

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 23 November 2021

**Public Authority:** Selby District Council

**Address:** Civic Centre  
Doncaster Road  
Selby  
North Yorkshire  
YO8 9FT

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about a pre-planning application enquiry received by Selby District Council ('SDC'). SDC disclosed much of the requested information, with redactions for personal data. SDC withheld email correspondence between the council and the applicant's agent regarding the enquiry, in its entirety, citing regulation 13(1) (Personal data) of the EIR. The complainant said that personal data could be redacted from the correspondence, which she believed would permit its disclosure.
2. Having excluded the names and contact information in the emails from the scope of the complaint, the Commissioner concluded that the remaining withheld information still comprised personal data. However, she found there is an Article 6 basis for processing and so the disclosure of the information would be lawful. Her decision is therefore that SDC was not entitled to rely on regulation 13(1) of the EIR to withhold the email correspondence.
3. The Commissioner requires SDC to take the following steps to ensure compliance with the legislation.
  - Disclose the email correspondence between the parties regarding the permitted development enquiry, with all names and contact details for the applicant, their agent and the SDC officer, redacted.

4. SDC 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.

## Background

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5. The request concerns a permitted development enquiry ('PDE') made in connection with a planning application. SDC's website<sup>1</sup> states that applicants may submit PDE forms to it, in order to check whether proposed building work requires planning permission, or to ask questions about permitted development rights.

## Request and response

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6. On 29 September 2020, the complainant wrote to SDC and, referring to a report by the Planning Officer to the Planning Committee about a specific planning application, requested information in the following terms:

*"Reference is made in Para 1.9 to a Permitted Development enquiry [reference number redacted]. Could I please have sight of all correspondence relating to this. This should include the confirmation notice dated 13th August referred to at Para 1.10 final bullet point and all other relevant exchanges with the applicant, in particular the statement referred to in Para 1.9 about the applicant's intent should planning permission be refused."*

7. SDC responded on 2 October 2020, and said that information about the PDE could not be disclosed:

*"...it is a form of informal pre-application advice and therefore they are not made publicly available. The purpose of these PD enquiries is to inform applicants of whether planning permission will be required for a development."*

*Because of this, further information submitted as part of this pre-application advice cannot be shared publicly without the agreement of the applicant as it is not a formal application."*

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<sup>1</sup> <https://www.selby.gov.uk/planning-surgery>

8. On 19 October 2020, the complainant requested an internal review of SDC's response, asking it to deal with the request under the EIR.
9. SDC responded on 13 November 2020. It confirmed that it was dealing with the request under the EIR. It disclosed the following information, with third party personal data redacted:
  - PDE form
  - Sketch plan
  - Proposed garage roof alterations
  - Existing elevations A
  - Existing elevations B
  - Existing floor plan
  - Proposed elevations A
  - Planning Officer report
  - Enquiry response - that the erection of a pitched roof over the existing garage was confirmed to comply with permitted development criteria and planning permission was not required.
10. SDC redacted third party personal data from the above documents, and it also withheld, in its entirety, email correspondence between the applicant's agent and SDC about the PDE, on the grounds that the information was exempt from disclosure under regulation 13(1) of the EIR.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 9 December 2020 to complain about the way her request for information had been handled. She disagreed with SDC's decision to apply regulation 13(1) of the EIR to withhold the email correspondence between the parties about the PDE. She said she had no wish to receive any personal data, and that it could be redacted to allow her to receive copies of that correspondence.
12. The analysis below considers whether SDC was entitled to rely on regulation 13(1) of the EIR to withhold the email correspondence regarding the PDE. The complainant has not complained about SDC's decision to redact personal data from the other documents it has disclosed, and so they are not considered in this decision notice.

13. The Commissioner has viewed the withheld information, which comprises two email chains between SDC and the applicant's agent. SDC also forwarded a copy of its PDE enquiry response to the ICO, saying that it too was withheld information. However, as noted in paragraph 12, a redacted version of this had already been disclosed to the complainant (see paragraph 9). The complainant has indicated that she is content for personal data to be redacted from information falling within scope of her request, and so that document does not form part of this complaint.

## Reasons for decision

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### Is the information environmental information?

14. Environmental information must be considered for disclosure under the terms of the EIR. Regulation 2(1)(c) of the EIR defines environmental information as any information on:

*"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 [regulation 2(1)](a) and (b) as well as measures or activities designed to protect those elements."*

15. The request in this case is for information relating to a planning application. The Commissioner is satisfied that this is information on a measure likely to affect the state of soil and land (regulation 2(1)(a)). The Commissioner therefore considers that the request should be dealt with under the EIR.

### Regulation 13 - personal data of third parties

16. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
17. In this case, the relevant condition is contained in regulation 13(2A)(a)<sup>2</sup>. 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').

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<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. SDC has argued that the withheld information is the personal data of the agent who acted on behalf of the person who made the planning application, and who engaged in the correspondence with SDC. However, the arguments it supplied related to solely to the effect of disclosure on the applicant and not the agent.
25. The Commissioner has inspected the withheld information in this case, which comprises two email chains between the agent and an officer at SDC, about the administration of the PDE. The emails contain the names and contact details of both parties. The applicant is also copied in to some of them and is referred to by name on two occasions. The Commissioner is satisfied that this is personal data of all three parties within the meaning of section 3(2) of the DPA.
26. However, the complainant told the Commissioner that she did not wish to receive any personal data and that it could be redacted. SDC has taken this approach with the remainder of the request, redacting personal data from the other information it holds, and then disclosing it to the complainant.

27. Given the above, the Commissioner considers it the case that the complainant does not expect to receive the names or contact details of any individuals contained within the withheld information, and that this does not form part of her complaint. The Commissioner has therefore gone on to consider whether, if the names and contact information of the third parties are removed, the remaining information could still be considered to be anyone's personal data.
28. The exchange of correspondence relates to the PDE submitted by, or on behalf of, the applicant (which has itself been disclosed to the complainant, with personal data redacted). There were a number of objections to the subsequent planning application and it went to full Planning Committee for a decision. All three parties are likely to have participated in this process, and the Commissioner therefore considers there is a likelihood that, even if their names are redacted from the correspondence, all three parties may be identifiable by some members of the local community who have an ongoing interest in the matter.
29. In the circumstances of this case, having considered the withheld information, the Commissioner is of the view that the information relates to the three third parties and it is likely to identify them, even with their names and contact details removed. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
30. 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.
31. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

32. 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".*

33. 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.
34. 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**

35. 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.

36. 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"*<sup>3</sup>.

37. 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.

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<sup>3</sup> Article 6(1) goes on to state that:-

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

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

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

38. 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*

39. 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.
40. 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.
41. SDC said that it had not identified any legitimate interest being pursued by the request.
42. However, the Commissioner notes that the complainant, and others, objected to the planning application which the PDE relates to. The Council's Planning Officer recommended that approval be granted but, because of the number of objections received, the case was heard before the council's Planning Committee on 7 October 2020. Planning permission was subsequently granted.
43. When reviewing the Planning Officer's report to the Planning Committee, the complainant said she noted that a PDE had been received and she believed that this had not previously been declared by SDC (the Commissioner does not know whether that was the case). It led her to question whether the planning application process had been transparent and fair.
44. Disclosure of the withheld email correspondence would therefore permit external scrutiny of the nature of any discussions which took place about the proposed development, including any consideration SDC gave to them. The Commissioner therefore accepts that a legitimate interest is being pursued in the request.

*Is disclosure necessary?*

45. '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.



46. Having regard to the legitimate interest identified above, which is for external scrutiny of the discussions surrounding the PDE, the Commissioner is satisfied that the information which has been requested is not otherwise accessible. Therefore, she concludes that disclosure under the EIR would be the least intrusive means of meeting the legitimate interests identified above.

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

47. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
48. 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.
49. 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.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. Firstly, the Commissioner has looked at the content of the correspondence in question. Whilst she cannot go into specifics, she notes that it is overwhelmingly concerned with the administrative arrangements surrounding SDC's consideration of the PDE and it is therefore not 'personal' in nature.
52. With regard to expectations of confidentiality, the Commissioner notes that the SDC officer and the agent were both acting in a professional capacity. The Commissioner holds the view that the SDC officer is a public-facing member of the council's planning department, and that their involvement in the planning application is already public knowledge. She therefore does not consider that, in view of its content,

the SDC officer would have a reasonable expectation that the correspondence would be regarded as confidential, if requested under the EIR.

53. The applicant's agent is not a public authority employee, however, the Commissioner considers that professionals who interact with public authorities about matters which are subject to the EIR, should nevertheless expect that information about those interactions will potentially be accessible to members of the public under the EIR. Again, having regard to the content of the correspondence in this case, the Commissioner can see no compelling reason why it should be considered as confidential, even if the agent's preference, for business reasons, is that it not be disclosed. The correspondence reveals two individuals interacting in a purely professional capacity and the Commissioner can see no harm or detriment to either party if the information was disclosed.
54. The Commissioner understands that the applicant is involved in a personal capacity, in that the proposed development relates to their domestic premises.
55. SDC argued that applicants have an expectation of confidentiality regarding pre-application discussions and that:

*"The individual should be able to enter into discussions with the Council at a pre-application stage and in relation to permitted development issues without such discussions being made the subject of public disclosure."*
56. Despite this, the Commissioner notes that, as set out in paragraph 9, above, SDC has in fact disclosed a great deal of information about the PDE, including the original PDE form and SDC's enquiry response (redacted for personal data, which the complainant did not challenge).
57. While the Commissioner considers that the applicant would have a reasonable expectation that any information which gives an insight into their personal life (including any plans regarding a development) might be considered confidential, the correspondence in this case does not contain such information. It does not contain any details of how the application, or its refusal, might impact the applicant personally, and the reader is given no insight into any aspects of the applicant's private life or alternative plans for the development. The Commissioner can therefore see neither anything confidential in the exchange from the applicant's perspective nor any harm or detriment to the applicant if the information was disclosed.
58. SDC also argued that:

*“Disclosure would result in confidential discussions being made public and as such might constitute a deterrent to other prospective applicants to enter into such discussions with the Council and as such compromise a fundamental tenet of the operation of an effective town and country planning system.”*

59. Arguments that disclosure would damage the planning process are not relevant to considerations of regulation 13(2) of the EIR, which is solely concerned with whether disclosure would interfere with data subjects' rights under the DPA and GDPR.
60. Having taken account of all the above factors, the Commissioner has determined that there is sufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

### **Fairness and transparency**

61. Even though it has been demonstrated that disclosure of the requested information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
62. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
63. The requirement for transparency is met because as a public authority, SDC is subject to the EIR.

### **The Commissioner's view**

64. In this instance, the Commissioner has decided that SDC has failed to demonstrate that the exception at regulation 13(1) is engaged.
65. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of regulation 13(1) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.
66. SDC is now required to take the action set out in paragraph 3, above, taking care to redact names and contact information in line with the complainant's expressed wishes.

## Right of appeal

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67. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

68. 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.

69. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**