

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 June 2024

Public Authority: Wakefield Council
Address: County Hall
Wakefield
West Yorkshire
WF1 2QW

Decision (including any steps ordered)

1. The complainant has requested a copy of a particular planning contravention notice (PCN) issued by Wakefield Council (the council).
2. The Commissioner's decision is that the council is entitled to rely on regulation 13 (personal information) of the EIR as its basis for refusing to provide the requested information.
3. The Commissioner does not require the council to take further steps as a result of this decision notice.

Request and response

4. On 11 October 2023, the complainant wrote to the council and requested information in the following terms:

"I would like to make a request under the FOI for the information contained on the PCN sent out in July 23 to [address redacted] relating to a breach in planning for dog kennels."
5. The complainant confirmed that they would accept the redaction of "sensitive information such as names" from the relevant information before disclosure.

6. On 7 November 2023, the council provided its response to the complainant, advising that it considered the requested information to be exempt "in line" with regulation 12(3) and regulation 13 of the EIR.
7. The council also advised that it considered the exception at regulation 12(5)(b) (the course of justice) of the EIR to apply to the requested information, and that the public interest favoured maintaining the exception in this case.
8. On 9 November 2023, the complainant contacted the council. They said that "considering the second PCN information has apparently already been sent to me, yet in a different format," they questioned why the council had refused their request. The complainant also said it was not uncommon for information to be shared between all interested parties, and that this allows the opportunity for information to be disputed.
9. On 9 November 2023, the council responded, explaining to the complainant that any disclosure in response to a request under the EIR is not just to the individual, but to the world at large, and that this had been considered when issuing the refusal notice.
10. The council went on to say that the planning department may, in certain circumstances, provide an individual with information about an investigation which involves them, which they would not disclose to the "world at large" in response to an information request under the EIR. The council said that if the complainant believed that they had a "legal entitlement" to certain information that was held, then this would have to be dealt with directly by the planning department.
11. The complainant has said that they contacted the council again on 24 January 2024, to express their continued dissatisfaction with the council's responses to the request. The complainant said that they considered that the information should be disclosed on the basis that the notice had already been served, and will be valid for all of the time that the recipients of the PCN reside at the relevant property. They argued that the release of the information would not cause detriment to any future investigations, and believe that a copy of the requested information should be provided in a redacted format.
12. As far as the Commissioner is aware, the council did not respond to the complainant's correspondence of 24 January 2024.

Scope of the case

13. The complainant is concerned about the council's decision to withhold the requested information.
14. Whilst the council did not formally acknowledge it as such, the Commissioner considers that the complainant's correspondence of 9 November 2023, expressed dissatisfaction with the council's handling of the request, and is therefore a request for an internal review. The Commissioner has taken the council's response of the same date to be the internal review response.
15. During the Commissioner's investigation, the council advised that it was no longer relying on the exception at regulation 12(5)(b) of the EIR, but still considered the requested information to be exempt from disclosure under regulation 13 of the EIR.
16. The Commissioner will therefore decide whether the council is entitled to rely on regulation 13 of the EIR as its basis for withholding the requested information.

Reasons for decision

Regulation 13 – third party personal information

17. Regulation 13 of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than that of 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). 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(2A) of the EIR cannot apply.
20. 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?

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 council has advised that the requested PCN relates to a residential property. It has said that it considers the withheld information to be the personal data of an individual, or individuals, who reside at that property.

26. The Commissioner accepts that certain matters relating to planning will focus primarily on the land itself. Therefore, not every set of information relating to planning will be personal information. However, a PCN is issued directly to an individual, or individuals, and relates to activities which have been carried out (or not carried out) in relation to land that they are considered to be responsible for.

27. Having considered the withheld information, the Commissioner is satisfied that it relates to an individual or individuals. Furthermore, it is the Commissioner's opinion that if any names and the address were to be redacted, as suggested by the complainant, the remaining information would still allow individuals residing at the relevant address to be identified, at the very least by the individual making the request, and, given the matter which the PCN relates to, members of the local community.

28. The Commissioner is satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA.

29. The fact that information constitutes the personal data of an identifiable living individual, or individuals, 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.

30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. 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”.

32. 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.

33. 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

34. 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”¹.

35. 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;

¹ 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) the EIR (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 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 sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
36. 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

37. 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.
38. 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.
39. The complainant has argued that it is important that the local community is made fully aware of the planning issues relating to the relevant property; they have said that the noise caused by the dogs being kept within the buildings on the land is having a detrimental effect on both them and their neighbours.
40. The council has said that it accepts that the requester has a right to certain information in this particular instance, as they have had some involvement in the matter to which the request relates.
41. The Commissioner is satisfied that there is a legitimate interest in understanding the actions which are taken, and decisions that are reached, in relation to planning matters, and that the principle of transparency and openness about the planning process is of relevance in this case. Given this, the Commissioner considers the legitimate interest to be broader than the complainant's own interest.

Is disclosure necessary?

42. '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.
43. 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

44. 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.
45. 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.
46. The council has said that this is a matter that concerns a neighbour dispute, and it does not consider that the relevant individual, or individuals, would expect the information contained within the PCN to be disclosed to the world at large in response to an information request. The council says that it considers that there would be a breach of the relevant individual(s) right to privacy, should the requested information be placed into the public domain, and may have a negative impact and cause harm or distress to an individual.
47. The council has also said that it has provided some information directly to the complainant, due to their involvement in matters to which the request relates. It says that the planning officer has been in regular contact and has kept the complainant fully informed on the position of the case, and that this has included the provision of details relating to the PCN. The council has said that it considers that the information that it has released to the complainant should be sufficient for their "stated purposes."
48. In the Commissioner's view, a key issue is whether the individual(s) concerned has 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.

49. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to an individual.
50. The Commissioner understands that a PCN is issued when it appears that a breach of planning control may have occurred and where more information is required to decide what, if any, enforcement action to take. The council has no statutory obligation to publish information relating to a potential breach of planning control, and there is no requirement to include this information within the council's register of enforcement notices, stop notices and breach of condition notices.
51. The Commissioner has taken into account the complainant's argument that they have received similar information from the council, and therefore there is no justification for withholding the information in response to their request.
52. However, the Commissioner considers it important to note that any information which was released directly to the complainant was done so as a result of their particular involvement in matters that relate to the PCN. The Commissioner considers that a release of information about a PCN in response to an EIR request to be significantly different, as it would be a release to the "world at large", and not just to the complainant.
53. The Commissioner is satisfied that it would not have been within the reasonable expectations of the individual(s) that the PCN requested by the complainant would, at the time of the request, be made available to the "world at large" by way of a request made under the EIR. In such circumstances, the Commissioner considers that disclosure would be likely to cause harm or distress to an individual.
54. 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.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.
56. The Commissioner's decision is that the Council is entitled to withhold the information under regulation 13(1) of the EIR.

Right of appeal

57. 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

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF