



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0101

**Heard on the papers
On 28th October 2019 and 16th December 2019**

Before

**JUDGE
MISS FIONA HENDERSON**

**TRIBUNAL MEMBERS
MR DAVE SIVERS
MR NIGEL WATSON**

Between

MR JULIAN CHEYNE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

And

LEE VALLEY REGIONAL PARK AUTHORITY

2nd Respondent

DECISION AND REASONS

1. The Appeal is allowed in part for the reasons set out below.

Introduction

2. This is an appeal against Decision Notice FER0762114 dated 5th March 2019 which held that the requested information is not environmental information and that the Lee Valley Regional Park Authority therefore had no obligation to provide it under EIR.

3. Background

Lee Valley Regional Park Authority (LVRPA) is a statutory body responsible for managing and developing Lee Valley Regional Park. Part of the authority's responsibilities are regenerating derelict and neglected land into high quality public open spaces and wildlife habitats of ecological importance, as well as preserving the region's historical value.¹

4. In 2014 LVRPA appointed Pinny Grylls their designated "filmmaker in residence" for 2014.² They funded a project filming local people visiting the Authority's parkland areas and describing what it means to them. As a result of this project a film was made by Pinny Grylls however, this was never released in full. Ms Grylls' evidence is that she "*was not sure which of the final versions I sent had been approved for public release in the end – if at all- as there was various requests to cut this and that – and in the end I think I did not finish the final release form paper work due to this confusion. I was awaiting final confirmation. The normal procedure is that a film needs picture lock and final approval for public release sign- off before this work is completed*".³
5. The LVRPA Commissioning Officer ended his employment with LVRPA prior to completion of the project and his successor has also now left so there is no direct information from them before the Tribunal. LVRPA did not release the film as they said they were unable to satisfy themselves that image release consents had been obtained for those who appear in the film, and the film contains footage of activities that the LVRPA would not seek to promote. They released 3 extracts on their website/youtube but withdrew these once they considered the implications of the personal data of those featured.⁴
6. It is the Appellant's understanding that the film was one of several community projects paid for from a fund intended to benefit Walthamstow and Leyton Marshes and park users, as a form of public compensation for the disturbance caused by the construction of a temporary basketball training venue on Leyton Marsh during 2012. LVRPA have indicated that the film contains "*general footage of unknown persons undertaking activities such as small social gatherings, dog walking and religious ceremonies and of homelessness within mainly unidentifiable natural landscapes much of which cannot be verified as the Authority's land*".⁵

Information Request

7. On 8th January 2018 the Appellant wrote to LVRPA asking for (amongst other things⁶): "*a copy of the film made by Pinny Grylls which I understand was commissioned by the LVRPA*".
LVRPA responded on 8th February 2018 refusing to provide the film as it was intended to publish it later (s22 FOIA) and providing some documentary information relating to the

¹ <https://www.leevallepark.org.uk/en/content/cms/corporate/about-us/>

² P119

³ P210 OB email of 11.11.19

⁴ Excerpt 1 is part of the open bundle, Excerpts 2 and 3 are part of the closed bundle. All 3 excerpts come from the copy of the film that forms the disputed information.

⁵ P89

⁶ Along with other information relating to its use, commission and effectiveness

rest of his request⁷. The Appellant wrote on 2nd March 2018 asking for a description of the film and its contents, referencing the 3 excerpts online and asking for further details of the process by which the film was made. He wrote again on 7th March 2018 stating:

“I also note that you did not answer my request for a copy of the film or films or refer to this in your response. I would again ask for a copy of the film or films”.

8. LVRPA advised the Appellant on 9th March 2018 that it was not subject to FOIA⁸ but had voluntarily adopted the process. LVRPA refused to provide the film relying upon s40(2) FOIA.⁹
9. On 29th May 2018 the Appellant wrote to LVRPA stating that his request should have been dealt with under EIR. He also made a request for information relating to the policy on consents, copies of correspondence with Ms Grylls concerning consents and permissions and for more details of the kinds of activities LVRPA did not endorse.
10. LVRPA provided a response relating to the information it had regarding the new requests and stated that it had previously advised the complainant that the film would not be provided.
11. The Appellant complained to the Commissioner on 3rd July 2018 stating:
*“I wish to complain against the Lee Valley Regional Park Authority for its failure to supply a copy of the film it contracted to be produced on its behalf”*¹⁰
He further added on his complaint form:
“I made this request under Freedom of Information but realised later that this should probably have been an Environmental Information Request. The Authority refused to provide the film even when I pointed out that it should have been an EIR.”
During the course of the Commissioner’s investigation LVRPA accepted that it should have considered the request of 29th May 2018 as a new EIR request and separate from the original FOIA request¹¹. However, it refused to provide the video under reg 12(4)(a) EIRs (the information is not held) as it maintained that it does not contain environmental information as defined in regulation 2 (1) EIRs.
12. Following an investigation the Commissioner concluded that the information was not environmental information as it did not fall with Reg 2(1)(c) EIRs as the “measure” relied upon (namely the decision to commission a film about the authority’s parkland with a view to promoting the area) would not affect or be likely to affect the elements and factors referred to in Reg 2(1) (a) or (b), neither is it designed to protect those elements.

The Appeal

13. The Appellant appealed by notice dated 30th March 2019¹². In this he asked that the Commissioner’s decision be reversed and the LVRPA be required to disclose the film.

⁷ We observe that it does not appear that the Appellant was given a complete response as the standard contract that was applicable was not disclosed at that stage. It is not within the scope of this request and has now been provided to the appellant as part of the open bundle.

⁸ This is not disputed, they are not listed in Schedule 1 FOIA

⁹ Refusal to disclose film dated 3rd April 2018 and internal review of 6th April 2018

¹⁰ P55

¹¹ P83

¹² P8-13

14. The Commissioner reviewed her decision and now concedes that the requested information is environmental information. Whilst she maintains that she was correct in her application of reg 2(1)(c) EIRs she accepts that she failed to consider Reg 2(1)(a) and now accepts that the information is environmental information as it is information in visual and aural form “on” the state of a landscape and natural site. She has gone on to consider whether the information is nonetheless exempt from EIRs. Her view is that to the extent that identifiable individuals are shown contravening the Park’s bylaws disclosure would be unwarranted and the information should be withheld to that extent.
15. LVRPA were joined by the Registrar on 30th May 2019. In their response dated 9th July, they:
- i. challenge the application of Reg 2(1)(a) EIRs to the entirety of the film as some of the film cannot be verified as being their land. As such they invite the tribunal to re-consider the conclusion that the film in its entirety is a record of the state of LVRPA’s Marshes.
 - ii. In the interests of pragmatism invite the Tribunal to allow the appeal except for the parts showing individuals in breach of the bylaws (for the same reasons identified by the Commissioner in her response).

Procedural Issues:

16. All parties have consented to the case being determined on the papers. The appeal was considered at a paper hearing on 28th October 2019 and adjourned as the panel did not have sufficient information to determine the issues raised by the appeal. In particular the Tribunal sought further submissions upon:
- whether the film contains “sensitive personal data¹³” or “special category¹⁴” personal data.
 - the status of the activities alleged to be in breach of the bylaws (including whether LVRPA had consented to this by filming).
 - What consent from data subjects for disclosure had been obtained.
 - The impact (if any) that the purpose of the film had upon the expectation of the data subjects.
 - Redaction.
17. Following the adjournment, the Tribunal has received submissions from the parties and further evidence from LVRPA. The Tribunal has had regard to all the documentary information before it: an original open bundle of 209 pages, a copy of the withheld film and the open and closed evidence and submissions in response to the Tribunal’s adjournment directions. The Tribunal is satisfied that it now has sufficient information to determine the case.

Scope

18. The Appellant’s complaint to the Commissioner specified the “*failure to supply a copy of a film it contracted*”. The Tribunal reminds itself that the right of appeal lies from the

¹³ DPA 1998

¹⁴ Article 9(1) GDPR

Decision Notice which arises out of a complaint to the Commissioner¹⁵. Consequently, we are satisfied that the disputed information comprises the film (and not any of the other items that were requested in the associated correspondence from January to May 2018).

Rule 14 application

19. The ICO and LVRPA applied for their closed submissions and closed evidence to be withheld pursuant to rule 14(6) GRC Rules. The closed evidence consists of:
- 2 excerpts from the withheld film,
 - Consent forms from participants in the film,
 - A character log.
20. We are satisfied that these should be withheld pursuant to rule 14(6) and in reaching this decision we have had regard to the overriding objective as set out in rule 2. We are satisfied that disclosure of the excerpts would defeat the purpose of the appeal as they form part of the withheld material. The consent forms and character log provide the personal data of those whose personal data rights are the subject of this appeal. However, we are satisfied that a blank copy of each type of consent form should be placed in the open bundle with all personal data removed. The closed submissions refer directly to the content of the withheld film and disclosure would defeat the purpose of the appeal. We are satisfied that the substance of the arguments applying to the withheld material have been advanced in the open material.

Environmental Information

21. There is no dispute between the parties¹⁶ that LVRPA is a public authority for the purposes of EIR pursuant to regulation 2(2)(c) EIRs which defines “*public authority*” as: “*any other body... that carries out functions of public administration*”. Applying *Fish Legal and Shirley v IC EU: C: 2013:853* we rely upon the fact that the LVRPA was established by statute (the *Lee Valley Regional Park Act 1966*) to provide services in the public interest and pursuant to s28 of that Act has the power to make Bylaws.
22. There is no substantive challenge to the Commissioner’s reasoning¹⁷ in which she accepts that the film is environmental information because it falls within the definition of environmental information within reg 2(1)(a) EIRs. LVRPA’s challenge is to the Commissioner’s conclusion that the film shows the state of the Marshes because some of the film may show other areas. The Tribunal is satisfied that this is not material. The duty imposed by Reg 5(1) EIRs is that: “*a public authority that holds environmental information shall make it available on request*”¹⁸. The Tribunal is required to consider what environmental information is held by the public authority. The environmental information does not have to relate to land under the ownership or control of the public authority. Similarly, when assessing (pursuant to reg 2(1)(a) EIRs) whether the information that is held is “on” :

¹⁵ S50(1) FOIA: 1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

¹⁶ ICO paras 16-21, LVRPA concede this by responding under EIR p83 letter??? That LVRPA is a public authority is part of the Appellant’s case.

¹⁷ Aras37-40 response p 27-8 OB.

¹⁸ Subject to the parameters of the rest of the EIRs

“the state of the elements of the environment, such as ... landscape and natural sites including wetlands ...”

there is no additional requirement or provision for the landscape or natural sites concerned to be linked to the public authority that holds the information.

23. We are satisfied that the entirety of the film is held by LVRPA. We have viewed the film and on its face, from its purpose as evidenced in the proposal and documentation surrounding its creation, we are satisfied that the entirety of the film (regardless of the ownership of the land concerned) falls within reg 2(1)(a) EIRs and is therefore environmental information. To this extent the appeal succeeds.

Personal Data

DPA 1998 or DPA 2018 and GDPR?

24. The Commissioner and LVRPA rely upon r13(1) EIRs to withhold the film. An issue arises as to which legislation to apply in considering the request. The Commissioner in her submissions and correspondence with LVRPA during her investigation uses the terminology of the DPA 1998 whereas the Appellant and LVRPA have applied the terminology of the DPA 2018 and GDPR. The DPA 2018 came into force on 25th May 2018 as such it is material for the Tribunal to consider the date of the request. We have not adjourned the case to seek specific submissions as to which regime to apply as we are not satisfied that this is proportionate¹⁹. We are satisfied that our decision would be the same were we to have applied DPA 1998²⁰.
25. As set out above, although the initial request was made in January 2018, that request was considered under FOIA on a “voluntary” basis as LVRPA are not a public authority under FOIA. Although the request for a copy of the film echoes part of that initial request, the Appellant only asked for it under EIRs on 29th May 2018 which was after the new legislation had come into force. Although the refusal of the request under EIRs referred back to an earlier response made under the 1998 legislation, we rely upon LVRPA’s identification of the date of the request as 29th May 2018 in their EIR response provided before the Commissioner. We are satisfied that the effective date for the date of the request is 29th May 2018. When LVRPA received the 29th May request, they were required to consider the basis (under EIRs) upon which they were not obliged to supply the

¹⁹ Overriding objective rule 2 GRC Rules, in particular consideration of delay and resources.

²⁰ The Tribunal is satisfied that it would reach the same conclusion applying the DPA1998. We observe that the definitions of special category data and criminal offence data reflects the definitions of sensitive personal data at s 2(c) and 2(g) DPA 1998. Similarly the Article 9(2) (a) and (e) GDPR and Schedule 1 (29 and 32) conditions of DPA 2018 correspond to Schedule 3 conditions (1) and (5) under DPA 1998. Schedule 2 condition 6 is equivalent to Article 6(f) except for the additional requirement to pay specific attention to whether the data subject is a child, which is a factor that we would take into consideration in any event in relation to expectation and whether intrusion was warranted.

film pursuant to reg 5(1) EIRs. At the date when they first addressed their mind to EIRs (based upon the exemptions now being considered) they would have had to consider the terms of regulation 13 EIRs which by 29th May had been amended²¹ to apply DPA 2018 and GDPR. As such we are satisfied that this is the legislation that we must apply in determining this appeal.

Regulation 13 EIRs

26. Regulation 13 EIRs provides so far as it is relevant:

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if — (a) the first condition is satisfied, ... and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations — (a) would contravene any of the data protection principles....

Is the information Personal Data?

27. We have had regard to the disputed information and are satisfied that it contains personal data. Personal data is defined in s3(2) DPA 2018²² as:

any information relating to an identified or identifiable living individual_

data subject is defined in s3(5) as:

the identified or identifiable living individual to whom personal data relates.

We are satisfied from this that the visual image of an individual or their voice constitutes their personal data. We have had regard to clothing and are satisfied that where a face is not visible but clothing is distinctive and recognisable they are identifiable. In determining whether an individual is identifiable we have had regard to self identification and identification by close family and friends as well as someone more generally identifiable to the public. We have provided a closed annex with each instance where we have identified that personal data occurs and our decision relating to disclosure based upon the application of the general principles as set out in the open decision.

Would disclosure be lawful?

28. The first data protection principle is set out in Article 5(1) of the GDPR²³ which states:

a) Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.

Article 6 provides that:

(1) processing shall be lawful only if and to the extent that at least one of the following applies:

a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; ...

²¹ Environmental Information Regulations 2004 Modified by Schedule 19 Part 1 Paragraphs 305-309 of the DPA2018

²² Pursuant to EIRs r 2(1)

²³ Pursuant to EIRs reg 2(1) and DPA 2018 s85

e) 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.

Is the information special category data?

29. Additional considerations apply if the information is “special category data” which is defined in Article 9 of the GDPR. ‘Special category data’ includes personal data about an individual’s “*religious or philosophical beliefs*”.

30. In assessing whether any of the personal data falls within this category (and as specified in the closed schedule) we agree with the Commissioner that information that reveals or concerns these details is caught within this definition. The Commissioner has applied a test of a reasonable degree of certainty as to whether data should be treated as special category data. We agree and have had regard to the reasonable inference to be drawn from the film in terms of anything seen or heard, the context and appearance of those concerned. As set out in the closed schedule there are some parts of the film which we are satisfied contain special category data.

31. Disclosure is prohibited by Article 9 unless one of the exemptions in Article 9(2) applies namely:

a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes ...

e) processing relates to personal data which are manifestly made public by the data subject;

32. In this case a number of the data subjects in the film have signed consent forms. We have ruled that specimens of the proformas should be placed in the open bundle. It is implicit in the terms of Article 9 that the consent should relate to the disclosure of the special category data (in addition to consent for any other personal data). We have had regard to the annotations on some of the consent forms and are satisfied that to the extent that that activity is represented on the film the consent is for the personal data associated with that religious or philosophical belief. Whilst EIR is not explicitly referred to, the terms of the consent are extremely wide and in our judgment is agreement to public dissemination to the world at large and hence consistent with disclosure under the EIRs.

33. When assessing whether the personal data has been manifestly made public by the data subject we have had regard to the context. We have considered whether the filming appears to be in a public place, whether it appears that the data subjects knew they were being filmed and whether knowledge of filming was consistent with an expectation of being seen by the wider public (rather than e.g. a friend videoing for personal use).

Conclusion on Special Category Data

34. As set out in the closed schedule:

- i. there is one part of the film which we withhold as special category data. If (as appears to us) there is no consent form that would cover all those present, we are not satisfied that the data subjects have manifestly made public the special category personal data. We have had regard to the nature of the activity depicted, the context and the extent to

which it would have been perceived by those present to be viewed by the public. No Article 9 condition being met, the data must not be disclosed as disclosure would be unlawful and therefore contravene principle (a). As set out below we are satisfied that this part of the film can be anonymised to redact the identities of those present.

- ii. There is another part of the film we are satisfied is special category data but which we are satisfied can be disclosed. It appears to us likely (but it is a matter for LVRPA to clarify with Miss Grylls) that the consent of those present has been obtained. However, even if it has not the Tribunal having regard to the interaction with the camera of those present, the location and the nature of the event, we are satisfied that it has been manifestly made public by the data subjects.
- iii. The Tribunal considered a third excerpt but is not satisfied that it is special category data due to the lack of clarity as to the activity taking place and its motivation. This excerpt is nevertheless not disclosable pursuant to Article 6(f) GDPR following the reasoning set out below and in the closed schedule.

Is the information criminal offence data?

35. There are also separate safeguards for personal data relating to *offences*²⁴ and “*the alleged commission of offences by the data subject*²⁵; ...”

36. LVRPA argue that breaches of the bylaws fall within this category. We are satisfied that breach of a bylaw is capable of falling within this category. Bylaws are made pursuant to s28 of the Lee Valley Regional Park Act 1966. S28(3) states that:

*“Bylaws made under this section may contain provisions for imposing on persons offending against the bylaws reasonable fines, recoverable on summary conviction not exceeding level 2 on the standard scale, and in the case of a continuing offence a further fine not exceeding five pounds for each day during which the offence continues after conviction therefor.”*²⁶

This is reflected in the Bylaws themselves at paragraph 57 which provides for a penalty:

“Any person offending against these bylaws shall be liable on conviction to a fine not exceeding level 2 on the standard scale...”

37. From this we are satisfied that a breach of the bylaws constitutes a criminal offence and that the alleged commission of a breach would bring the behaviour within the definition of criminal offence data as envisaged by the DPA 2018. No prosecutions have been brought relating to any of the behaviour captured within the disputed information as such we are satisfied that there is no evidence of confirmed offending behaviour. However, the Tribunal must be satisfied whether the behaviour relied upon meets the threshold of an allegation of criminal behaviour. Where it does, in addition to an Article 6 basis for processing, the disclosure must also meet a specific condition in Schedule 1 of the DPA. The 2 conditions that appear relevant are:

29 This condition is met if the data subject has given consent to the processing.

²⁴ Article 10 GDPR

²⁵ s 11(2)(a) of DPA 2018

²⁶ P149

32 *This condition is met if the processing relates to personal data which is manifestly made public by the data subject.*

38. LVRPA rely upon specific types of behaviour stating:

*“The Authority does not wish to endorse activities where bylaws are seen to being breached such as lighting fires within the park and camping within the park which includes rough sleepers”.*²⁷ Before the Commissioner they relied specifically upon allegations of breaches of 4 bylaws.²⁸ These are dealt with in turn. However, in assessing whether the threshold for treating these activities as allegations of criminal behaviour, the Tribunal makes the following general observations applicable to all of them:

Activity

- i. None of the activities complained of are per se illegal. The Tribunal observes that disclosure of the film even with all the personal data redacted is still going to provide evidence of the activities that LVRPA “do not wish to endorse” e.g. film of a fire or a tent with no person associated with it. Regardless of whether the fact of the fire or the evidence of the camping is evidence of a breach of a bylaw if it does not constitute the personal data of an identifiable data subject there is no basis to withhold it (as LVRPA have not relied upon any other exemptions under EIRs).

Attribution

- ii. For an individual to be in breach of a bylaw there is an element of responsibility required. For example a picture of a tent and a picture of an individual may provide an inference that the individual is the person camping but is not proof that the tent belongs to that person or was erected by them. Similarly, presence near a fire is not evidence that the individual lit the fire.

Location

- iii. To constitute an offence the activity must occur on identifiable land to which the bylaw applies. In her submissions the Commissioner states that: *“disclosure of images relating to data subjects identifiable from the film showing a breach of bylaws on land belonging to LVRPA”*²⁹*would not be in the reasonable expectation of the data subjects given the reputational damage to them”.* LVRPA stated in their refusal that *“much of which [ie the natural landscapes shown] cannot be verified as the Authority’s land”*, they have not sought to distinguish to the Tribunal what land upon which bylaw breaking activity takes place they can confirm is theirs. LVRPA have not satisfied the Tribunal that any of the land upon which the activity took place was in fact the Authority’s land. From this the Tribunal is not satisfied that there is prima facie evidence of the bylaws being broken.

Permission

- iv. All the bylaws have an element of permission both explicitly within their terms and also by way of bylaw 57 which provides a defence if a person *“can prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence.”*

LVRPA have explained that the Commissioning officer and his successor have both left and they therefore do not know whether and if so to whom consent was given. It is not apparent from the evidence before the Tribunal that any effort has been made to

²⁷ P44

²⁸ P106

²⁹ Emphasis added

seek to contact them in order to obtain clarification. The Tribunal has had regard to the role of Ms Grylls who was referred by LVRPA as their film-maker in residence and the fact that this footage was filmed in order to make a film on their behalf. In our judgment permission can be deemed where the activity is being filmed on behalf of and for onward use by the authority who have the power to enforce the bylaws. The Commissioner argues that “*there is no evidence that any of the activities shown in the film were in fact “taking place in order for it to be filmed” to indicate that such consent had been given*”. The Tribunal disagrees and has had regard to the data subject’s interaction with the camera (whether for example they are aware they are being filmed e.g. staring at the camera) and the extent to which the activity appears staged. Additionally we have had regard to the fact that LVRPA has volunteer programmes and park rangers and where it appears that an activity is being carried out by someone in an “official” capacity (as evidenced by the use of safety equipment or clothing with a company logo) we consider that good evidence that it is more probable than not that the activity was carried out with permission. We have also had regard to the presence of consent forms and the annotations which appear to suggest that some activities have been undertaken for the purpose of filming.

Consent

- v. The case was adjourned as LVRPA had not made sufficient enquiries as to what consents had been obtained in circumstances when it was to be expected that they would have been. They sought to defer responsibility to Ms Grylls as the film maker however, as set out above, by their referring to her as their film-maker in residence we are satisfied that she was acting on their behalf and with their authority and that they as the commissioners and recipients of the film had a duty to satisfy themselves that the information obtained upon their behalf complied with data protection obligations. They had stated “*Since the Authority is unable to reach Ms Grylls, we are unable to confirm this with her*”. Following the adjournment Ms Grylls has now been contacted and has provided copies of consent forms and a log. Ms Grylls refers to the usual process by which a film is “signed off” for distribution and we note that the consent forms have annotations to enable the personnel to be identified on the film, this correlates with the log and we would expect from the dates of the consent forms that Ms Grylls and hence the authority can establish which individuals on the film have signed consent forms. The wording of the consent forms is wide and we are satisfied that where a consent form has been signed this is sufficient for disclosure under EIRs notwithstanding any allegation of behaviour in breach of the bylaws. We are satisfied that parent/guardians can consent on behalf of children for whom they are responsible.
39. The Tribunal deals with the 4 bylaws referred to by LVRPA in general terms in the open document. The Tribunal has identified other activities that might constitute breaches of 2 other bylaws which are dealt with in the closed document (as their discussion in the open document would be to reveal the content of the closed material). The fact that they have not been argued by LVRPA is taken as evidence by the Tribunal that the LVRPA does not consider them to be breaches. Both bylaws are subject to locational and consent restrictions. For the reasons specified in the closed annex the Tribunal is not satisfied that there is sufficient evidence that the activities represented disclose allegations of an offence.
40. Bylaw 4 – Unauthorised removal of vegetation. This bylaw specifies:

*(1) No person shall without reasonable excuse remove **from or displace within the ground**:...*

b)..turf or the whole or any part of any plant, shrub or tree.

The Tribunal observes that for this to constitute an offence the vegetation or part of vegetation has to be **removed from or displaced within the ground**, thus many types of “removal of vegetation” such as e.g. cutting a branch or picking a flower would not appear to fall within the terms of this bylaw as they are wholly above ground.

41. Bylaw 10 – Unauthorised camping which states:

“No person shall without the consent of the Authority erect a tent or use a vehicle, caravan or any other structure for the purpose of camping except in a designated area for camping.”

The applicability of this bylaw to a tent appears to be limited to the person who erected the tent, (rather than the person using the tent) as it is arguable that the use of any “other” structures for the purpose of camping excludes a tent in light of the earlier reference to tents.

42. Bylaw 11 – Fires. This bylaw provides:

“(1) No person shall light a fire or place, throw or drop a lighted match or any other thing likely to cause a fire.

(2) Bylaw 11(1) shall not apply to:

a) The lighting of a fire at any event for which the Authority has given permission that fires may be lit;

Again liability rests with the person that lit or caused the fire, consequently we are not satisfied that those who are present when a fire has been lit are themselves in breach of the bylaw.

43. Bylaw 42 Unauthorised public performances. This bylaw states:

“No person shall without the consent of the Authority hold or take part in any public show or performance”.

What is meant by a public show or performance is not defined. In light of the reference in bylaw 41 (in the context of excessive noise) to the requirement for a person playing a musical instrument or singing, to desist upon request; we are satisfied that the playing of an instrument or singing does not of itself constitute a public performance. The Tribunal is satisfied that for a breach of bylaw 42 to be established the possibility that an individual was playing for their own enjoyment, rehearsing or engaging in a communal activity with friends would need to be ruled out. The Tribunal is also satisfied that where the performance becomes public by dint of it being filmed as part of the withheld information then permission should be deemed by the public authority.

44. For the reasons set out above and specified in the closed schedule we are not satisfied that any of the behaviour allegedly in breach of the bylaws falls meets the threshold for an allegation of criminal behaviour. However, even if we are wrong, where there is a consent form, we rely upon the wide wording of the consent form and the fact that the consent was obtained for the activity being undertaken at the time to satisfy ourselves that the consent was informed and consistent with disclosure under EIRs even if it were a breach of the bylaws. Where there does not appear to be a consent form, in assessing whether an activity has been manifestly made public we have taken into consideration the factors identified in paragraph 33 above.

Is there any Article 6 lawful basis for processing the personal data?.

45. In relation to all the personal data contained within the film we must consider whether disclosure is lawful. It is not argued that disclosure breaches statute or common law (criminal or civil). Lawful disclosure requires that it meets an Article 6 condition. Those that are relevant on the facts of this case are:
- (a) consent and
 - (f) *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.*
46. We are satisfied that consent is defined in Article 4 of the GDPR as: *“any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”*.
47. In this case a number of the data subjects in the film have signed consent forms. We have ruled that specimens of the proformas should be placed in the open bundle. We have had regard to the terms of the consent forms and whilst EIRs are not explicitly referred to, the terms of the consent are extremely wide and in our judgment are consent for public dissemination to the world at large and hence consistent with disclosure under the EIRs. Ms Grylls has provided copies of consent forms and a log. Ms Grylls refers to the usual process by which a film is “signed off” for distribution and we note that the consent forms have annotations to enable the personnel to be identified on the film, this correlates with the log and we would expect from the dates of the consent forms that Ms Grylls and hence LVRPA can establish which individuals on the film have signed consent forms. Where a consent form exists we are satisfied that disclosure is fair and lawful for the purposes of Article 6.
48. We have gone on to consider Article 6(f) GDPR. We are satisfied that apart from the additional requirement to take into consideration whether the data subject is a child, this is an equivalent provision to Schedule 2 condition 6 DPA. As such we are satisfied that in assessing fairness the Tribunal must balance the reasonable expectations of the data subject and the potential consequences of disclosure on the data subject against the legitimate public interest in disclosing the information. In doing so we apply *Goldsmith International Business School v The Information Commissioner and Home Office [2014] UKUT 0563 (AAC)*.
49. The legitimate interests being pursued we are satisfied are transparency and accountability in the use of the land; an understanding of how public money has been spent, whether value for money has been obtained and the controls and processes in place in managing such a project. The film cost over £5,000 and was intended to be used to celebrate the use of the public space that LVRPA are charged with managing for the benefit of the public. The film has not been published (contrary to the original intention) the process of completing the film was abandoned (possibly due to staff turn over) and LVRPA have stated that they *“did not think the film was in keeping with the brief provided”*³⁰ From the submissions of LVRPA it appears that public money has been spent creating a film containing activities that LVRPA would not wish to promote. From this we are satisfied

³⁰ P50 email 03/04/2018

that there is a strong legitimate interest being pursued by the Appellant in seeking to view the withheld information.

50. We have considered whether disclosure is necessary (in particular in light of the documentary evidence that has been disclosed). We accept that disclosure of the film is necessary to enable the public to form their own judgments relating to value for money, consistency with the brief and to hold the public authority to account. The Tribunal has considered the information disclosed already relating to content and whilst this is not wrong, it does not convey a sense of the whole, especially bearing in mind the artistic nature of the endeavour and the subjective qualitative evaluation applicable to such a project.
51. We have applied a balancing test: namely does the legitimate interest outweigh the interests and rights of the individual's whose data is disclosed by the film. We take into consideration whether (and to what extent) the activity is taking place in public, whether the data subjects appear to be aware that they are being filmed and if so whether the filming could have been construed by the data subject as being for personal by the person filming. The nature of the activity being undertaken (whether it appears anodyne e.g. walking a dog or more intimate/personal) we have also had regard to how intrusive the representation is (i.e. close up, in passing, face visible or from behind). We have considered whether the data subject is or may be a child and if so the likely impact of public disclosure in this context upon a child. We accept the representations of LVRPA that this was not a "commercial" undertaking although its intended use was to celebrate the use of the park. In our judgment public dissemination of non intrusive anodyne activity in a public place when an individual was aware that they were being filmed would not outweigh the considerable legitimate interest in disclosure.
52. Where we are satisfied that the legitimate interests are overridden by the rights of the data subject, in applying the test of reasonable necessity we have considered alternative measures, i.e. "*a measure would not be necessary if the legitimate aim could be achieved by something less*"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question. In this regard we are satisfied that any prejudice to the rights and freedoms or legitimate interests of the data subjects can be mitigated so that it is not unwarranted, by redaction. LVRPA have expressed a preference for redaction by editing out the relevant extract. We are not satisfied that that is appropriate. Removal of the section removes the context, the activity, a concept of the amount of film that has been redacted and unless separately redacted the soundtrack, it also disrupts the contextual flow of the piece. In our judgment the appropriate form of redaction to remove visual personal data is anonymisation (this can be by way of pixilation, blurring or blanking). Where the tribunal is satisfied that the soundtrack should be withheld, that element should be edited to mute the soundtrack for the period concerned. The Tribunal has considered self-identification notwithstanding redaction but is satisfied that all of the activities took place in public or in a social setting and as such we are not satisfied that there would be distress associated with self identification notwithstanding anonymisation.
53. As well as the requirement that processing is lawful, it must also be fair and transparent.³¹ We adopt our reasoning in relation to the assessment of the legitimate interests of the data requestor balanced against the rights and freedoms of the data subjects in determining whether disclosure is fair and transparent.

³¹ Article 5(1) GDPR

The public interest

54. Additionally, for information to be disclosed notwithstanding regulation 13 EIRs, disclosure must be in the public interest. In addition to the legitimate interests in favour of disclosure as set out above, we have also considered the presumption in favour of disclosure as set out in Regulation 12(2) EIRs. Against disclosure in addition to the rights and freedoms of the data subjects as considered above, we have taken into consideration LVRPA's arguments that it is not in the public interest to promote activities that were they to take place on LVRPA's land without their permission would constitute a breach of the bylaws. However, we consider the weight applicable to this considerably reduced for the reasons set out in the analysis of the bylaws above. We are satisfied therefore that the considerable public interests in disclosure outweigh the public interest in withholding the information relating to the identifiable data subjects.

Conclusion

55. For the reasons set out above we allow this appeal in part:
- i. all the withheld information is environmental information.
 - ii. However, we are satisfied that some excerpts should be redacted by way of anonymisation/muting the soundtrack in reliance upon regulation 13.
56. The Tribunal's detailed reasons with reference to the withheld information are set out in the closed annex. These reasons are provided to be used where consent has NOT been obtained. The Tribunal has not definitively married up consent forms with data subjects represented but is satisfied that LVRPA ought to be able to perform this exercise by reference to the log, the annotations on the consent forms, and by correlating the dates on the consent forms to the dates of filming. The Tribunal would expect them to clarify this with Ms Grylls if they are not sure. Where consent is applicable the Tribunal's decision is that the data should be disclosed. The Tribunal's alternative reasons should only be applied where consent has not been established.

Steps

57. LVRPA are to disclose the film (redacted by anonymisation and muting the soundtrack as specified in the closed schedule) within 35 days

Signed Fiona Henderson

Judge of the First-tier Tribunal

Date: 2nd January 2020

Promulgation date: 6th January 2020