

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

Date: 25 January 2024

Public Authority: Newport City Council
Address: Civic Centre
Godfrey Road
Newport
NP20 4UR

Decision (including any steps ordered)

1. The complainant requested information about dropped kerb applications. Newport City Council (the Council) provided some information but withheld information about a specific application under section 40(2) (third party personal data) of the FOIA. During the course of the Commissioner's investigation the Council agreed that the request falls to be considered under the EIR as opposed to the FOIA and sought to rely on regulation 13 (third party personal data) of the EIR. The Commissioner's decision is that the Council correctly relied on regulation 13 to withhold the requested information. The Commissioner does not require any steps to be taken.

Request and response

2. On 15 May 2023, the complainant wrote to the Council and requested information in the following terms:

"Your web pages on dropped kerbs (<https://www.newport.gov.uk/en/Transport-Streets/Road-Street-Maintenance/Dropped-Kerbs.aspx>) very clearly state that only one

vehicle crossing is allowed per property" and that the proposed site must be 10m from a minor road".

I understand that NCC approved the installation of dropped kerbs at [address redacted] in November 2020. These dropped kerbs will be well within 10m of the junction with [street name redacted] and the second set of dropped kerbs at this property. Despite the very clear wording of your policy I understand that officials consider the policy to be "certain criteria that generally must be adhered to" but that "these are a guide only" which NCC may deviate from "in certain cases" because the Highways Authority has "limited scope for discretion".

I would like to see any documents that NCC holds that set out guidelines for officials on the scope for their discretion in terms of approving dropped kerbs that do not comply with the criteria set out in the online application.

Furthermore, I would like to see a copy of the application pertaining to dropped kerbs at [address redacted] together with any correspondence you hold between officials and with elected members and with the applicant regarding said application.

Finally, I would like to see any statistics you hold on the number of applications for dropped kerbs that have been approved by NCC in the period 2018 to 2023 including how many of these did not comply with the criteria set out in the policy on siting (10m from a junction with a minor road) and space (only one crossing per property) where discretion has been applied.

3. The Council responded on 10 July 2023. It provided a copy of the guidelines used by officials, and statistics on dropped kerb applications. The Council stated that information relating to the specific property referenced in the request was exempt under section 40(2) of the FOIA.
4. On 21 July 2023 the complainant requested an internal review of the handling of the request. They indicated that the "scope for discretion document" did not provide information on the discretion officers have, but rather a list of bullet points of what is permitted or encouraged. They also disputed the Council's application of section 40 of the FOIA to information about the property in question. Finally the complainant asked for clarification in relation to the statistics provided in relation to dropped kerb applications.
5. The Council provided the outcome of its internal review on 18 August 2023. It confirmed that it did not hold any additional recorded information relating to guidance used by officers in terms of discretion used when considering dropped kerb applications. It also clarified the query concerning the statistics relating to dropped kerb applications.

Finally, the Council upheld its decision that information about the property in question was exempt under section 40 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 21 September 2023 to complain about the way their request for information had been handled, and specifically whether the Council had correctly withheld information about the property referred to in the request.
7. During the Commissioner's investigation, the Council agreed that the request should have been considered under the EIR as opposed to the FOIA. It reconsidered the request under the EIR and confirmed that it considered regulation 13 of the EIR applied to the remaining withheld information.
8. In light of the above, the scope of the Commissioner's investigation in this case is to determine whether the Council correctly applied regulation 13 to the request.

Reasons for decision

Is the information environmental?

9. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

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

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

10. The Commissioner considers that applications for dropped kerbs are a measure or an activity that affects or is likely to affect elements of the environment, namely land and landscape and therefore falls within the definition of environmental information provided by regulation 2(1)(c) of the EIR.

Regulation 13 – third party personal data

11. Under regulation 13(1) of the EIR, information is excepted from disclosure if it's the personal data of someone 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 (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 General Data Protection Regulation (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(1) cannot apply.
14. 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?

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. The withheld information in this case comprises correspondence between the Council and the individual that submitted a dropped kerb application for the property referred to in the request.
19. The Commissioner is satisfied that the requested information is personal data. Following the Tribunal's decision in the case of *England & L B of Bexley v Information Commissioner* (EA/2006/0060 & 0066), the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

Commissioner's established position is that the address of a private property constitutes the personal data of its owner/occupier.

20. Therefore, even if the owner's name was redacted from the information, they would remain identifiable from the address, which the complainant already knows.
21. Information about work carried out or proposed to be carried out on that property, and details about the property itself, also provides information relating to the owner – it provides insight into work carried out by the individual on their own private property.
22. The requested information is therefore personal data as it is information about a private property owned by an individual who can be identified via the address of the property.
23. In light of the above, the Commissioner is satisfied that the withheld information falls within the definition of personal data as set out in the DPA.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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”.

27. 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.
28. 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

29. 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.

30. 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.
31. 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

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, 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.
33. 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.
34. The Commissioner is satisfied in this case that the complainant has a legitimate interest in knowing the details of the application at the

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".

property in question as he understands that they live near to the property.

Is disclosure necessary?

35. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

37. 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 FOIA 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.
38. 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.
39. 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.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

41. The Council does not consider there is any wider legitimate interest in disclosure of the withheld information. It also does not consider that disclosure of private correspondence between the individual and the Council is necessary other than to satisfy the private concerns and interests of the complainant in this case. The Council believes that the individual would have had no expectation that their private correspondence would be disclosed into the public domain. As the complainant lives near to the property in question, the Council considers that disclosure has the potential to cause unjustified harm to the individual concerned. The Council believes the individual's rights and freedoms override any legitimate interest in disclosure of the withheld information.
42. The Commissioner is satisfied that, in this case, the individual concerned would have a reasonable expectation that their personal data would not be disclosed to the wider world in response to an EIR request. The information concerns them in a private capacity. It was provided for the specific purpose of obtaining approval to install a dropped kerb at their property. Unlike planning application information, the Council does not routinely publish information about dropped kerb applications online, and there is no legal requirement for it to do so as there is in the case of planning applications. The individual would not therefore reasonably expect that their personal data would be disclosed in response to an EIR request, into the public domain. The Commissioner considers that disclosing details about their private property, when that is not expected, would be seen as intrusive, and would be likely to cause them distress.
43. Based on the above factors, the Commissioner is satisfied that the complainant's legitimate interest is not sufficient to outweigh those of the data subject and their 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.
44. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
45. The Commissioner's decision is that the Council is entitled to withhold the information under regulation 13(1) of the EIR, by way of regulation 13(2A)(a).

Right of appeal

46. 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

47. 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.
48. 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

Joanne Edwards
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