

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 7 September 2023

Public Authority: North Yorkshire County Council
Address: County Hall
Racecourse Lane
Northallerton
North Yorkshire
DL7 8AL

Decision (including any steps ordered)

1. The complainant has requested information about a declaration of interest relating to a planning application. North Yorkshire County Council (the Council) refused to provide the requested information, on the basis of it being third party personal information.
2. The Commissioner's decision is that the Council was entitled to refuse to comply with the request, by virtue of regulation 13(1) of the EIR.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 11 May 2023, the complainant wrote to the Council and requested information in the following terms:

"Please can you inform me of the date that [redacted] declared her financial interest in the above application."

5. The Council responded on 8 June 2023. It stated that the requested information was exempt from disclosure by virtue of section 40(2) of FOIA.
6. Following an internal review the Council wrote to the complainant on 30 June 2023. It maintained its reliance on section 40(2) to refuse to comply with the request.

Scope of the case

7. The complainant contacted the Commissioner on 7 July 2023 to complain about the way their request for information had been handled.
8. During the course of his investigation the Commissioner noted that the requested information would in fact be considered to be environmental information as described by regulation 2(1)(c) of the EIR, as it concerns how the Council applies its planning policies. Therefore, the Council should have handled this request in accordance with the EIR instead of FOIA.
9. The Commissioner, in his role as the Data Protection regulator, has proactively applied regulation 13(1) rather than asking the Council to reconsider the request in accordance with the EIR. This is because it would make no difference to the decision, as section 40(2) of FOIA and regulation 13(1) of the EIR work in the same way, therefore the Council's arguments apply equally under both pieces of legislation.
10. The Commissioner therefore considers the scope of his investigation to be to determine whether the Council was entitled to rely on regulation 13(1) of the EIR to refuse to comply with the request.

Reasons for decision

Regulation 13(1) – personal data

11. 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.

12. 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').
13. 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.
14. 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?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information clearly relates to the data subject who was named within the request. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. The fact that information constitutes personal data of an identifiable individual does not automatically exclude it from disclosure under the

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

EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

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

Would disclosure contravene principle (a)?

22. 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”.

23. 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.

24. 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

25. 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 interest 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.

26. 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:-

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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

- 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 legitimate interests override the interests or fundamental rights and freedoms of the data subject.
27. 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

28. In considering any legitimate interests in the disclosure of the requested information under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
29. 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.
30. The complainant argued that they have a legitimate interest in the requested information as an objector to the planning application to which the declaration of interest relates, and they therefore wish to understand at what point the declaration of interest was made.
31. The Council stated that in this case it is a matter of public knowledge that the Council officer has declared a personal interest in the planning application, and that the planning application has generated significant local interest. Therefore the Council accepts that there is a legitimate interest in the public being aware that the officer has not been involved with the application, and in reassuring the public that the application is being dealt with in a fair and transparent manner.

Is disclosure necessary?

32. '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.

33. The Council argued that it is not necessary to disclose the date on which the declaration of interest was submitted, due to there being no legal requirement or guidance requiring the name or role of an officer or the precise details of their interest to be made available to the general public. The Council further argued that it considers that any legitimate interests are already fulfilled by the public knowledge of the declaration of interest along with the Council correctly following its established procedure for such scenarios by ensuring that the planning application is considered by a Planning Committee of elected councillors.
34. The Council explained that its Constitution requires that where a senior officer has a pecuniary interest in the outcome of a planning application, the planning application is considered by the Council's Planning Committee rather than being delegated to the Head of Planning. The purpose of this is to ensure that decisions on planning applications are properly taken and to avoid as far as possible any legal challenge on the basis that there has been inappropriate involvement on an application by someone who has a personal interest in the outcome of that application.
35. The Commissioner understands the complainant's wish to understand the point at which the declaration of interest was made as a means to determine if any malpractice has occurred in the handling of the planning application. Concerns of malpractice should typically be raised via the public authority's internal complaints process in the first instance, or alternatively via the Local Government Ombudsman if the concerns cannot be resolved via the public authority's own processes.
36. In confirming that it holds information within the scope of this request, the Council has confirmed that a declaration of interest has been made. If the complainant has concerns about malpractice, they are able to raise a complaint without knowing the precise date on which the interest was declared. The Commissioner also notes that the final decision on the application will be dealt with by elected councillors rather than council officers – further reducing the opportunity for any individual officer to exert undue influence.
37. Disclosure of information in response to a request under the EIR is essentially a disclosure to the world at large. It is not a private transaction between the public authority and the requester. The Commissioner is therefore satisfied that it would not be an appropriate or proportionate step for the Council to place the officer's personal information into the public domain, when there are less intrusive avenues available for addressing such concerns. As such, the Commissioner concludes that it is not necessary for the Council to disclose the date on which the officer declared their interest in the planning application.

38. As the test of necessity has not been met, the Commissioner does not need to go on to consider the balance between the legitimate interests and the interests or fundamental rights and freedoms of the data subject.
39. As disclosure is not necessary, there is no lawful basis for the disclosure of the requested information. Disclosure would be unlawful and would therefore breach the first DP principle. The Commissioner finds that the Council was entitled to rely on regulation 13(1) of the EIR to refuse to comply with the request.

Right of appeal

40. 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

41. 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.
42. 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

Amie Murray
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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