

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

Decision notice

Date: 20 October 2022

Public Authority: London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
Middlesex
EN1 3XF

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Enfield ("the Council") about resident responses to a traffic scheme consultation survey. The Council disclosed some of the information requested but refused to provide the postcodes citing the personal information exception under regulation 13(1) of the EIR (personal information). The Council also stated that it did not hold the paper copies of the surveys.
2. The Commissioner's decision is that the Council correctly withheld the postcodes under regulation 13 of EIR and that, on the balance of probabilities, the Council does not hold the paper copies of the surveys.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 February 2022, the complainant wrote to the public authority and made a request for information in the following terms:

"In line with Statutory Guidance for the 'Traffic Management Act 2004: network management to support recovery from COVID-19' and its requirement that polls may be validated as per the British Polling Council requirements, please provide the following for the Fox Lane QN Consultation Survey (January 2022):

1. Computer table of all responses including date and time for each entry, postcode, street name and question responses (excepting personal details).
2. Sight of the source materials relating to all offline responses. With personal details redacted but including postcode and street name."
5. The Council responded on 14 March 2022. It provided a table of information but applied section 40(2) of FOIA to withhold any third party personal information. In relation to the 30 paper responses received to the consultation, the Council explained that it did not hold the original documents. They were destroyed after the contents were manually entered by Council staff into the specific form on the Council's Let's Talk page after the consultation had closed.
6. On 4 April 2022, the complainant requested an internal review and asked for a copy of the postcodes which had been redacted. He said: "I did specifically request these so that I could check some anomalies." In relation to the paper responses, he explained that he wished to see the originals as "there are anomalies here too."
7. In its internal review dated 25 May 2022, the Council explained that it should have dealt with the request under the EIR but maintained its position that the postcodes were third party personal information in accordance with regulation 13. It also confirmed that the original paper copies of the responses were no longer held but that the information provided was "verbatim copies of these responses, which included all details."

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2022 to complain about the way the request for information had been handled.
9. The complainant told the Commissioner that as regards the withheld postcodes:

"The published report contained a chart showing very high responses from a few postcode areas. In answer to an FOI, I was provided with a spreadsheet of survey responses which did not allow me to investigate these postcode anomalies, as the spreadsheet excluded postcode data. The Council would not release such data as it claimed that would breach confidentiality rules. I do not agree that postcode data would enable me to identify individual respondents and I believe there is a good reason for requiring validation of the responses. My concern is that mismatches between postcodes and street names could indicate 'gamed' responses. If I have a spreadsheet containing postcodes and street names then I can cross-check these to see if they match. I

suspect that gamed responses will include street names with incorrect or incomplete postcodes.”

10. The complainant also said in relation to the paper copies:

“I also wanted to validate a small number of paper questionnaires. There were 30 of these and more than half came from my street. This is an extreme discrepancy and coincides with local door-to-door canvassing undertaken by some activists. I wanted to see the originals to determine if they had been filled out by the same hand. The Council say that the forms have been destroyed.”

11. In view of the nature of the information requested, the Commissioner agrees that the information constitutes ‘environmental information’ as defined in regulation 2(1) of the EIR.
12. While the Commissioner accepts that the complainant may have specific personal reasons for wanting to access the requested information, the Commissioner has to take into account the fact that disclosure under EIR is effectively an unlimited disclosure to the public. He must therefore consider the wider public interest issues and fairness when deciding whether or not the information is suitable for disclosure.
13. The Commissioner therefore considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the postcodes under regulation 13 of EIR and whether the Council holds the requested paper copies.
14. As the Commissioner is also the regulator of data protection legislation, he has decided that he has sufficient information to reach a decision in this case, based on the internal review arguments and his own expertise, without seeking further arguments from the Council. He has also not sought the withheld information as he does not consider that the content of the information itself would affect his decision.

Reasons for decision

Regulation 13 personal information

15. 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.
16. In this case the relevant condition is contained in regulation 13(2A)(a). 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").
17. 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.
18. 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?

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

"any information relating to an identified or identifiable living individual."
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. From his knowledge of postcodes, albeit this is not exhaustive, the Commissioner understands that the majority of the full postcodes in question will relate to specific streets and will each cover an average of 15 properties.

24. In previous decision notices – FER0754377¹ and FS50704419² - the Commissioner found that a full postcode can be categorised as personal data because someone who is motivated so to do could both apply their local knowledge and employ investigative techniques in order to identify specific individuals from those postcodes. The Commissioner therefore finds the same in this case, that the full postcodes requested are the personal data of third persons. The Tribunal have also previously considered the question of whether postcodes are personal data in *Dundas v ICO & City of Bradford*³ and found that the full postcode should indeed be considered personal data.
25. In forming this opinion he has also reviewed his published guidance: Anonymisation: managing data protection risk code of practice⁴.
26. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individual covered by the withheld information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
27. The complainant has requested the responses of the individuals residing at each of the full postcodes. The Council notes that the consultation responses are detailed. The Commissioner accepts that this increases the possibility that a motivated individual could identify the individuals. The Commissioner is therefore satisfied that, when combined with the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553920/fer0754377.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258620/fs50704419.pdf>

³ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i128/Dundas.pdf>

⁴ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

full postcode, this information could result in the individuals being identified. Because the information would be disclosed under EIR to the world at large, there is a distinct possibility that it would come into the hands of people who would be able to "de-anonymise" the data.

28. Therefore, the Commissioner accepts that the information falls 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 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 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
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"⁵.

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.

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 sake, 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. The Council identified a legitimate interest in promoting greater transparency and public understanding of an environmental issue. However, it is the Council's view that information already provided to

⁵ 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) 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".

the complainant, i.e. the road names, addresses the legitimate interest identified and that postcode information is not required to do that.

41. In this case, the Commissioner notes, that the complainant has raised a number of matters that he submits amount to reasonable grounds to conclude that the process of the consultation exercise was flawed. It is clear that the complainant has a clear personal interest in disclosure of the withheld information, namely speculation as to the propriety of the consultation. The complainant says the postcodes are required as "mismatches between postcodes and street names could indicate 'gamed' responses."
42. The Commissioner does therefore consider that there is a legitimate interest in disclosure of information which may hold the Council to account and promotes transparency in relation to its consultation procedures. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the withheld information and has therefore gone on to consider the necessity test.

Is disclosure necessary?

43. '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.
44. The Council argues that the information provided to the complainant was sufficient for the purpose of promoting greater transparency and public understanding of an environmental issue and the postcodes were not necessary in order to achieve the legitimate interest identified.
45. The Commissioner has decided in this case that disclosure of the withheld information to the world at large is not necessary to meet the legitimate interest in disclosure. The Commissioner considers that there are other Council complaint procedures that could be utilised by the complainant without the need for the disclosure of personal postcode data. Residents voluntarily provided information in the consultation responses and the disclosure of the information might lead to the individuals being contacted which may be regarded as an unwarranted intrusion into their private lives.
46. In this particular case, therefore, the Commissioner is satisfied that there was a less intrusive means of achieving the legitimate aims identified than disclosing the information under the EIR.
47. The Commissioner is aware that the complainant can make a formal complaint to the Council about his concerns about the consultation

responses being 'gamed' via the Council's Corporate and Statutory Complaints procedures⁶.

48. As the Commissioner has decided in this case that disclosure to the world at large 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).
49. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1) of the EIR (personal information).

Regulation 12(4)(a) EIR - determining whether information is held

50. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a public authority that holds environmental information shall make it available on request.
51. Under regulation 5(2), information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
52. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information "to the extent that it does not hold that information when an applicant's request is received."
53. 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 arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
54. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.

⁶ <https://www.enfield.gov.uk/contact-us/are-you-unhappy-with-something/make-a-formal-complaint>

55. The Commissioner notes the Council's explanation of how it had concluded that it did not hold the information. The Council explained that it did not hold the 30 original paper consultation copies. This is because they were destroyed after the contents were manually entered by Council staff into the specific form on the Council's Let's Talk website page after the consultation had closed.
56. The Commissioner appreciates that the complainant has raised a number of specific grounds of complaint both as part of the internal review process and in submissions to support his complaint which set out why, in his view, the Council should hold relevant information. Whilst the Commissioner recognises that the complainant does not consider that the Council has fulfilled the request, the Council has provided a clear explanation of why it no longer holds the information falling within the scope of the request. No evidence is available to the Commissioner which would indicate that the Council holds further recorded information falling within the scope of the requests.
57. In addition, the Commissioner is unable to identify any further action that the Council could reasonably be expected to take as part of its statutory obligations under the EIR in order to identify or locate the requested information. If information is not held then it cannot be disclosed in response to a request.
58. In conclusion, the Commissioner finds, on the balance of probabilities, the Council does not hold any recorded information falling within the scope of the request.

Right of appeal

59. 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

60. 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.

61. 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

Jonathan Slee
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