

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **10 January 2022**

Public Authority: **Gravesham Borough Council**

Address: **Civic Centre
Windmill Street
Gravesend
DA12 1AU**

Decision (including any steps ordered)

1. The complainant has requested information held by Gravesham Borough Council (the council) about flooding to his land.
2. Whilst the council provided the complainant with some information in response to the request, it is the Commissioner's decision that parts 1, 3, 4 and 5 of the request involve the complainant's own personal data, and are therefore exempt under regulation 5(3) of the EIR.
3. With regard to part 2 of the request, the Commissioner is satisfied that this is third party personal data, and that the council is entitled to rely on regulation 13 of the EIR when withholding this information.
4. The Commissioner has found a breach of regulation 14(2), and regulation 11(4), of the EIR, as the council failed to issue both a refusal notice, and carry out an internal review, within the statutory timescales.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 19 July 2020, the complainant submitted five separate requests for information. The council subsequently confirmed that they were to be dealt with as one request. The five parts to the request were as follows:

Part 1

'We request all copies of emails between the Environment Department and [neighbour's name and address redacted], following a site visit to our property [complainant's address redacted], on 7 May 2020.'

Part 2

'In an email from [name redacted] to [name redacted] sent on 28th March 2017 and 08:04, [name redacted] stated: "A block plan is also attached, the rainwater harvest tank was not installed, the treatment plant is installed approximately in the area where the rainwater harvest tank is indicated." We request a copy of the block plan sent to [name redacted] please.'

Part 3

'In an email written by [name redacted], Manager, on 14 May 2020, he set out the salient points of the virtual meeting. The email states that STG and [name redacted] were going to try and find a neutral third party consultant/company to carry out water sampling. He did say that the virtual team would have to have further discussions about how this would be paid for.'

We would like to request what STG and [name redacted] found out with regards to this matter.

Were further discussions had after their investigation into this? If so we request details of the discussions.

We are very interested in any new contacts we can make with any consultant or company that they found, as we would be able to call on their services as they would be satisfactory to the Investigative Team as they had sourced them.'

Part 4

'We would like to request any details between [name redacted] Manager, STGBC and [neighbour's name and address redacted]

following the virtual joint departmental case review held on 14/5/2020, to consider our request for the cessation of effluent discharge from 27 using Section 59 of the Building Act 1984.'

Part 5

'We would like to request any emails between [name redacted] and [neighbour's name and address redacted] following the virtual joint departmental case review held on 14/5/2020 to discuss our request to use Section 59 of the Building Act 1984 to investigate the effluent discharge onto our property from [neighbour's address redacted].'

7. On 19 August 2020, the council contacted the complainant to advise that it was to withhold the information relevant to parts 1-4 of the request under regulation 12(3), and regulation 13, of the EIR. It went on to then say '5-nil' before concluding its response.
8. On 19 August 2020, the complainant requested an internal review, and on 30 November 2020, the council provided its response.
9. With regard to part 1 and 4 of the request, the council upheld its previous decision that this information should be withheld under regulation 12(3) and regulation 13 of the EIR. With regard to part 2, 3 and 5 of the request, it stated that it had not previously applied the legislation correctly, and would further consider this and issue a new response. On 14 December 2020, the council then provided the complainant with a revised response.
10. With regard to part 2 of the request, the council advised that the information had been provided in confidence by the neighbour's representative, that they would have had no expectation that this information would be disclosed, and that to do so would be unfair and unlawful and would breach the first data protection principle. The council also provided an answer to the questions set out within part 3 of the request, and then finally advised that it did not hold any information relevant to part 5 of the request.

Scope of the case

11. The complainant contacted the Commissioner on 15 December 2020, to complain about the way his request for information had been handled.
12. The complainant states that he believes that the council has failed to disclose all the relevant information that it holds. He has also raised concerns about the time that it took the council to respond to his request.

13. The Commissioner is to examine whether any parts of the complainant's request involve the complainant's personal data (which would be exempt from disclosure under the EIR), or third party personal data.
14. If appropriate, the Commissioner will then decide whether there is any further information held by the council which should have been provided to the complainant in response to his request.
15. The Commissioner will also consider the timeliness of the council's responses, as requested by the complainant.

Reasons for decision

Regulation 5(3) – the complainant's own personal data

16. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR does not require the council to disclose this information.
17. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:
'any information relating to an identified or identifiable living individual'.
18. The two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
19. The complainant has raised concerns with the council about regular flooding to his garden, which he believes to be caused by defective drainage in a neighbour's field.
20. The Commissioner understands that following receipt of the complainant's concerns, a council officer visited his property, and the neighbours were asked to take certain action. However, the complainant then raised further concerns with the council as he did not believe the problem to be fully resolved.
21. It is the Commissioner's view that some of the information which has been requested is likely to be the personal data of the complainant. He is clearly identifiable from information held by the council about the matter of flooding in his garden, and the information is significant and biographical to him, and the land which he owns. The Commissioner is

therefore satisfied that this information both relates to and identifies the complainant.

22. The information requested in parts 1, 3, 4 and 5 of the request directly relates to concerns raised about the adequacy of the neighbour's drainage system, and the allegations of the detrimental effect that this drainage system was having to the complainant's garden. It is the Commissioner's opinion that such information would be the personal data of both the complainant, and the neighbour.
23. In the Commissioner's published guidance, '*Personal data of both the requester and others*'¹, he makes it clear that in circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, i.e. it is 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
24. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA, or regulation 5(3) of the EIR.
25. Taking the above into account, the Commissioner finds that regulation 5(3) is engaged in relation to parts 1, 3, 4 and 5 of the request, as it is the personal data of the complainant. As a result, this information is exempt under the EIR, and the Commissioner is not required to consider further whether the council's response to these parts of the request was correct.
26. With regard to part 2 of the request, the complainant asked for a copy of a block plan that relates directly to the neighbour's drainage system and land. It is the Commissioner's opinion that this information does not directly relate to the complainant, or his land, and he would not be identifiable from such information. He therefore considers it to be the personal data of the neighbour only.
27. The Commissioner has therefore gone on to consider whether part 2 of the request is subject to regulation 13 of the EIR, on the basis that it

¹ [s40 Personal data of both the requester and others v2.0 \(ico.org.uk\)](https://ico.org.uk/s40-personal-data-of-both-the-requester-and-others-v2-0/)

does not constitute the complainant's own personal data, but is the personal data of a third party.

Regulation 13 – third party personal data

28. 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.
29. 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.
30. 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 data protection principles.
31. The Commissioner is satisfied that the information requested relates to a living individual (the neighbour) who is identifiable from that information, and therefore the requested information falls within the definition of 'personal data' in section 3(2) of the DPA.
32. 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.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

34. 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'.
35. In the case of an FOIA 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.
36. 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

37. 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

38. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

39. 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

40. In considering any legitimate interest in the disclosure of the requested information under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

² 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) 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".

41. 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.
42. In this case, the Commissioner accepts that the complainant has a legitimate interest in knowing some of the details held by the council about the neighbours' drainage provision, where it directly relates to the problems he is experiencing on his own land.
43. However, it is the Commissioner's opinion that the disclosure of the information relevant to part 2 of the request would not serve this legitimate interest. It is clear from the council's representations that it has already provided the complainant with a great deal of information in response to his complaint about the flooding to his land. It has also provided answers to questions and explanations in response to his queries and requests for information.
44. The Commissioner does not consider it to be the case that the block plan requested would add any further understanding or insight into the problem of flooding on the complainant's land, and any further remedial action which may, or may not, be required to resolve this. Furthermore, the Commissioner has been unable to identify a wider legitimate interest in the disclosure of this information.
45. As a result, the Commissioner does not consider there to be a legitimate interest in disclosure of the information held by the council relevant to part 2 of the complainant's request. He has therefore not gone on to consider the balancing test. As disclosure is not necessary, there is no lawful basis for the processing, and it therefore does not meet the requirements of principle (a).
46. The Commissioner is therefore satisfied that the council is entitled to rely on regulation 13(1), by way of regulation 13(2A)(a) and is not required to disclose this information.

Procedural matters

Regulation 14 – refusal to disclose information

47. Where a public authority refuses a request, it is obliged under regulation 14 to inform the complainant why the request is being refused within 20 working days of the request being received. In this instance, the complainant submitted his request on 19 July 2020, and the council provided its response, refusing part of the request on 19 August 2020. Whilst the Commissioner has found a breach of regulation 14 of the EIR,

it should be noted that the council's response was only just outside the statutory time period.

Regulation 11 – representations and reconsideration

48. In broad terms, where a public authority initially refuses to provide the requested information, regulation 11 provides an applicant with the right to ask the public authority to reconsider that decision. This is commonly referred to as the right to request an internal review. Under regulation 11(4) the public authority is required to notify the applicant of the outcome of its internal review within 40 working days of the request to carry out such a review being received.
49. In this instance, the complainant requested an internal review on 19 August 2020, but as the council did not provide its response until the 30 November 2020, it has breached regulation 11(4) of the EIR.

Other matters

The complainant's personal data and the DPA

50. The Commissioner cannot require a public authority to take action under the DPA via an EIR decision notice. However, given that he has found parts 1,3, 4 and 5 of the request to involve personal data, he regards it to be appropriate to recommend to the council that it consider issuing a new response to the complainant in order to comply with its data protection obligations.

The council's engagement with the Commissioner

51. The Commissioner has found it to be necessary to record within this decision notice his concerns about the way in which the council has responded to his enquiries in this case.
52. Whilst the council has provided a general response about its handling of a number of requests received from the complainant, it has failed to provide copies of information and direct responses to the Commissioner's questions about how it dealt with the specific request under consideration.
53. The council has advised the Commissioner that it regards this to be a matter that has already been fully addressed. It states that there were some administrative errors in the way that it originally dealt with the request (it states that the wrong advice was initially applied to some of the complainant's questions), and accepts that this may have caused

some confusion to the complainant, but that this was corrected at the internal review.

54. The council also argues that the issues relating to the request have been reviewed and closed to the satisfaction of the Local Government and Social Care Ombudsman, and that a disproportionate amount of public money and resources have already been expended on this singular matter.
55. The council goes on to say that it has attempted to provide information and explanations to the complainant both in respect of this request, and a number of other requests that he has made about the same issue. However, despite all its efforts to try and assist the complainant, the council states that any response it provides results in further communications, questions and information requests. The council argues that the complainant is attempting to use various channels to reopen a matter which has been fully addressed and is considered closed.
56. The council states that it is reluctant to expend already depleted council resources and officer time on a matter, the outcome of which will add no value to the issue presently at hand. It states that it is unlikely to be considered in the public interest to place this additional burden on public funds and use of valuable officer time, which could be better used elsewhere to serve the public, especially during the pandemic.
57. The Commissioner appreciates that this is a difficult time for all public authorities. Furthermore, he fully accepts the council's point that the significant delay between the receipt of the complaint by his office, and his subsequent investigation letter, creates an additional burden on the council's resources when providing a response, particularly if staff that dealt with the original request are no longer at the council.
58. However, whilst the Commissioner is sympathetic to the council's position, he expects a full response to any enquiries he may make to any public authority. In the circumstances of a case such as this, it would not be unreasonable for a public authority to request additional time to respond, so that it is able to manage the resources it has, and have the time it needs to consider the matter properly. This is also an opportunity for the council to review and revise its previous position, applying new exceptions to the request, if it believes it is appropriate to do so. It is not for the public authority to decide what information the Commissioner requires in order to make a decision.
59. In this case, after careful consideration, the Commissioner concluded that he was able to reach a decision based on all the information available to him; therefore an information notice was not required. However, he would ask that the council, in future, provide the

information that he has requested. A failure to do so is likely to result, at the very least, in an information notice being issued.

60. A record has been made of the poor engagement that the Commissioner received from the council in this case. This matter may be revisited should similarly poor engagement be experienced by the Commissioner in any future cases relating to this council.

Right of appeal

61. 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

62. 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.
63. 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

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