

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 September 2022

Public Authority: **Sodbury Town Council**
Address: **The Old Reading Rooms**
26 High Street
Chipping
Sodbury
BS37 6AH

Decision (including any steps ordered)

1. The complainant submitted an information request to Sodbury Town Council ("the Council") for correspondence relating to a stopping up order along [address redacted].
2. The Council relied upon section 40(2) to withhold the information, however, the Council should have considered the request under the EIR.
3. The Commissioner's decision is that the Council is entitled to withhold the information under Regulation 13(1) of the EIR. However, in failing to specify the EIR exceptions it was relying on, when refusing the request, within 20 working days, the Council has breached regulations 14(2) and 14(3) of the EIR.
4. The Commissioner does not require the Council to take any further steps.

Request and response

5. On 25 November 2021, the complainant wrote to the Council and requested information in the following terms:

“This request is being made under the freedom of information act 2020 (sic) for all email correspondence relating to the stopping up order for our land along the [address redacted]. The request includes all emails, which includes authors and dates sent, as the FOIA specifies that, as a public body, the Town Council is required to provide me with and I am entitled to view under the act.”
6. A response was provided on 21 December 2021 in which the Council confirmed that it had provide anonymised copies of all correspondence to the complainant’s wife, to which the complainant was cc’d into, but that the names and email addresses were withheld under Section 40(2) of FOIA.
7. The complainant requested an internal review on 20 January 2022 stating that the exemption was invalid.
8. The Council responded on 2 February 2022 and maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 7 January 2022 to complain about the way their request for information had been handled.
10. The Commissioner explained to the complainant that they had not exhausted the authority’s internal review procedure and wrote to the Council to remind it of its obligations.
11. On 4 February 2022, the complainant informed the Commissioner that they had received their internal review and that they would like their case progressed.
12. In line with his usual practice, the Commissioner contacted the Council to ask, initially, about its application of section 40(2) and then whether it considered handling the request under EIR.
13. In response the Council confirmed that it had not considered the request under EIR and provided a response.

14. The Commissioner then wrote to the complainant on 4 August 2022 to offer his preliminary view of their complaint. The Commissioner explained that it was his view that the information, that was being withheld, was personal data and therefore exempt from disclosure under EIR.
15. The complainant requested that the Commissioner issue a decision notice.
16. The Commissioner considers the scope of his investigation is to determine whether the Council was correct to withhold the requested information under regulation 13(1) of the EIR.

Reasons for decision

Is the requested information environmental?

17. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (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);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).
18. The Commissioner has not seen a copy of the requested information, however he is satisfied that it is environmental. The Commissioner considers that as the requested information relates to evidence submitted to dispute a stopping up order on the complainant's land, it would fall within the definition at regulation 2(1)(c) and/or 2(1)(e).
19. He will next consider the Council's refusal to provide the requested information on the basis of regulation 13(1) of the EIR.

Regulation 13 personal data

20. 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.
21. 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 UK General Data Protection Regulation ('UK GDPR').
22. 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.
23. 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.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

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

26. 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.

27. 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.

28. The information being withheld in this case are the names and email addresses of people who contacted the Council to dispute the stopping up order. Clearly such information would be that individual's personal data so would fall 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 does not, however, 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. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
35. 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
36. 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;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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) 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 subparagraph (displaying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

38. 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.
39. 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.
40. In correspondence to the Commissioner, the complainant has argued that the letters sent were full of inaccuracies and personal slurs about them and their property.
41. They further explained that the letters are "libellous and defamatory" and were intended to "change the minds of a public body".
42. The Council stated that the complainant had acknowledged that his wife had already received some of the data that they had requested, and that it is only the names and emails addresses that had been withheld from the complainant. Therefore the Council could not identify a legitimate interest that would favour disclosure, and stated that to do so would "override the fundamental rights and freedoms of the data subjects".
43. The Commissioner accepts that the request is motivated by a private interest, however, as he recognises a requester's own interests may be a legitimate interest. In cases where the requester is pursuing a purely private concern unrelated to any broader public interest, this will be taken into account in the balancing test.

Is disclosure necessary?

44. '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.
45. In order for the complainant to find out who was "making false accusations" against them, disclosure would be necessary in order to meet the legitimate interests identified.

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

46. 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.
47. 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.
48. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. This expectation 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 an individual and the purpose for which they provided their personal data.
49. In this case, the individuals who had disputed the stopping up order would not expect their personal data to be disclosed in response to an information request and the Council confirmed as much in its correspondence to the Commissioner.
50. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects as it would reveal information about the data subjects which is not otherwise in the public domain.
51. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.

The Commissioner's conclusion

52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' 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.
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
54. The Commissioner therefore finds that regulation 13(1) is engaged in respect of the withheld information.

Regulation 14 – Refusal to disclose information

55. Regulations 14(1) and (2) of the EIR state that where a public authority intends refusing a request for environmental information it must issue a refusal in writing, within 20 working days of receipt of the request. Regulation 14(3) states that the refusal should specify the reasons for non-disclosure, including any non-disclosure exception relied on.
56. In this case, the Council refused the request citing reasons under FOIA.
57. By failing to inform the complainant, within 20 working days, that it was relying on exceptions under the EIR to refuse parts of the request, the Council breached regulations 14(2) and 14(3) of the EIR.

Right of appeal

58. 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

59. 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.
60. 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

Phillip Angell
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