

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

Date: 25 April 2022

Public Authority: Derry City and Strabane District Council
Address: 98 Strand Road
Derry
BT48 7NN

Decision (including any steps ordered)

1. The complainant has requested information regarding a surveyor's report for a specified property. The council provided a copy of the report but redacted some information on the basis of EIR 12(5)(d), confidentiality of proceedings.
2. As it appeared that the withheld information constituted personal data, the Commissioner exercised his discretion and considered whether regulation 13 was engaged. His conclusion is that the information should be withheld on the basis of regulation 13 (personal information).
3. The Commissioner does not require any steps.

Request and response

4. On 5 March 2021, the complainant requested information from Derry City and Strabane District Council ("the council") in the following terms:

"FOI request report on 23 grouse hill park

I would like to submit a FOI request for a full unredacted copy of the surveyors report"
5. The council responded on 25 March 2021. It refused to provide the requested information on the basis of EIR 12(5)(d), confidentiality of proceedings.
6. The complainant requested an internal review on 26 March 2021.
7. The council wrote to the complainant with the outcome of an internal review on 28 April 2021 in which it upheld the original position.

Scope of the case

Background

8. The surveyor's report ("the Report") was prepared in response to a formal investigation of a complaint which was undertaken by the Northern Ireland Public Services Ombudsman ("the Ombudsman").
9. The Ombudsman made a recommendation in the outcome of the investigation that the council "should appoint an independent surveyor to examine and review the records in this case to establish whether the council acted appropriately in issuing the Completion Certificate. A copy of the independent's surveyor's report should be shared with [the complainant] for information."
10. The council states that it had difficulty in obtaining an independent surveyor who was prepared to undertake the survey required by the Ombudsman. Ultimately the independent surveyor who prepared the report did so on the basis that their name would not be disclosed.

Withheld information

11. The council has provided the complainant with a redacted copy of the Report. The withheld information identifies the author by their name and company details. It also contains details regarding various positions the

author has held, by way of background information on their experience in related matters.

Scope of the case

12. The complainant contacted the Commissioner on 26 May 2021 to complain about the way their request for information had been handled. Specifically that the council had redacted some information within the Report.
13. The Commissioner has considered the application of regulation 12(5)(d) from the perspective that the council has already provided the majority of the report to the complainant. The council has made the case that 12(5)(d) is applicable because disclosure of identifying details regarding the author of the Report would adversely affect the confidentiality of the proceedings. The proceedings in this case being the investigation initially carried out by the Ombudsman, of which the Report is a follow up activity.
14. The Commissioner considers that if the council had chosen to withhold the Report in its entirety on this basis, then the arguments for 12(5)(d) may hold. However in this case whilst the council identifies the proceedings, it then goes on to make a case solely for withholding the Report author details. The Commissioner does not consider that these details on their own relate to the confidentiality of the cited proceedings.
15. The Commissioner, however, considers that the author's details are personal information. As such he considers it appropriate to determine whether the information should be withheld on the basis of regulation 13 (personal information).
16. The scope of the case is to determine whether the requested information should be withheld on the basis of regulation 13.

Reasons for decision

Regulation 13 personal data

17. 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.

18. In this case the relevant condition is contained in regulation 13(2A)(a)¹. 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 UK General Data Protection Regulation ('UK GDPR').
19. 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.
20. 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?

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. The withheld information comprises of an individual's name, the details of their company, address details, and background information on their work experience.

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

26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the author of the Report. He is satisfied that this information both relates to and identifies the person concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. 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.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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".

30. 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.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

32. Article 6(1) of the UK 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.
33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

34. In considering the application of Article 6(1)(f) of the UK 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.
35. 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

36. 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.
37. 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.

"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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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 complainant stated to the Commissioner that the council was instructed by the Ombudsman to employ an independent surveyor to assess the building control issues relating to their property. Whilst the council has provided all other details contained within the Report, the complainant is dissatisfied that the surveyor details are redacted.
39. The Commissioner therefore assumes that the complainant has a personal interest in the identity and experience of the surveyor undertaking the work. There is also a general public interest in transparency and accountability of the council when spending public money to contract services of independent third parties.

Is disclosure necessary?

40. '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.
41. The council has provided the majority of the Report to the complainant. This provides them with full details of the examination undertaken by the surveyor, the process of investigation, the findings and the author's opinion.
42. Considering the detailed information already provided, and that the complainant clearly requires details of the author of the Report, the Commissioner has been unable to identify alternative measures that would satisfy the request.

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

43. 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.
44. 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.
45. 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.
 46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 47. The council states that whilst the majority of the details of the Report are in the public domain, the author's details are not.
 48. The council had difficulty contracting a surveyor to carry out the independent examination and review, of which the Report is the resulting output. The withheld information are details which the author had specifically requested not be provided before agreeing to prepare the Report.
 49. The council advises that whilst the Ombudsman's investigation has concluded, the complainant is continuing legal action with the council regarding the matter.
 50. The Commissioner considers that the author of the Report may experience distress if their name is disclosed, as they had specifically agreed as a precursor to undertaking the work that their information was not to be disclosed. He considers therefore, that they have a reasonable expectation that their personal information will remain redacted.
 51. The Commissioner considers that whilst the complainant may have a legitimate interest in the details of the surveyor, disclosure will in effect be making an unrestricted disclosure of personal data to the general public on the strength of the requester's private interests. This could constitute a disproportionate and unwarranted level of interference with the individual's rights and freedoms.
 52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

54. The Commissioner has therefore decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Right of appeal

55. 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

56. 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.
57. 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

Janet Wyles
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