part of the test to consider is whether the confidentiality of the proceedings is provided by law. If there is no specific statutory restriction on disclosure, then proceedings may be protected by what is called a 'common law' duty of confidence. For this to apply, there must be a clear and reasonable expectation that the information would not be disclosed, and it must not be trivial or already in the public domain.
60. The Council explained that the information is subject to the common law duty of confidence. It stated that the information has the necessary quality of confidence and is not publicly available elsewhere, neither is it trivial in nature. The Council argued that, *"those who request to enter into communications with the Council prior to the formal compulsory purchase order process have a reasonable expectation that information provided to the Council is done so in circumstances of confidence."*
61. The Commissioner accepts that those who provided information to the Council as part of the pre-negotiations and the compulsory purchase order process would have done so in confidence and would have had a reasonable expectation that what they provided would be kept

confidential. She therefore considers that the second part of the test has been met.

62. The final consideration when applying the exception provided by regulation 12(5)(d) is that the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. The term 'would be' is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question; in this case the confidentiality of the compulsory purchase order process for the land upon which there were plans to construct the new bypass.
63. The Council states that disclosure of the withheld information would damage the general principle of confidentiality itself. It pointed out that landowners and their agents are under no obligation to discuss the circumstances surrounding their ownership, beyond that which can be accessed through a formal Land Registry search. The Council is of the view that the whole process would be undermined if such information were to be routinely disclosed to the wider public as individuals would become much more guarded about what information they provided to the Council. This would interfere with the safe space required for the process and harm the ability of the Council to gather the information, have candid discussions and carry out negotiations with a view to potentially saving time and money.
64. As the Commissioner accepts that disclosure would have an adverse effect by undermining the compulsory purchase order process, the final part of the test has been met and she is satisfied that the Council has correctly applied regulation 12(5)(d) to the withheld information.

The public interest test

65. Regulation 12(5)(d) is subject to the public interest test as set out in regulation 12(1). This means that even though the exception is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
66. Furthermore under regulation 12(2) there is a presumption in favour of disclosure.
67. The Council accepts that there is a public interest in public authorities being open and transparent as far as decision-making processes are concerned, and informing public debate about matters that affect the wider public. It considers that being able to have a voice and participate in planning matters is very important for the public and that this is

served by the formal planning compulsory purchase order process and the inquiry that follows.

68. Regarding the public interest arguments in favour of maintaining the exception, the Council has pointed out that there is an inherent public interest in protecting confidential information, and breaching an obligation of confidence would undermine the relationship of trust between the Council and those providing the information, which would not be in the public interest.
69. The Council argues that individuals and organisations should be able to communicate with a public body without fear that such communications will be shared with the wider public. The benefit of such a process is that there is a potential to save time and money identifying issues and averting potential further time taken and expenditure at the formal application stage.
70. If individuals thought that their private and confidential discussion with the Council would be routinely disclosed it is likely to lead to disengagement from the process, a lack of frankness in proposals and would undermine the whole process. The loss of trust in the process may result in individuals not willingly providing information and potentially may result in an increase in the time and expenditure needed to deal with such matters to the detriment of both developers and the Council.
71. The Commissioner accepts that it is very important for the public to have a voice in planning matters, which is part of the general public interest in openness and transparency. However, she considers that this is served by the formal process as outlined above, and therefore disclosure of the withheld information would not further inform the public debate to such an extent that it would outweigh the arguments in favour of maintaining the exception, as outlined in paragraphs 67-69 above.
72. The Commissioner accepts that it is important for individuals engaging in such a process to have a relationship of trust with the Council, thereby enabling the Council to receive full and frank information from them. This is particularly important in planning matters such as these, whereby the bypass will affect both the public as a whole and those whose land is being acquired in order to construct it. As stated in paragraph 19 above, a significant amount of money is being spent on the process, and disclosure of the information may lead to landowners refusing to negotiate, which would potentially cost even more money and take up more time, which would not be in the public interest.

73. She therefore concludes that the public interest in maintaining the exception, in all the circumstances of the case, outweighs that in disclosure of the withheld information.

Procedural matters

Regulation 5(2) of the EIR – Time to respond

74. Regulation 5(2) of the EIR requires information to be provided to the requestor within 20 working days following receipt of the request.
75. This notice only concerns the Council's handling of the refined request of 30 September 2019, to which the Council issued its response on 1 October 2019.
76. At various points after this, the complainant was provided with further information which previously was not disclosed, the last of which was provided to him in February 2021, well outside of the 20 working day timescale. Therefore the Council breached regulation 5(2) by disclosing information after 20 working days.

Regulation 14 of the EIR - Issuing a valid refusal notice

77. Regulation 14(1) of the EIR states:-

"If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulations. (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of the receipt of the request. (3) The refusal shall specify the reasons not to disclose the information requested, including- (a) any exception relied on under regulations 12(4), 12(5) or 13..."

78. In this case, the Council applied section 40(2) of the FOIA in its initial refusal notice for the request dated 30 September 2019. It later changed this to regulations 12(5)(e) and 13 of the EIR, before withdrawing its reliance upon regulation 12(5)(e), disclosing some further information to the complainant, and then citing regulations 12(5)(d) and 13 as a basis for non-disclosure of the remaining withheld information.
79. The Commissioner therefore finds that the Council breached regulations 14(2) and 14(3)(a) of the EIR.

80. As the Commissioner has since found that the exceptions as set out in regulations 12(5)(d) and 13 have been correctly applied, she does not require any steps but asks that the Council takes note of its obligations to issue a valid refusal notice under the EIR.

Right of appeal

81. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

82. 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.
83. 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

Deirdre Collins
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