Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **2 March 2021**

Public Authority: **The Ministry of Housing, Communities and Local Government**

Address: **2 Marsham Street**
London
SW1P 4DF

Decision (including any steps ordered)

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1. The complainant has requested copies of monitoring reports from Torbay Council, relating to sites receiving Land Release Funding.

2. The Commissioner's decision is that the Ministry of Housing, Communities and Local Government ('MHCLG') is entitled to rely upon regulation 12(5)(g) to withhold information. The MHCLG is entitled to rely upon regulation 13 to redact some council officer names however the name of the Senior Responsible Owner ('SRO') should be disclosed. The MHCLG responded outside of statutory timescales and therefore breached regulations 11 and 5(2) of the EIR.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the name of the SRO in the monitoring reports

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 January 2019 the complainant requested information from the Ministry of Housing and Local Communities ('the MHCLG') in the following terms:

> "… *We therefore request from you under the Freedom of Information Act and Environmental Information Regulations a copy (by email preferably) of each monitoring report you have received from Torbay Council since 8 March 2018 to the present date (including the report that covers the period for 18 October to 31 December 2018). We only need them for the LRF* [Land Release Funding] *sites at Collaton St Mary and Preston Down Road. If you require any further information in order to meet this FOI/EIR request I can be contacted by email or by telephone as shown below or by letter at the address at the head of this letter.*"

6. The MHCLG responded on 1 March 2019. It refused to provide the requested information and cited the following exemption as its basis for doing so: FOIA section 43(2) – commercial interests.

7. The complainant requested an internal review on 30 April 2019.

8. The MHCLG wrote to the complainant with the outcome of an internal review on 22 November 2019 in which it revised the position to rely upon the EIR access regime rather than the FOIA. The MHCLG advised that it had identified the monitoring reports dated 22 June 2018, 24 October 2018, 19 January 2019, 11 April 2019 and 12 August 2019 as being of interest. The 2019 reports were considered out of scope of the original request, however they were provided due to the lateness of the internal review response. The MHCLG provided redacted versions of the five reports. The redactions were made on the basis of the following EIR exemptions:

   - 12(4)(d) (material in the course of completion)
   - 12(5)(f) (interests of the person who provided the information)
   - 12(5)(g) (protection of the environment)
   - 13 (personal information)

   Some further redactions were made on the basis that the information does not relate to the sites at Collation St. Mary and Preston Down and therefore is out of scope of the request.

9. During the course of the Commissioner's investigation, on 29 October 2020 the MHCLG wrote to the complainant with the outcome of a further internal review. It provided the same five reports but with fewer

redactions. The redactions were made on the basis of regulation 12(5)(g), regulation 13, and the information which is out of scope of the request.

Scope of the case

10. The complainant initially contacted the Commissioner on 4 December 2019 to complain about the way their request for information had been handled, during the course of the investigation the Commissioner agreed the scope with the complainant.

11. The complainant remained dissatisfied with the exceptions cited to withhold information. The complainant also required confirmation that some of the redacted information is correctly identified as out of scope of the request. Furthermore, the complainant was dissatisfied with the time taken by the MHCLG to provide responses, both to the original internal review request and during the course of the investigation.

12. The Commissioner considers that the scope of the case is to establish whether the MHCLG has correctly engaged the exceptions at regulation 12(5)(g) and 13. If it has, then she will consider where the balance of public interest lies. She will also consider whether the MHCLG has released all of the information that is in scope of the request, within the provided reports ('the Monitoring Reports'), and if it made any procedural breaches of the EIR in the handling of the request.

Background

13. The Land Release Fund (LRF) is a cross-government initiative between the MHCLG and One Public Estate (OPE) which is delivered in partnership by the Local Government Association and the Cabinet Office.

14. Councils can bid for funding for land remediation and small-scale infrastructure, which will help bring sites forward for housing that would not have otherwise been developed.

15. The information request is in relation to Torbay Council's LRF funding for two greenfield sites, named Collaton St Mary and Preston Down Road.

Reasons for decision

Regulation 5(1) – Duty to make environmental information available on request

16. Regulation 5(1) of the EIR states that: *"a public authority that holds environmental information shall make it available on request."* This is subject to any exceptions that may apply.

17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.

18. The Commissioner is mindful of the Tribunal's decision in Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072) in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records".* It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.

The complainants view

19. The complainant has asked the Commissioner to determine whether the MHCLG were correct to redact information from the Monitoring Reports on the basis that it is out of scope of the request. The complainant also requested that the Commissioner review the information that is redacted in this respect.

The MHCLG's view

20. The scope of the request for information is limited to information concerning the sites at Collaton St. Mary and Preston Down Road. Any other information in those reports which is related only to other sites is therefore out of scope.

Conclusion

21. The Commissioner agrees with the MHCLG's position that only information relating to the sites at Collaton St. Mary and Preston Down Road is in-scope of the request.

22. The Commissioner has reviewed the redacted information which the MHCLG has identified to her as being to be out of scope of the request because it relates to other sites. She can confirm that the information relates to projects at other sites.

23. The Commissioner is therefore satisfied that the redactions, which were identified as information being out of scope of the request, have been made correctly.

24. The Commissioner requires no steps to be taken by the MHCLG in relation to the set of information that is withheld on the basis that it is out of scope of the request.

Regulation 12(5)(g) – Protection of the environment

25. Regulation 12(5)(g) provides an exception from the duty to make environmental information available if it would harm the protection of the environment to do so.

26. In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing people's awareness and understanding of environmental issues. This principle is recognised in EU Directive 2003/4/EC on Protection of the environment (regulation 12(5)(g)) – EIR guidance 20120516 Version: 1.1 4 public access to environmental information, which the EIR implement.

27. However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "the protection of the environment to which such information relates, such as the location of rare species" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.

28. To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:

    - that the information in question relates to the aspect of the environment that is being protected;

    - how and to what extent the protection of the environment would be affected; and

    - that the information is not on emissions

29. The MHCLG identified five redactions that are made on the basis of regulation 12(5)(g):

        - 24 October 2018 report: LRF Project Tracker, Collaton St. Mary, fourth row – part of the entry.

- 11 April 2019 report: LRF Project Tracker, Collaton St. Mary fourth row – part of the entry; nineth row – part of the entry; 11th row – part of the entry.

- 11 April 2019 report: LRF Risk Register, risk 22, the fifth, six and tenth cells entirely.

30. The MHCLG explained that the information was provided by Torbay Council ('the council'). Therefore, the MHCLG has taken account of the views of the council in reaching its own decisions about whether to disclose information.

31. MHCLG explained that the information was withheld for the following reasons:

    - The information in question relates to an aspect of the environment, being a protected species, that the council has a duty to safeguard.

    - This is a legal duty of the council, it can be prosecuted if any harm were suffered by a protected species as a result of it disclosing information.

    - The council provided evidence of incidents of concern including the firing of shotguns, reported to the council and Torbay police in relation to the protected area. They report that *"although the majority of incidents appear to relate to illegal lamping, there has also been at least one reported incident of gratuitous cruelty towards wildlife."*

32. The MHCLG confirmed that it considers the council has provided sufficient evidence of a substantial rather than remote existing risk of harm to the protection of the environment. It considers that disclosure of the withheld information into the public domain would only serve to increase that risk.

33. The MHCLG advised that some actions had been scheduled for the end of 2019 that would have removed the risk of harm identified. However, it had checked with the council who confirmed the activity had not happened as planned and therefore the risks associated with the disclosure are still present.

34. The Commissioner has reviewed the withheld information and can confirm that it relates to the specific aspect of the environment identified by the MHCLG and provides identification information which could be used for the purposes of harm.

35. Disclosure under the EIR is essentially a disclosure into the public domain. The Commissioner accepts that disclosing the withheld information in the reports would enable a person to do something that would harm the elements of the environment in question. Disclosure would provide intelligence which could be used by members of the public intent on interfering with, or damaging, the site and the species in question.

36. As disclosure of the withheld information would adversely affect the protection of the environment, the Commissioner has determined that the exception at 12(5)(g) is engaged and has gone on to consider the public interest test.

Public interest in disclosure

37. The MHCLG stated that it recognises that the public interest is served in general by making environmental information available. It submitted that, in this case, since the internal review, the department has recognised this in practice by disclosing virtually all the information within scope of this request.

38. It is the MHCLG's position that the current disclosures fully serve the public interest in making the relevant information available. It contends that no appreciable further public interest would be served by the disclosure of these few remaining entries in the monitoring reports concerning a safeguarded element of the environment.

39. The complainant advises that it is suspected that incomplete information is being given regarding the undeliverability of the sites and unviability of their LRF projects, given the real extent of ecological and environmental constraints, including for protected species.

40. They argue that information regarding known ecological constraints may be withheld in order to conceal the unviability and undeliverability of those sites on ecological and environmental grounds and therefore also on economic and social grounds.

41. The complainant contends that as withholding the information may minimise the real extent and degree of environmental and ecological constraint, it is therefore in the public interest to understand the real difficulties or impossibilities, and the costs, of designing any adequate mitigation.

42. The complainant contends that the exception might be engaged to permit redaction of exact locations of any protected habitat or species. However, in the context of protecting economic or commercial interests, it is inappropriate to assert that potential harm to habitats and species

could result from disclosing the identified risks and proposed mitigation measures in the report.

Public interest in maintaining the exception

43. The MHCLG states that there is an inherent public interest in avoiding the harm to the environment. Furthermore, where the location of a protected species would expose that species to interference and damage there is a particularly strong public interest served in minimising the risk of that occurring.

44. The MHCLG stated that disclosure of this information would increase the risk of any individuals so minded to carry out deliberate, interfering acts. It understands that the information is not generally known and, even if it were known to some extent, the MHCLG considers that the public interest is not served by adding to that exposure.

Balance of the public interest

45. The Commissioner acknowledges that there is always some public interest in disclosure of information to promote transparency and accountability in the work of public authorities.

46. In assessing the weight of the arguments for disclosure, the Commissioner has taken into account the nature of the information and the timing of the request. She has also taken into account how far disclosing the requested information would further the public interests identified. She is also mindful that Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

47. The Commissioner notes the concerns of the complainant regarding the possible motivation for redacting the information. The Commissioner also appreciates that the complainant has not had full sight of the withheld information in order to understand its context and why the exception has been applied.

48. The Commissioner considers that the complainant has a valid public interest concern, being in relation to the degree of the environmental constraint and how this may affect the viability of the LRF projects. However, in making the information available the Commissioner is cognisant that it would identify information regarding a protected species.

49. The Commissioner is mindful of the incidents in relation to the site reported by local residents, and evidenced by the council, which included the repeated sound of shotguns and pellets which have been serious enough to involve the police.

50. Having considered the arguments and reviewed the information, the Commissioner does not consider that the disclosure of the withheld information justifies the risk to the protection of the environment. She has therefore concluded that the MHCLG correctly applied regulation 12(5)(g) in this case.

Regulation 13 personal data

51. 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.

52. In this case the relevant condition is contained in regulation 13(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').

53. 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.

54. 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?

55. Section 3(2) of the DPA defines personal data as:

> "*any information relating to an identified or identifiable living individual*".

56. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

57. 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.

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[1] As amended by Schedule 19 Paragraph 307(3) DPA 2018.

58. 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.

59. The MHCLG advised that the information that is withheld on the basis of regulation 13 comprises the names of officials at Torbay Council in the roles of Senior Responsible Owner, Programme Manager and Project Manager.

60. The information appears at the top of some of the *'Risk Register'* sheets on the Reports and within the *'Risk Owner'* column multiple times.

61. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the council officials concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

62. 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.

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

Would disclosure contravene principle (a)?

64. 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".*

65. 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.

66. 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

67. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful <u>only</u> if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

68. 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].

69. In considering the application of Article 6(1)(f) of the 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;

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

70. 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

71. 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.

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[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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) 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*".

72. 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.

73. The complainant contends that the personal names of public authority post-holders, as a matter of public record, transparency and accountability, should not be redacted.

Is disclosure necessary?

74. '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.

75. In this case the names of council officers in the roles of the Senior Responsible Owner ('the SRO'), Programme Manager and Project Manager have been redacted from the risk register sheets.

76. During the course of the investigation the MHCLG advised it had received consent to the disclosure of the SRO's name. The SRO holds a director position at the council and is a senior member of the project board for the LRF sites with decision-making authority. As such the MHCLG advised that it is now of the view that there is a more reasonable expectation of his identity in the context of the relevant information being disclosed, and with the specific lawful basis of his direct consent in any case, they are content to disclose that information.

77. The majority of the information relating to the risk registers of the sites in scope of the request is unredacted and the Commissioner considers that the agreed disclosure of the SRO name will provide further transparency.

78. The MHCLG stated that the Programme Manager and Project Manager do not have public facing roles, neither are they senior employees of the council with decision-making responsibility who could have a reasonable expectation of being publicly identifiable and in the context of the relevant information.

79. On balance, the Commissioner considers that disclosure of the SRO name, who has decision making authority, provides reasonable transparency in order to meet the complainants legitimate interest in disclosure.

80. The Commissioner does not consider that the disclosure of the names of officers, who are not decision makers, would further the legitimate interest in transparency and accountability of the council in respect of the LRF projects.

81. The Commissioner has decided in this case that disclosure of the Programme Manager and Project Manager names is not necessary to meet the legitimate interest in disclosure. She has therefore not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

82. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider separately whether disclosure would be fair or transparent.

The Commissioner's decision

83. The Commissioner has therefore decided that the MHCLG should disclose the name of the SRO within the Monitoring Reports however it was entitled to redact the names of the Programme Manager and Project Manager.

Procedural matters

84. The complainant has expressed concerns regarding the extended period of time to receive information. They state that this has seriously impinged on the public's ability to scrutinise and take action regarding the LRF sites.

85. The complainant submitted the request for information on 9 January 2019. The MHCLG withheld the information in scope of the request, in its entirety and issued a refusal notice on 1 March 2019. Following an internal review, the MHCLG provided redacted versions of the requested information in a revised response on 22 November 2019.

86. The Commissioner accepted the case for investigation on 17 February 2020, however scope for the case was not agreed with the complainant until 2 September 2020, after which the investigation with the MHCLG commenced. The MHCLG released its final response, containing some further information, to the complainant during the course of the investigation on 29 October 2020.

87. The MHCLG apologised to the complainant for the lengthy period of time in the internal review response of 22 November 2019, which it stated was mainly due to administrative error.

Regulation 5(2)

88. Regulation 5(2) of the EIR says that the authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.

89. The above timeline provides an explanation of the extended period of time between the request and responses. It is the case that the final version of the information was made available 21 months after receipt of the original request. As such, the MHCLG breached regulation 5(2) of the EIR.

Regulation 11

90. Regulation 11(1) provides that:

> 11.—(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

91. Regulation 11(4) requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.

92. The complainant wrote to the MHCLG on 30 April 2019 asking for an internal review to be carried out. The MHCLG provided an internal review 7 months later on 22 November 2019. This is over 40 working days, therefore Regulation 11(4) of the EIR has been breached.

Right of appeal

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

94. 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.

95. 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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