

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 October 2018

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested correspondence between the public authority and government departments relating to a compensation payment to a particular company. Norfolk County Council disclosed some information and withheld personal data under regulation 13 of the EIR.
2. The Commissioner's decision is that Norfolk County Council:
 - disclosed the relevant information that it holds and complied with regulation 5(1),
 - issued a late internal review response and breached regulation 11(4) and,
 - correctly withheld personal information under regulation 13(1).
3. The Commissioner does not require the public authority to take any steps.

Background

4. The request relates to plans to build a £500m incinerator at King's Lynn. Norfolk County Council (the "council") abandoned the project and in April 2014 a deal was struck to terminate project, with the council agreeing to pay compensation of £33.7m to the developer, Cory Wheelabrator¹.

Request and response

5. On 14 December 2017 the complainant wrote to Norfolk County Council (the "council") and requested information in the following terms:

"Please provide copies of all correspondence (including attachments and reference documents) between Norfolk County Council (officers/councillors) and any government department in which the compensation payment made to Cory Wheelabrator was mentioned, particularly government's assistance or contribution towards paying it.

Please also provide all correspondence within NCC that discussed approaching the government for any form of reimbursement towards the compensation payment."

6. The council responded on 17 January 2018 and disclosed information to the complainant.
7. Following an internal review the council wrote to the complainant on 27 March 2018. It disclosed additional information and confirmed that it was withholding some personal data under regulation 13 of the EIR.

Scope of the case

8. On 8 May 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

¹ See, for example: <https://www.bbc.co.uk/news/uk-england-norfolk-30276721>

9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had disclosed all the relevant information falling within the scope of the request and whether it had correctly withheld personal data under regulation 13.

Reasons for decision

Regulation 5(1) – information held

10. Regulation 5(1) of the EIR requires public authorities to provide environmental information held on request. In this case the complainant considers that the council has failed to disclose all the relevant information it holds.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
12. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
13. In order to assist with this determination the Commissioner approached the council with standard questions she routinely asks in such scenarios. The questions and summaries of the council's responses are set out below.

Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

14. The council confirmed that when the initial request was received, a focussed search was conducted by an officer within the Waste Service department who has detailed knowledge of the records in relation to this project. The council stated that the officer:

"...searched those parts of the Waste Service electronic project files where correspondence within the scope of the request was deemed likely to be found. The electronic project files contain nearly 12,000 documents and a search of the entirety of the project files is not a reasonable or proportionate exercise to carry out. Rather, the files have been organised in a logical structure that makes retrieval and disclosure of information as easy as possible for most requests by targeting the

search at those parts of the files that cover the material within scope of the request."

15. The council explained that the relevant project folders are organised in chronological order to the stages of the project to procure the PFI contract. The council confirmed that folders covering the termination phase of the project were:

"...searched in their entirety, save for those folders known to contain only contractor supplied documents that detailed the make-up of the compensation sum. The folders covering the competitive dialogue and preferred bidder phase of the project were also searched. These phases of the project would have included discussion between the County Council and Defra on a range of matters including the termination payment. It was necessary to find such documents and then assess them for mentions of the compensation payments and specifically the notion of government assistance towards meeting it.

16. The council explained that the search also encompassed more general Project Management files including a folder entitled 'Defra', although this was found to contain more generic and strategic items of communication rather than information specific to particular project events.

17. The council further stated that:

"It was known that there was a particular focus on the options available for termination of the contract and consequent compensation obligations that might arise from a range of termination scenarios in the spring of 2013. This theme continued to be a subject of discussion throughout the agreement of the Revised Project Plan in October 2013 and through to the actual decision to terminate the contract in April 2014 and the ongoing discussions beyond then before the compensation payment was settled in November of 2014. On that basis the folders containing project governance for that whole period of time and....the communications in the folder containing the termination work-streams were all searched thoroughly at the time of the request. This exercise was repeated at the time of the internal review."

18. The council confirmed that a folder dedicated to Member briefing notes was searched in its entirety and officers searched their email accounts for relevant information. It explained that a search was also carried out within Democratic Services for records held by the former leader of the council. It confirmed that, following the internal review, in which the complainant indicated information which they believed was missing from the records, officers carried out a further search and located two manual files of the former Leader. The council stated that three further documents for disclosure were retrieved within these files.

If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

19. The council confirmed that it did not employ search terms as it finds this method to be "...ineffective, particularly for requests such as this that ask for correspondence that mentions a particular subject. This method would not, for example, pick up correspondence in pdf format. Instead the files were manually searched."
20. The council explained that the search did include a search of email accounts but not information held locally on personal computers as its policy requires all officers to file records on the server and not on individual hard drives.

If no or inadequate searches were done at the time, please rectify this now and explain what steps you have taken.

21. The council confirmed that it considered that adequate searches were conducted. In relation to the complainant's specific concerns that searches were not conducted in the right places or at the right time, the council disputed this, confirming that searches covered the time periods specified by the complainant.

If information were held would it be held as manual or electronic records?

22. The council confirmed that most of the information would be held in electronic form. It explained that the only information likely to be held in paper form was correspondence of council members and, as noted above, this information was located at the internal review stage.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

23. The council confirmed that there is no record of any information being held and subsequently destroyed.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

24. The council explained that information associated with the management of the contract with Cory Wheelabrator would be subject to a 6 year retention period following the completion of the file. It confirmed that, where information in scope relates to day to day administration and

management of the project, the relevant retention period would be 3 years from the completion of the file.

25. The council explained that, although the 3 year period would have expired for some of the information in scope, caution was exercised in deleting such records because there has been a persistent pattern of information requests and associate appeals relating to the project. It confirmed that no deletion of in-scope material that would be due for destruction during this 3 year period has been identified.

Is there a business purpose for which the requested information should be held? If so what is this purpose?

26. The council confirmed that, at the time of the request, the only purpose for retaining the information would be to comply with its standard retention policies. It clarified that, as the project is now over, the waste management team no longer have a business purpose to retain the requested information.

Are there any statutory requirements upon the council to retain the requested information?

27. The council confirmed that, beyond its standard retention policies, there is no statutory requirement for it to retain the information.

Is there information held that is similar to that requested and has the council given appropriate advice and assistance to the applicant in line with the duty contained in regulation 9 of the EIR?

28. The council confirmed that the request focus was clear and that it considered it had located and disclosed all the relevant information, save for the small quantity of personal data withheld under regulation 13.

Conclusions

29. The Commissioner is mindful of the complainant's concerns that not all relevant held information falling within the scope of the request has been identified and disclosed. However, she considers that the council's explanation of the actions taken to locate and retrieve relevant demonstrate that thorough and extensive searches were conducted and that the complainant's specific concerns were addressed.
30. In the absence of evidence which contradicts the council's explanation of the actions taken in this regard, the Commissioner has concluded that, on the balance of probabilities, it is likely that the council has disclosed all the relevant information it holds and complied with regulation 5(1) of the EIR.

Regulation 11 – internal review

31. Under regulation 11(4) of the EIR, public authorities must provide an internal review response within 40 working days of the date of receipt of a submission.
32. In this case the complainant submitted their request for internal review on 20 January 2018 and the council issued its response on 27 March 2018.
33. In its submissions the council explained that the complainant has submitted a large number of requests, 35 of which have been directly linked to this matter, which have steadily grown in scope. It explained that it considered that the volume of requests made and associated involvement with appeals to the Commissioner had become burdensome, placing pressures on staff time which resulted in its late review response.
34. Whilst the Commissioner acknowledges the concerns raised by the council, she finds that, as its response was issued outside the 40 working day timeframe, it breached regulation 11(4) in this case.

Regulation 13(1) – Third party personal data

35. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (“the DPA”).

Is the withheld information personal data?

36. Personal data is defined by the DPA as any information relating to a living and identifiable individual. This information comprises the names of council officers and it is clearly personal data.

Would disclosure breach the Data Protection Principles?

37. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual or individuals concerned. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
38. In this case the council has explained that the individuals in question are current and former council employees who are all junior officers at tier 5 or below and their personal details have been redacted from the disclosed meeting minutes and correspondence. It confirmed that the

individuals were not themselves responsible for policy development or decision-making in relation to the project which is the subject of the request.

39. The council has argued that, as the individuals concerned were not in a position to be held directly accountable for policies or key decisions relating to the project, they would have a reasonable expectation that their names would not be placed in the public domain.

Consequences of disclosure

40. The council explained that officers previously named in connection with this matter have received abuse and threats on social media and in public, including, at its most extreme, the threat of crucifixion.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

41. In general, there is always some legitimate interest in the disclosure of information that is held by public authorities. This is because disclosure helps to encourage the general aims of achieving transparency and accountability. It also assists people in understanding the decisions made by public authorities and to be more involved in that process. The Commissioner considers that public authorities should expect to be subjected to scrutiny, particularly in relation to decisions which relate to public expenditure.
42. However, the Commissioner has to consider, as with the disclosure of any information, that there is always the question of degree and the circumstances will not always warrant the disclosure of every last detail of a particular matter in order to satisfy the legitimate public interest. Public authorities have to be mindful of their obligation to protect the right to privacy that individuals have where that is reasonable.

Has the council considered whether any of the conditions in schedule 2 would allow the information to be disclosed?

43. The council confirmed that it considered all the conditions schedule 2 and that it does not consider that any apply in this case. It argued that it is not necessary for the public to know the names of junior officers in order to hold the council to account and, in view of the cited risks to the individuals, it does not consider that there is any legitimate interest in disclosure that would outweigh the prejudice to rights and freedoms of the individuals in question.

Conclusions

44. The Commissioner has consistently maintained in previous decision notices that, whilst it might be appropriate for senior staff to be held publically accountable for decision-making, there is little public interest in identifying junior staff who are not ultimately responsible for such matters. Moreover, in addition to having a reasonable expectation that their names would not be placed in the public domain, the legitimate public interest in disclosure is far outweighed by the risk of abuse identified by the council.
45. The Commissioner is also mindful that the individuals in question have refused consent for their names to be disclosed and, in any event, she is satisfied that the public interest in accountability has been served by the information disclosed by the council.
46. On consideration of all of the above, the Commissioner finds, in this case, the individuals' right to privacy outweighs any legitimate public interest in disclosure and therefore regulation 13(1) of the EIR is engaged.

Right of appeal

47. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

Andrew White
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