

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

Date: 24 August 2015

Public Authority: Tewkesbury Borough Council
Address: Gloucester Road
Tewkesbury
GL20 5TT

Decision (including any steps ordered)

1. The complainant has requested contact and correspondence information from Tewkesbury Borough Council ("TBC") relating to a supermarket car park. TBC refused this citing Regulation 12(4)(e) of the EIR as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the information is exempt by virtue of Regulation 5(3) because it is the complainant's personal data.
3. No steps are required under the EIR.

Request and response

4. On 1 November 2014, the complainant requested information of the following description:
 - "1. The date and time of all telephone calls and meetings with the developer, Tesco, or any other agent or interested party on the issue of the height of the car park.
 2. Copies of all emails or letters on the subject of levels internally between such parties.
 3. Copies of all minutes or Record of decisions, or similar documents, where this subject of the height of the car park has been mentioned internally or between such parties".
5. He reiterated this in a request of 5 November 2014 as follows:

"As you were unable to furnish me with the information requested, please consider this an FOI request.

I wish to be furnished with all council correspondence, internal and external, regarding the Car Park levels at the Durran's Garden Centre Site.

Please include internal meetings and telephone calls with contractors.

Please acknowledge this FOI".

6. On 19 December 2014, TBC responded. It disclosed some information but refused to provide the remainder and cited Regulation 12(4)(e) of the EIR as its basis for doing so. It also cited section 42 of the FOIA as its basis for withholding other information. Following an internal review TBC wrote to the complainant on 4 February 2015. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 6 March 2015 to complain about the way his request for information had been handled, providing the relevant requests and responses set out above.
8. During the course of Commissioner's investigation, TBC provided him with copies of what it had disclosed to the complainant within the scope of the request. Broadly, these were copies of email exchanges concerning the car park, the majority of which appeared to be exchanges between the complainant and TBC. TBC also provided the Commissioner with the information that fell within the scope of the request but which remained withheld from disclosure.
9. The Commissioner has considered whether TBC is entitled to withhold under EIR that information within the scope of the complainant's request which has not been disclosed.

Reasons for decision

10. The Commissioner notes, by way of background, that the complainant is particularly concerned about the impact of a newly-built supermarket car park on his property. The concern focusses on the relative height of the car park and the extent to which it overlooks his property. He has been in extensive correspondence with TBC about this.

Is the requested information environmental?

11. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR. Under regulation 2(1)(c), any information about measures (including administrative measures), affecting or likely to affect the elements and factors referred to in regulation 2(1)(a) and (b), will be environmental information.¹ The request relates to the building of a superstore carpark and local residents’ concerns about the impact of this on their property. It is therefore understandable that TBC should consider the request in the round under the EIR.²
12. It had made some disclosure of environmental information to the complainant. The Commissioner then had to consider what remained.

Is any of the information personal data?

13. Personal data is information relating to a living individual and which is biographically significant about that person. A requester’s personal data is absolutely exempt from disclosure under the EIR by virtue of Regulation 5(3). Under Regulation 5(3) there is no obligation on a public authority to provide information “to the extent that the information requested includes personal data of which the applicant is the data subject”.
14. The complainant’s request is made against the background of concerns he has raised with TBC and these relate to his property which is also his home. It is therefore wholly possible that any information within the scope of the request may make reference to him such that it can be considered his personal data. If held, it would relate to him, he could be identified from it and it would be of biographical significance to him. In reaching his view as to whether the requested information included

¹ “(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)”.

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

personal data, the Commissioner has had regard for his own published guidance on what personal data is.³

15. The appropriate access regime for an applicant's own personal data is section 7 of the Data Protection Act 1998 (DPA). The Commissioner recognises that it is not always obvious that requested information is the applicant's personal data.
16. There are no express refusal provisions within the EIR where the requested information is the personal data of the applicant. As a consequence, where the scope of a request may include the personal data of the requester, the Commissioner prefers a public authority to refuse to confirm or deny under EIR whether it holds the requester's personal data. It should then deal with that element of the complainant's request under its information access obligations in the DPA.
17. While this may seem obtuse to anyone in the middle of correspondence with a public authority on a given matter, it is important to remember that the EIR is an information access regime for the public at large. Put simply, anything a public authority discloses to one member of the public under the EIR, it should be prepared to disclose to any other member of the public under the EIR. It is unfair to assume that an individual who makes a request under the EIR about a matter close to their interests would be content for information about that matter to be made public to anyone else who requested it. This is particularly the case where that individual can be readily identified from that information. The complainant here can be readily identified from the withheld information in this case.
18. It may be that an individual who can be readily identified from withheld information would be wholly content for that information to be released to anyone who asks for it with any identifying information intact. An individual may also take steps to put information about themselves and their concerns into the public domain, including information which identifies them.
19. However, a public authority cannot assume consent for public disclosure and would be acting unfairly if it did so. Regulation 5(3) recognises this and ensures that, in effect, a requester's own personal data drops out of the EIR. For this reason, a public authority should, strictly speaking,

³ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

refuse to discuss under EIR whether it holds a requester's personal data and make clear that any response it gives about access to that individual's personal data is being made under section 7 of the DPA.⁴

20. It is important to note that section 7 of the DPA gives an individual the right to access information to which he or she is entitled. This right is also subject to exemptions and, ultimately, a person can exercise this DPA right of access through the courts.
21. In this particular case, TBC has confirmed to the complainant that it holds other information within the scope of his request and originally applied Regulation 12(4)(e) to it. From a purely practical perspective, the Commissioner considers that it would probably be very unhelpful to the complainant to now introduce a "neither confirm nor deny" response even though, technically speaking, that would be the most appropriate one to give. The complainant has been dealing with TBC on this matter extensively and has received some information within the scope of his request from TBC.
22. Having read through the information which remains withheld, the Commissioner is satisfied that it is the complainant's personal data and that any dialogue between the complainant and TBC about access to it should now be under the subject access provisions of the DPA and not the EIR.
23. TBC should have explained to the complainant that it must consider separately his access to his personal data and his access to (other) environmental information within the scope of his request. Different legal considerations apply. The Commissioner recommends that it could address this under separate headings within correspondence. The question of which information access regime is applicable becomes crucial once the matter becomes a formal complaint with the regulator.
24. The Commissioner is an independent regulator and is therefore not under a duty to act either on behalf of a complainant or a public authority. However, he is also mindful of his role as regulator of the DPA. In light of his responsibilities under the DPA, the Commissioner considers he has a duty to take positive steps to prevent the unfair disclosure of personal information under EIR which would breach the DPA.

⁴ <https://ico.org.uk/for-organisations/guide-to-data-protection/principle-6-rights/subject-access-request/>

Conclusion

25. In the Commissioner's view, the information that remains withheld within the scope of the complainant's request is his personal data. It relates to him. He can be identified from it and it is biographically significant to him. TBC should have withheld it under Regulation 5(3) because a requester's personal data is entirely exempt from disclosure under either the EIR or the FOIA.
26. The Commissioner has made further comment on this in the Other Matters section of this notice.

Other matters

27. A request for information under the DPA is usually referred to as a 'subject access request'. TBC should have drawn this to the attention of the complainant and handled this element of the request in accordance with its normal DPA subject access request procedures. For example, it is entitled to charge an administration fee of £10 for subject access requests. There is also an exemption in the DPA from the requirement to disclose requested personal data if the information in question is subject to legal professional privilege which may be applicable in this case.⁵ In any event, it should have engaged with the complainant under the DPA in respect of access to any of his own personal data that it might hold.

⁵ <https://ico.org.uk/for-organisations/guide-to-data-protection/exemptions/> (see "Legal advice and proceedings")

Right of appeal

28. 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: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Alexander Ganotis
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