

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

### **Decision notice**

**Date:** 19 May 2022

**Public Authority:** Kirklees Metropolitan Council  
**Address:** Civic Centre 3  
Market Street  
Huddersfield HD1 2EY

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

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1. The complainant requested information from Kirklees Metropolitan Council ("the Council") contained in user evidence forms ("UEF") provided to the Council by witnesses as to the long-term use of a claimed public right of way.
2. The Council relied on regulation 13 of the EIR (personal information) to withhold some of the information, specifically the name, full address, date of birth, telephone number, occupation, previous address and signature of the witnesses who had completed the forms.
3. The Commissioner's decision is that all of the withheld information engages regulation 13(1) of the EIR.
4. The Commissioner does not require the Council to take any steps.

#### **Request and response**

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5. On 16 July 2021, the complainant made the following request for information:  
  
"Thank you for this... I look forward to receiving the documents, however I insist that all UEFs must be un-redacted for the following reasons:

It is a fundamental right to know ones accusers.

See

<https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/davis-2.htm>

I spoke this morning with the ICO. They can see no justification for withholding the information under GDPR and indeed noted, with amusement, the fact that the UEFs explain that the forms may be revealed. You may wish to contact them yourself for confirmation.

<https://ico.org.uk/>

PINs already has already published guidance on this.

See <https://www.gov.uk/government/publications/planning-inspectorate-privacynotices/>

If you continue to refuse to reveal your witnesses then their "evidence" is not admissible and your argument, such as it is, fails and you should withdraw.

If you do not wish to withdraw, please treat my request for un-redacted UEFs as a Freedom of Information request."

6. The Council responded on 16 September 2021 citing regulation 13 of the EIR (personal information) as the basis upon which to withhold the information.
7. Following an internal review, the Council wrote to the complainant on 11 November 2021. It confirmed its view that the information had been correctly withheld under regulation 13 (personal information).

### **Scope of the case**

8. The complainant contacted the Commissioner on 11 November 2021 to complain about the way their request for information had been handled.
9. The complainant asserted that the veracity of some witness statements was in doubt and could only be proved if the full name, date of birth, address and contact details of the witnesses were disclosed. The complainant argued that the witness evidence was inadmissible if full identities were not disclosed. The complainant also argued that due to specific wording on the UEFs, the witnesses were aware that the information they gave could be made public at a public inquiry.
10. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exception at regulation 13 of the EIR (personal information).

## **Reasons for decision**

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### **Regulation 13 personal information**

11. 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.
12. 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 UK General Data Protection Regulation ("UK GDPR").
13. 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.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. Having considered the withheld information which consists of the names, dates of birth, and contact details (including full addresses) of

individuals who gave written evidence about the long-term use of a claimed public right of way, the Commissioner is satisfied that such information both relates to and identifies the individuals in question. This information therefore falls clearly within the definition of "personal data" in section 3(2) of the DPA.

20. 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.
21. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
22. 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.
23. 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 GDPR**

24. 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>1</sup>.

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<sup>1</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:-

25. In considering the application of Article 6(1)(f) of the UKGDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether 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.
26. 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**

27. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
28. The Commissioner questioned the Council as to whether a legitimate interest had been identified and the Council responded that there was a legitimate interest in the public understanding that the Council had properly handled an issue regarding a public right of way. The Council further stated that a landowner would also have a legitimate interest in knowing whether a witness giving evidence as to the long-term use of a disputed public right of way had lived in the area long enough, and at a close enough proximity to the public right of way, to be able to make the statements they made in the UEFs. However, it is the Council's view that the redacted information already provided to the complainant addresses the legitimate interests identified.

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"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

29. The Commissioner recognises that the complainant has a legitimate interest in trying to determine the veracity of witness statements, as it is the complainant's belief that some of the witness statements may be false. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the withheld information and has therefore gone on to consider the necessity test.

***Is disclosure necessary?***

30. '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 EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

31. The Council argued that disclosure of the withheld information was not necessary to satisfy the legitimate interest in this case because any legitimate interest was satisfied by the information which had already been provided to the complainant, namely:

- the area in which the witness lived along with their postcode,
- the length of time the witness had lived both at that address and in the area generally,
- details of how the witness used the disputed route and their observations of its use.

32. The Council argued that the information already provided to the complainant was sufficient for the purpose of determining whether a UEF was relevant to the issue of the disputed public right of way, i.e., that a witness lived locally and had used the public right of way over a number of years.

33. The Council also explained that the UEFs formed a significant part of the evidence of use of a way, which supported the making of a Definitive Map Modification Order (the "Order") by the Council and subsequent confirmation of the Order by the Secretary of State. The evidence contained in the unredacted elements of the UEFs was open to challenge by objectors to the Order as part of the proper process for making the Order.

34. The Commissioner asked the Council to explain the wording on the UEF which stated: "The information you give will eventually become public and may be used as evidence at a public enquiry." The Commissioner is

aware that the complainant believes this wording means that the withheld information should be disclosed.

35. The Council explained that the wording appears on the form after the section where the witness enters their personal details and relates only to the written evidence given.
36. The Council went on to explain in detail what happens to the information contained in UEFs at the various stages of making an Order and this explanation is set out in paragraphs 37 to 39 below.
37. Prior to determination of an application for an Order, the only information contained in UEFs that would be made publicly available would be those parts that do not comprise personal data: **Dainton v IC & Lincolnshire CC** (EA/2007/0020). Should an Order be made, the UEFs on file, in partially redacted form (with names, full address and contact details, etc, redacted), would be available for public inspection, along with other documentary evidence taken into consideration, in the six-week period following publication of notice of making of an Order ("Publication of Notice Stage"): paragraph 3(8) of Schedule 15 of the Wildlife and Countryside Act 1981.
38. In this particular case, relating to the route now recorded as Restricted Byway Holmfirth 231 (following confirmation of an Order by the Secretary of State), the UEFs and other documents were made available for inspection by appointment at Holmfirth Library & Information Centre, 47 Huddersfield Road, Holmfirth, West Yorkshire HD9 3JH and at Kirklees Customer Services, Civic Centre 3, Huddersfield in normal opening hours.
39. If a public enquiry were to be held, the Council would contact the witnesses who have submitted UEFs and ask them if they are willing to give evidence at the enquiry. If they said no, then no additional personal data would be disclosed. If they agreed to be called as a witness, the Council would obtain written consent at this stage for other personal data (including name and address and possibly occupation) to go into the public domain. Other personal data including contact details would not be disclosed, even at a public inquiry.
40. The Commissioner has decided in this case that disclosure of the withheld information to the world at large is not necessary to meet the legitimate interest in disclosure. Therefore, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

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



## Right of appeal

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42. 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)

43. 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.
44. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**