

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **3 November 2022**

Public Authority: **Stroud District Council**
Address: **Ebley Mill**
Ebley Wharf
Stroud
Gloucestershire
GL5 4UB

Decision (including any steps ordered)

1. The complainant requested from Stroud District Council all emails and written communications relating to planning applications S.21/0388/FUL and S.21/00389LBC between the applicant and/or the applicant's agent and the local planning authority. Stroud District Council disclosed some of the requested information but made redactions under Regulations 13 and 12(5)(e) of the EIR.
2. The Commissioner's decision is that Stroud District Council has successfully engaged Regulation 13(1) in relation to the names, email addresses and phone numbers of the applicant and the applicant's agent architects and the email addresses and phone numbers of its planning employees. However, the Commissioner finds that Stroud District Council has not engaged Regulation 13(1) in relation to the names of its planning department employees. With regard to Regulation 12(5)(e) the Commissioner's decision is that Stroud District Council has not successfully engaged the exemption. The Commissioner's decision is therefore that Stroud District Council should disclose the names of its planning employees and the information it has withheld under Regulation 12(5)(e).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - disclose the names of its planning employees that it redacted under Regulation 13(1)
 - disclose the information it has withheld under Regulation 12(5)(e).

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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 9 November 2021 the complainant wrote to Stroud District Council (the Council) and requested information in the following terms in relation to planning applications S.21/0388/FUL and S.21/00389LBC:

“I wish to make a FOI request for all emails or other written communications to do with these planning applications between the Applicant and/or Applicants Agent(s) and the LPA.”
6. The Council responded on 7 December 2021. It disclosed some of the requested information but withheld the third party personal data (consisting of the names, email address and phone numbers of its planning employees and the applicant and his agent architects) under Regulation 13 of the EIR and information relating to the drainage and boundary of the development site under Regulation 12(5)(e).
7. As the complainant was dissatisfied with the Council’s response he requested an internal review on 5 January 2022.
8. Following an internal review the Council wrote to the complainant on 15 February 2022 upholding its original decision.

Scope of the case

9. The complainant contacted the Commissioner 9 March 2022 to complain about the way his request for information had been handled. In particular, he was unhappy with the redactions made to the information requested.
10. On 13 October 2022 the Commissioner contacted the Council and requested copies of the withheld information together with any further arguments it wished to raise in relation to any EIR exceptions it considered applicable. The Commissioner also provided the Council with links to his guidance on the EIR and in particular, Regulations 12(5)(d) 12(5)(e) and 13(1). He also provided links to some of his previous decisions in relation to complaints similar to the one under investigation.

11. The scope of the Commissioner's investigation will be to assess the Council's application of Regulations 13(1) and 12(5)(e) of the EIR to the requested information.

Reasons for decision

12. The Council has made redactions to the requested information under Regulations 13(1) and 12(5)(e) of the EIR. The Commissioner will now deal with these exceptions separately.

Regulation 13(1) – third party personal data

13. The Council has withheld the third party personal data under Regulation 13(1) on the basis that disclosure would breach the first principle of the General Data Protection Regulation ("GDPR").
14. 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.
15. In this case, the relevant condition is contained in Regulation 13(2A)(a). This applies where 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 GDPR.
16. 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.
17. 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?

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

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

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

20. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
21. 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.
22. In its representations to the complainant the Council stated that it was withholding the third party personal data as disclosure would be 'likely to breach the first principle of the UK GDPR'.
23. The Commissioner has reviewed the third party data which has been redacted from the requested planning information. It consists of the names, email address and phone numbers of the Council's planning employees and the applicant and the applicant's agent architects.
24. The Commissioner is satisfied that the names, business email addresses and phone numbers of the Council's planning employees constitutes their personal data as it clearly identifies and relates to them.
25. The Commissioner is also satisfied that the applicant's name and email address and those of the agent architect constitute third party personal data within the meaning of Section 3(2) of the DPA as they clearly identify and relate to them.

Would disclosure of that data would breach any of the DP principles.

26. Having established that information redacted constitutes the personal data of the individuals identified, the next step for the Commissioner is to establish whether disclosure would breach any of the DP principles.
27. 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".
28. 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.
29. 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.

30. Article 6(1) of the 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.
31. 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 .
32. 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.
33. 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

34. 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.

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, 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".

35. 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.
36. The Commissioner finds that a legitimate interest is being pursued and the matter is not a purely private concern or trivial.

Is disclosure necessary?

37. '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.

The name and email address of the applicant and the names and email addresses of the applicant's agent architects.

38. The Commissioner does not consider that it is necessary to disclose the name and private email address of the applicant and the names, email addresses of the applicant's agent architects. The job titles of the latter individuals and the organisation they work for has already been disclosed by the Council.
39. As the Commissioner has decided in respect of these individuals that disclosure is not necessary to meet the legitimate interest in disclosure, he has 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)
40. 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.

The names, email addresses and phone numbers of the Council's planning employees.

41. However, the Commissioner does consider that the disclosure of the names of the Council's planning employees is necessary for the legitimate interest of the complainant (and other interested members of the public) in order that they can see who was involved in this matter in their professional capacity. He considers the disclosure of employee names is necessary for accountability, although he acknowledges that the information exchanged is on behalf of their employers. The Commissioner does not consider it necessary to disclose the email

addresses and phone numbers of the Council's planning employees as this does not further that legitimate interest.

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

42. 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.
43. 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.
44. In the Commissioner's view, a key issue is whether the individuals concerned have 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.
45. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
46. The Commissioner's guidance² states that, although an employee may regard the disclosure of their personal data as an intrusion into their privacy, often this may not be a persuasive factor on its own, particularly if the information is about their public role rather than their private life. This implies that the employee has some responsibility for

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

explaining the views, assessments, policies or actions of the organisation.

47. The Commissioner has considered this personal data and his view is that the role of all these individuals is professional, they are representatives of their organisations and their names are in the public domain. He does not accept that the disclosure of their personal data would be beyond their reasonable expectations when dealing professionally for or with a public authority. The Commissioner is not persuaded that they would expect confidentiality. His view is that the named individuals are the public face of the Council concerned and that this means that the processing is necessary for the interests of the complainant regarding this information request and the concerns expressed, or those of any other individual making the same request.
48. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

49. Even though it has been demonstrated that disclosure of the names of the Council's planning employees under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
50. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
51. The requirement for transparency is met because as a public authority, the Council is subject to the EIR.

The Commissioner's view

52. In respect of the personal information consisting of the names of the Council's planning employees, the Commissioner has decided that the Council has failed to demonstrate that the exception at Regulation 13(1) is engaged.
53. However, the Commissioner is satisfied that the Council has engaged Regulation 13(1) in respect of the applicant's name and email address and the applicant's agent architects' names and email addresses and the phone numbers and email addresses of its planning employees.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

54. Regulation 12(5)(e) states:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”

55. The Commissioner’s published guidance³ on Regulation 12(5)(e) sets out that the exception should be broken down into a four-stage test, and that all four elements of the test are required in order for the exception to be engaged:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

56. For information to be commercial in nature it needs to relate to a commercial activity. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.

57. For information to be industrial in nature it is generally understood to be about the processing of raw materials and the manufacture of goods in factories, as opposed to their sale or purchase.

58. The Commissioner is satisfied that the documents provided to the Council’s planning department in respect of a proposed development for converting and extending a stone stable are commercial in nature. This is because they are the product of the applicant’s architect providing their professional services, for which they can charge and gain a profit.

Is confidentiality provided by law?

59. The Commissioner considers that confidentiality provided by law includes confidentiality imposed on any person by the common law duty

³ <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

of confidence, by a contractual obligation, or by statute. It covers information obtained from a third party, information jointly created or agreed with a third party, and it also covers information which a public authority creates itself.

60. In this case the withheld information consists of email and letter communications between the applicant, the applicant's architect and the Council in relation to a planning application. The Commissioner takes the view that this correspondence, which does not meet the Council's criteria for publication on the planning portal, was provided under the common law duty of confidence. This is normal practice for discussions concerning planning applications.
61. When relying on the common law of confidence the Commissioner's guidance sets out that there are two key issues to consider:
 - Does the information have the necessary quality of confidence?
 - Was the information shared in circumstances creating an obligation of confidence?
62. Discussions, drawings and plans provided to the Council's planning department (which do not meet the criteria for publication on its planning portal) are not considered to be trivial nor are they generally placed into the public domain, so the Commissioner is satisfied that they do carry the necessary quality of confidence.
63. The Commissioner is further satisfied that the discussions, drawings and documents would have been shared with the Council in circumstances creating an implied obligation of confidence, due to this being the standard established practice between applicants/architects/developers when receiving information of this nature.

Is the confidentiality protecting a legitimate economic interest?

64. It is not enough to say that disclosure of information might cause some harm to an economic interest. A public authority must demonstrate that disclosure would cause harm. Furthermore, if the information was provided to the public authority by a third party, it is the interests of the third party that are relevant rather than those of the public authority.
65. In this case, the Council has stated that disclosure of the requested information 'would adversely affect the commercial interests of the applicant'. However, the Council has not produced any evidence from the applicant to suggest why this might be the case. It is not for the Commissioner to speculate as to what, if any, adverse affects the third party may suffer to its commercial interest as a result of the requested information being disclosed.

66. The Commissioner therefore finds that the Council has failed to engage Regulation 12(5)(e) of the EIR.

Right of appeal

67. 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

68. 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.

69. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**