

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

Decision notice

Date: 30 April 2018

Public Authority: Cheshire East Council
Address: C/O Municipal Building
Earle Street
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested from Cheshire East Council (the council) a copy of an email relating to a meeting of the staffing sub-committee. The council said that the information was exempt under the exemption provided by section 40(2) of the FOIA (third party personal data).
2. The Commissioner's decision is that the request should have been considered under the Environmental Information Regulations 2004 (EIR) however she was satisfied that the equivalent exception under regulation 13(1) applied.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 2 May 2017 complainant requested information from the council in the following terms:

"A copy of the email sent by Democratic and Registration Services Manager [name redacted] to the council's cabinet on 7 February 2013, regarding the meeting of the Staffing Sub-Committee which took place that morning. I would like attachments sent with that email to be included".

5. The council replied on 19 May 2017 and confirmed that it held this information however it said that it was exempt under section 40(2) of the FOIA.
6. The complainant requested an internal review on 5 June 2017.
7. The council completed its internal review on 28 June 2017. It said that it wished to uphold its original position.

Scope of the case

8. The complainant contacted the Commissioner on 11 July 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the information requested had been correctly withheld.
9. The Commissioner considers the scope of the case is to firstly determine whether the request should be considered under the EIR or FOIA.
10. She will then go on to determine whether the information constitutes third party personal data and whether it is exempt from disclosure under the relevant regime.

Reasons for decision

Background

11. Information connected to this complaint has previously been considered by the Commissioner and the First-Tier Tribunal (Information Rights). The background to these events that was included in the case of *Mr Ben Turner (OBO Macclesfield Express) v the Information Commissioner and Cheshire East Council (EA/2014/0009)*¹ is pertinent and those details have been partly reproduced below.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1419/Turner,%20Ben%20obo%20Macclesfield%20Express%20EA.2014.0009%20\(12.11.2014\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1419/Turner,%20Ben%20obo%20Macclesfield%20Express%20EA.2014.0009%20(12.11.2014).pdf)

"In 2011 contractors for CEBC stated work to develop a waste transfer station at Lyme Green. Work started prior to the public consultation and any application for planning permission. The costs of the project escalated beyond the budget and there were concerns that procurement and tendering procedures had been breached and the public misled. The development was abandoned at considerable cost to the public. The Council's Audit Manger produced a report dated 30th May 2012 which concluded that there were a number of failings in the way that the project had been conducted. This was discussed at the Audit and Governance Committee on 14th June 2012 and an Action Plan agreed to implement the recommendations of that report.

The report highlighted concerns relating to the actions of certain senior Council officers. Consequently a Designated Independent Person (DIP) was appointed pursuant to the The Local Authorities (Standing Orders) (England) Regulations 2001...

Schedule 3 provides that no disciplinary action may be taken against the relevant officer other than in accordance with a recommendation in a report made by a DIP.

The DIP investigation commenced in October 2012 and the report was provided to the Council in December 2012...It has subsequently been disclosed that a number of individuals left the Council's employment having exercised their right to resign. None of those senior officers criticised by the DIP for their role in this matter are now employed by the Council. That these individuals have left was at the point of their department a matter of public record.

Following the conclusion of the disciplinary proceedings...[the summary of the DIP report] was published on 17th June 2013".

12. The redacted version of the DIP report has been published by the council and can be found here:

http://www.cheshireeast.gov.uk/council_and_democracy/council_information/open-data-and-transparency/designated-independent-person-report.aspx

Environmental Information

13. The council disputed that the request should have been considered under the EIR. It said that whilst the issues that an independent investigation covered arose out of a proposed development of a site and the need for planning permission, the examination of any environmental

issues raised by such developments was not the purpose of the report produced or the subsequent disciplinary processes.

14. The Commissioner took the view in the case referred to above (*EA/2014/0009*) that the DIP report represented environmental information and should be considered under the terms of the EIR. The case proceeded under the EIR although the tribunal noted that the council did not concede that point. That outcome is consistent with the Commissioner's view that a fairly broad approach should be taken to the interpretation of the EIR in line with its overall purpose of enabling the public to participate fully in matters relating to the environment.
15. Under regulation 2(1)(c) of the EIR, environmental information is any information on activities affecting or likely to affect the elements of the environment (the Commissioner interprets the word "on" as meaning "relating to"). The Commissioner maintains that the DIP report itself (which included recommendations about action to be taken regarding the staff members concerned), is environmental because it *relates to* an activity that affected the environment, that is the aborted transfer station at Lyme Green.
16. The withheld information in this case is a continuation of the processes started by the DIP report, and focuses on the council's internal considerations. The Commissioner's view is that this information also relates to an activity that affected the environment (the transfer station at Lyme Green). It is not necessary, as suggested by the council, that the withheld information must be directly examining an environmental issue.
17. Under the EIR, there is an equivalent exception to section 40(2) of the FOIA provided by regulation 13(1). The Commissioner has exercised his discretion to consider its application below.

Regulation 13(1) – Third party personal data

18. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

15. Personal data is defined by the DPA as any information relating to a living and identifiable individual. This information relates to a member of the council's staff and it is clearly personal data.

Would disclosure breach the Data Protection Principles?

16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

17. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual or individuals concerned. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
18. In its refusal notice, the council explained that the email and attachment relate to a disciplinary matter concerning one former officer of the council. The council pointed to the Commissioner's guidance, highlighting that information relating to internal disciplinary matters would not normally be disclosed.
19. In further representations to the Commissioner, the council said that disclosure of the withheld information would not have been within the reasonable expectations of the individual concerned despite their seniority in the organisation. The council pointed out that it had entered into a compromise agreement with the staff member concerned and she would have expected legal confidentiality. For clarity, a compromise agreement is a legally binding agreement either during or following the termination of employment, and which brings an individual's employment to an end. Such agreements usually provide for a severance payment, in return for which the employee agrees not to pursue any claim or grievance that they may have in an employment tribunal.
20. The council added that the personal information relating to the staff member concerned had been considered in the Commissioner's previous decision and the associated tribunal appeal (*EA/2014/0009*). It said that the information was withheld and this had created a precedent in terms of expectations.

Consequences of disclosure

21. The council said that disclosure of the withheld information would breach the terms of the Compromise Agreement. The council said that this would be an actionable breach of the Compromise Agreement and could leave the council open to further legal action.
22. The council said that the disclosure of the withheld information would raise concerns about the integrity of the DIP process, and would also have a far-reaching effect on other disciplinary cases in this council and other public bodies. The council argued that to create an expectation that such information is disclosable would make future disciplinary investigations very difficult to undertake, as well as more costly. It said that if the usual confidentiality is undermined by the disclosure of the information requested in this case, there is a real risk that investigations of this nature will be less effective in the future.
23. The council also highlighted that the officer concerned has moved on with their life and that disclosure of this information could be distressing and have a damaging impact on employment prospects. The council explained that the DIP investigation had been undertaken on the basis that the report was a confidential one, because disclosure of its contents had the potential to cause distress and detriment to those named within it. The council argued that this extends to subsequent disciplinary processes. The council said that this is explained in the Joint Negotiating Committee for Chief Executives of Local Authorities ("JNC") guidance. This is the national negotiating body for the pay and conditions of service of Chief Executives in England and Wales.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

24. In general, there is always some legitimate interest in the disclosure of information that is held by public authorities. This is because disclosure helps to encourage the general aims of achieving transparency and accountability. It also assists people in understanding the decisions made by public authorities and to be more involved in that process.
25. The withheld information in this case is clearly linked to high profile council failures, which have been set out in the redacted version of the DIP report. This has clearly been a cause of serious concern which has damaged the council's reputation, impacted public trust and incurred a large bill for the taxpayer. There is a strong public interest in accountability and transparency about what happened in relation to this matter and the actions taken subsequently. Incomplete disclosure may undermine public confidence further.

26. The complainant has certainly made this argument. He has argued that it is important to bring transparency to the decision-making process undertaken by the council. He said that in order for those who made the decision to be accountable, it is necessary for the evidence of the decision to be released into the public domain. The complainant has noted that there is reference to payment of £45,000 in the council's Statement of Accounts 2013 for "loss of employment". He argues that there is a legitimate public interest in disclosing information about the way public money is spent, specifically in this case as there is the possibility that £45,000 may have been spent unnecessarily paying-off a very senior employee. He has argued that proper scrutiny of the pay-off is not possible without the evidence of the council's decision. He argues that it may not have been necessary for the council to provide this compensation but because the withheld information has not been disclosed, he states that he has never been able to ask the council questions as a journalist which are in the public interest.
27. The complainant highlights that the Commissioner's guidance does not specifically state that information relating to internal disciplinary matters should never be disclosed. The complainant said that this information relates to a very senior member of staff. He quotes the Commissioner's guidance as follows:

"It should be recognised that there is an increasing public expectation of transparency regarding the expenditure of public money and the performance of public authorities. This is specifically the case if there is any evidence of mismanagement by senior staff in a public authority".
28. The complainant is of the view that even in the event of any payoff, it would be legitimate for this information to be released into the public domain, given the individual's seniority and level of mismanagement that was involved meaning that they are no longer entitled to the privacy afforded by the council.
29. The complainant concludes that disclosure of the requested information would not cause "unwarranted interference with the rights, freedoms and legitimate interests" of the individual and that disclosure should therefore go ahead because it is necessary for the legitimate interest in ensuring accountability and transparency in the spending of public money.
30. However, the Commissioner has to consider, as with the disclosure of any information, that there is always the question of degree and the circumstances will not always warrant the disclosure of every last detail of a particular matter in order to satisfy the legitimate public interest.

Public authorities have to be mindful of their obligation to protect the right to privacy that individuals have where that is reasonable.

31. The council has advised the Commissioner that it does recognise that more senior officers should expect that more information may be released about them than more junior employees. However, it also has to have considerations for the compromise agreement in place.
32. The council has pointed out that the Commissioner has already made a decision in relation to the release of personal information relating to the individual, in the matters of their actions in relation to the Lyme Green Project. This information was withheld and upheld by the First Tier Tribunal.
33. The council considers that the release of the information would raise concerns over the integrity that the DIP provides which is effectively a disciplinary process as defined in the Local Authorities (Standing Orders)(England) Regulations 2001.
34. The council considers that the public knowing that the officers involved have left the council, following the results of the DIP, goes some way to satisfying the public interest.
35. The council considers that it is not legitimate or appropriate for the public to expect to see all evidence given in confidence in such a context, and that to create such an expectation would make future investigations of disciplinary breaches very difficult to undertake and less effective (as well as more costly), contrary to the public good.
36. The Commissioner has given strong consideration to the First Tier Tribunal case EA/2014/0009 and its findings on personal data as it has direct correlation with this request.
37. The Tribunal noted in that case (at paragraph 21 of its decision):
 - i. *"Disciplinary proceedings are virtually always conducted in circumstances of confidentiality. We have had regard to the policies of CEBC, they state that confidentiality "is normal practice in relation to conducting any disciplinary proceedings against Council Staff".*
 - ii. *The Joint Negotiating Committee for Chief Executives of Local Authorities (JNC) is the national negotiating body for the pay and conditions of service of Chief Executives in England and Wales. CEBC has had regard to the National Salary Framework and conditions of Service Handbook 2009 which provides a guidance note (Appendix 7) applicable where a DIP is appointed. This categorises the DIP procedure as "an internal and confidential*

process of the authority". Whilst acknowledging that there is no explicit bar, it asserts that disciplinary matters are customarily held in private and "anyone the subject of a DIP hearing is likely to expect the same". Additionally paragraph 3.10 states that "The joint secretaries consider DIP reports to be exempt from freedom of information disclosure by virtue of section 40 of Freedom of information Act 2000". Whilst the Tribunal observes that this is not binding and does not have the force of law, the Tribunal is satisfied that this would inform the expectation of all those involved in the DIP procedure and that the status of the JNC means that it was reasonable for those involved to rely upon the JNC guidance.

- iii. Those who provided information to the DIP (both those being investigated and those not) were asked to sign a confidentiality agreement 11 or accepted that they were bound by a duty of confidentiality attached to their office as Councillors.*
 - iv. Importantly Schedule 12A of the Local Government Act 1972 paragraph 1 provides that information relating to any individual is "exempt information" which means that it would not be discussed in an open Council meeting or disclosed to the public by way of agendas and background papers in the ordinary way."*
38. The Commissioner also sees that scrutiny of public authority employee's would be expected by the public, especially when it involves senior officers and errors have been made and costs to the public purse incurred. But this does still need to be balanced against the expectations of the individual and also in this case, the potential impact that disclosure could have on future investigations of a similar nature.
39. On consideration of all of the above, the Commissioner finds, in this case, the individual's right to privacy outweighs any legitimate public interest in disclosure and therefore regulation 13(1) of the EIR is engaged.

Right of appeal

40. 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 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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

Andrew White
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