

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 July 2023

Public Authority: Portsmouth City Council
Address: Civic Office
Guildhall Square
Portsmouth
Hampshire
PO1 2AL

Decision (including any steps ordered)

1. The complainant requested information concerning a complaint they had submitted about a particular property. Portsmouth City Council (the Council) initially stated that it did not hold any information other than that which was available on its website. At the time of its internal review the Council disclosed information relevant to the request, subject to some information being redacted under regulation 13 (personal data) of the EIR. The complainant disputed that the Council has disclosed all relevant documents and also the information that it redacted from the documents disclosed.
2. The Commissioner's decision is that:
 - On the balance of probabilities, the Council does not hold any further information other than the information it has disclosed and withheld.
 - Some of the information which has been withheld constitutes the complainant's own personal data and is exempt under regulation 5(3) of the EIR.
 - The Council correctly applied regulation 13 to withhold third party personal data.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 28 February 2023, the complainant wrote to Council and requested information in the following terms:

“Can you please forward all material concerning the investigation into potential collusion between PCC & [name of garage redacted], the email below was sent on 24 January 2022 by [name of councillor redacted] to [names of Council officers redacted] refers”.
5. The Council responded on 19 April 2023 and stated that it “does not hold any information in a recorded form relevant to your request in so far as no new material was created in the process of considering your concerns and copies of all of the original records relating to the planning applications that you are entitled to receive have already been provided to you in response to your previous requests”.
6. On 20 April 2023 the complainant requested an internal review of the Council’s handling of the request.
7. The Council provided the outcome of its internal review on 22 May 2023 and disclosed information relevant to the request, subject to some personal data relating to third parties and Council staff being redacted under regulation 13 of the EIR.

Scope of the case

8. The complainant initially contacted the Commissioner on 14 April 2023 regarding the delay in the Council responding to the request. The complainant contacted the Commissioner again on 22 May 2023 to confirm that they were still dissatisfied with the Council’s handling of the request following the information which had been disclosed.
9. The complainant confirmed to the Commissioner that they were not satisfied that the Council had identified all the information it held that fell within the scope of his request, nor with the redactions made under regulation 13.
10. The following analysis focuses on the following:
 - (i) whether the Council identified all the information it held within the scope of the complainant’s request;
 - (ii) whether any of the information within the scope of the request is the personal data of the complainant; and

- (iii) whether the Council correctly applied regulation 13 of the EIR when it decided to redact some parts of the information disclosed.

Reasons for decision

Is the requested information environmental?

11. The Commissioner has first considered whether the requested information would constitute environmental information as defined by regulation 2(1) of the EIR.
12. In this case the request relates to concerns the complainant has made about planning and noise from a nearby garage. The Commissioner considers that planning and development of land, is a measure, as set out in regulation 2(1)(c), which is likely to affect the elements of the environment, namely land and landscape and therefore the request falls to be considered under the EIR. The Commissioner also considers that information about noise nuisance complaints constitutes information on a factor under regulation 2(1)(b) of the EIR.
13. Therefore the Commissioner considers that the information is environmental in nature and the Council was correct to handle the request under the EIR.

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

14. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.
15. In their complaint to the Commissioner, the complainant stated that they did not consider the Council had disclosed all the documentation that it held relevant to the request. They mentioned that their concerns regarding potential collusion between the Council and the property in question date back several years and involve daily breaches of planning regulations and parking restrictions.
16. The Council advised the Commissioner that any information relating to the request would be held electronically and there are no paper records held by the areas of the Council that would have had any dealings with the subject matter.
17. The Council confirmed that searches were conducted in the Chief Executive's office, the legal services department and the regulatory services department as these are the service areas which have had an involvement in the subject matter. Searches were undertaken on the

Council's email system as this is the method that was used to communicate about the concerns that the complainant submitted about the garage.

18. The Council advised the Commissioner that when it issued its initial response stating that no information was held, it had overlooked the fact that the Chief Executive's department had not provided the results of its searches. On 20 April 2023, a number of emails were identified within the Chief Executives department. These were disclosed to the complainant, subject to some information being redacted under regulation 13 of the EIR. These emails were sent by the Assistant Director of Regulatory Services to the City Solicitor and copied to the Chief Executive. The Assistant Director and City Solicitor no longer held copies of the emails but the Chief Executive had retained copies as the complainant's concerns were report to him by the Leader of the Council.
19. The Council advised the Commissioner that the complainant has submitted multiple complaints to the planning service, regulatory service, corporate complaints, elected members and to the Local Government Ombudsman about similar issues. The complainant has also submitted 19 separate FOIA requests about the garage, a number of which have been referred to the Commissioner. In light of the history of contact between itself and the complainant the Council is very familiar with the records which exist in relation to the matters they have raised. The Council confirmed that all records relating to the concerns raised have been provided to the complainant since their first request was made in September 2019. In relation to the request which is the subject of this notice, the Council confirmed that all relevant information has been disclosed to the complainant (with the exception of the redactions within the documents disclosed). No written investigation report or other written outcome was created as a result of the concerns raised.
20. 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.
21. Based on the representations provided by the Council, the Commissioner is satisfied that appropriate searches and consultations were carried out to determine any information held falling within the scope of the request.

22. Having considered the circumstances of the case, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any further recorded information relating to the request, other than the redacted documents it has disclosed.

Regulation 5(3) – the complainant’s own personal data

23. Regulation 5(3) of the EIR provides that the duty to make environmental information available on request imposed by regulation 5(1) does not apply to information that is the personal data of the requester. This is because a person can access their own personal data via a Subject Access Request (SAR) under the UK General Data Protection Regulation (UK GDPR) without having to disclose it to the world at large – as is required for disclosure under EIR.
24. The Commissioner has considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.
25. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:
- “any information relating to an identified or identifiable living individual”.
26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. The majority of the information which the Council has withheld under regulation 13 constitutes the names and contact details of junior members of staff. However, the Council has also withheld other information from an email dated 25 January 2022 at 14:08 which relate to the concerns that the complainant raised about the neighbouring property under regulation 13. The Council considers that this is the personal data of the owner of the property that the complainant has raised concerns about.
28. In relation to the names and contact details of officers, the Commissioner has considered this information under regulation 13 below. However, the Commissioner has gone on to consider whether the other information that the Council has withheld under regulation 13 constitutes the complainant’s own personal data.
29. In its responses to date, the Council has not cited regulation 5(3) of the EIR, nor has it suggested that it has considered whether any of the information held relating to the request constitutes the complainant’s own personal data.

30. All of the information held relevant to the request has been created as a result of concerns which the complainant raised relating to a neighbouring property, a garage. On viewing the redacted documents which the Council has disclosed, it is the Commissioner's view that some of that information is the complainant's own personal data. It refers to concerns that they raised and actions which the Council has taken in relation to the matter.
31. The Commissioner has considered the information that the Council has continued to withheld from the email in question under regulation 13. It is his opinion that the information constitutes the personal data of both the complainant and the owner of the neighbouring property.
32. In the Commissioner's published guidance, 'Personal data of both the requester and others', he makes it clear that in circumstances where the personal data of the applicant is very closely linked to the personal data of other data subjects, i.e. it is 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
33. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under regulation 5(3) of the EIR.
34. Taking the above into account, the Commissioner finds that regulation 5(3) is engaged in relation to the information which the Council has withheld from the body of the email dated 25 January 2022 at 14:08. As a result, this information is exempt under the EIR, and the Commissioner is not required to consider further whether the Council correctly applied regulation 13 to this specific information.

Regulation 13 – third party personal data

35. 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) are satisfied.
36. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then Regulation 13 of the EIR cannot apply.
37. 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 Data Protection (DP) principles.

Is the withheld information personal data?

38. As explained in paragraphs 26 and 27 of this notice, section 3(2) of the DPA provides the definition of personal data. The same provision is relevant when determining the personal data of third parties and the same rules apply here - the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
39. The remaining part of the withheld information, other than the personal data of the complainant covered above, consists of names and contact details of Council officers. It is this information that the Commissioner has considered under regulation 13 of the EIR.
40. Having reviewed the withheld information, the Commissioner is satisfied that it both relates to and identifies the individuals concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
41. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene the first data protection principle?

42. 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".

43. 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.
44. 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.
45. To determine whether or not disclosure is lawful, the Council should consider whether there is a lawful basis for processing in Article 6(1) of the GDPR:

"processing is necessary for the purpose of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

46. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the EIR is Article 6(1)(f); legitimate interests. In considering the application of this provision in the context of a request for information under 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 interests, fundamental rights and freedoms of the data subject.
47. 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

48. 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.
49. 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.
50. The Council confirmed that it considered the legitimate interests of both the complainant and the officers/third parties whose personal data was redacted. It did not consider that the third party personal data which it has withheld affected the context of the emails in any way. As such, it does not consider that the complainant's legitimate interests would be furthered through disclosure of the third party personal data. In addition, the Council pointed out that the names and contact details of officers that has been withheld are not senior officers and as such they would not reasonably expect their information to be put into the public domain. The Council explained that its policy in terms of disclosure of officer contact details notes that staff below Tier 3 should not expect their details to be disclosed into the public domain.
51. Although the Council acknowledges that there is a wider legitimate interest in the scrutiny of its actions, for example, in this case there is an allegation that there was collusion between the Council and the owner of the property that concerns were raised about, it does not

consider that there is a wider legitimate interest in disclosure of the third party personal data.

52. The Commissioner notes that all the Council officers whose personal data was redacted, were acting in their professional capacity.
53. The Commissioner does not consider that disclosing the names of the individuals involved in the communications or who were only copied as part of the handling of the case in question would add any value to the information already disclosed or would contribute to increasing the transparency of the Council.
54. It is the Commissioner's view that although the data subjects in question were acting in their professional capacity, bearing in mind their relatively junior positions it is reasonable for them to expect that their personal data included in the withheld information would not be disclosed into the public domain. Considering their junior role and the fact that they are not involved in the process of decision making on behalf of the Council, the Commissioner considers that it is likely that disclosing their personal data would cause unnecessary and unjust distress to them.
55. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy may cause unwarranted distress. He acknowledges that there is a legitimate interest in matters relating to the issue in question, but he does not consider that the legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy. The Commissioner has therefore decided that the Council was entitled to withhold this information under the exception at regulation 13(1).

Other matters

56. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Correct access regime

57. In this case, the Council failed to recognise that the complainant had requested their own personal data and did not consider the request under the Data Protection Act 2018 (DPA). Whilst the Commissioner cannot require a public authority to take action under the DPA via a EIR decision notice, in view of his decision that the requested information is the personal data of the complainant, the Council should consider

providing a response to the complainant under the DPA in respect of the information they requested.

58. The Commissioner would point out that this does not necessarily mean that the complainant is entitled to receive this information. There are a number of reasons why a data controller may be entitled to withhold information from disclosure under a SAR – this includes where the information is also the personal data of a third party. There will therefore inevitably be some information that the complainant is not entitled to receive either via the EIR or via a SAR.

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

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF