

## **Environmental Information Regulations 2004 (EIR) Decision notice**

**Date:** 25 January 2019

**Public Authority:** Stratford-on-Avon District Council  
**Address:** Elizabeth House  
Church Street  
Stratford-upon-Avon  
CV37 6HX

### **Decision (including any steps ordered)**

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1. The complainant has requested from Stratford-on-Avon District Council a copy of an email together with attachments sent to it by a private individual in relation to a potential planning control matter.
2. Stratford-on-Avon District Council withheld the requested information in its entirety under regulations 12(3), 12(5)(b) 12(5)(f) and 13(1) of the EIR.
3. The Commissioner's decision is that Stratford-on-Avon District Council has correctly applied regulation 13(1) of the EIR to the requested information.
4. The Commissioner requires no steps to be taken.

### **Request and response**

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5. On 21 June 2018, the complainant wrote to Stratford on Avon District Council (the Council) and requested information in the following terms:

*"On 30 January 2018 (name redacted) wrote a letter to (name and address redacted). She referred to a letter and associated attachments that she had received from (name redacted) on 24 January 2018. I have learnt today that the letter and the associated attachments contain a number of allegations against me and my husband. Please may I have a copy of both the letter and associated attachments, redacted if necessary'.*

6. The Council responded on 5 July 2018. It applied the EIR to the request and refused disclosure of the information in its entirety under regulations 12(3), 12(5)(b), 12(5)(f) and 13(1).
7. On 5 July 2018 the complainant requested an internal review.
8. Following an internal review the Council wrote to the complainant on 2 August 2018 and stated it was upholding its original decision.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 3 August 2018 to complain about the way her request for information had been handled. In particular, she said she was unhappy with the Council's decision to refuse the information she requested in its entirety.
10. The scope of the Commissioner's investigation will be to assess whether the Council has correctly applied one or more of the EIR exceptions cited to withhold the requested information.

### **Reasons for decision**

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11. The Council has withheld the requested information under Regulations 12(3), 12(5)(b), 12(5)(f) and 13(1), of the EIR.

### **Regulation 12(3) and 13(1) of the EIR – 3<sup>rd</sup> party personal data**

12. 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.
13. In this case, the relevant condition is contained in regulation 13(2A)(a)<sup>1</sup>. 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 set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').
14. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) of the Data Protection Act 2018.

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

*Is the information personal data?*

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The Commissioner has viewed a copy of the withheld information which consists of an email communication dated 22 January 2018 together with three attachments (comprising of correspondence between the complainant's husband and a third party) sent to the Council by a private individual in response to an alleged breach of planning control. The communication includes the author's personal and subjective opinions on the complainant and her husband. The Council has pointed out that it took these opinions into account when deciding what potential action to take against him.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the author of the email communication. She is satisfied that this information both relates to and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in sections 3(2) and 3(3) DPA.
22. The Commissioner has also noted that the withheld information includes reference to the complainant and correspondence between the complainant's husband and a third party carrying on a business on the email author's land.

23. The Commissioner has considered her guidance on access to information held in complaint files<sup>2</sup> and has concluded that the withheld information also includes the personal data of the complainant, the complainant's husband and the third party with whom he was corresponding. She is therefore satisfied that this further information both relates to and identifies the individuals concerned. It therefore falls within the definition of 'personal data' in section 3 DPA.
24. Under regulation 5(3) public authorities are not obliged to make available environmental information that is the requester's personal data. To the extent that some of the withheld information includes the complainant's personal data, the Commissioner finds this is excluded from disclosure under regulation 5(3) of the EIR.
25. The fact that information constitutes the personal data of identifiable living individuals 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 data protection principles.
26. The Commissioner agrees that the most relevant data protection principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

27. Article 5(1)(a) GDPR states that:-

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

28. 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 (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

### **Lawful processing: Article 6(1)(f) GDPR**

29. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" bases for processing listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1179/access\\_to\\_information\\_held\\_in\\_complaint\\_files.pdf](https://ico.org.uk/media/for-organisations/documents/1179/access_to_information_held_in_complaint_files.pdf)

30. The Commissioner considers that the basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

*"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"<sup>3</sup>.*

31. In considering the application of Article 6(1)(f) GDPR 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 legitimate interest(s) or fundamental rights and freedoms of the data subject.

32. 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*

33. In considering any legitimate interest(s) in the disclosure of the requested information to the public under EIR, the Commissioner recognises that such interest(s) can include broad general principles of

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<sup>3</sup> 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) 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".*

accountability and transparency for their own sakes as well as case specific interests.

34. 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.
35. The complainant believes she has a legitimate interest in seeing the withheld information to ascertain whether any allegations were made against her and her husband by the author of the email to the Council.
36. The Commissioner understands why the complainant's personal interests would require disclosure of the withheld information. However, she is not aware of any wider public interest in the information being disclosed. The Council has considered the comments in the withheld information and taken them into account when making its decision on a planning issue. It has also considered the complainant's comments in relation to the same issue.

*Is disclosure necessary?*

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
38. While recognizing that the complainant has a personal interest in the withheld information the Council does not believe that a disclosure to the world at large under the EIR is necessary.
39. Recognizing the withheld information contained is the personal data of the author of the email, the Council wrote to him on 30 August 2018 asking whether he would be prepared to consent to this information being disclosed to the complainant under the EIR (and thereby to the world at large) in full or with redactions. The author responded on 17 September 2018 stating he could see no reason for any further disclosure. He acknowledged the planning issue had been determined and said he accepted the Council's decision in relation to it.
40. The Council sent a similar letter to the third party carrying on business on the author's land but did not receive a response.

41. The Council has not provided any evidence that it approached the complainant's husband in relation to his correspondence with the person referred to in the third party.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

42. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. The only interests in disclosure of the requested information are the complainant's personal ones. Against this are reasonable expectations and specific wishes of the author of the withheld information to maintain confidentiality in relation to the relevant correspondence.
44. The Commissioner also believes the complainant's husband, the person with whom he was corresponding and the complainant would also have a reasonable expectation that their personal data would not be disclosed to the world at large under the EIR.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would not therefore be lawful.
46. Given the conclusion the Commissioner has reached above on lawfulness, she considers there is no need to consider whether or not disclosure would be fair and transparent.
47. The Commissioner has therefore decided that the Council was entitled to withhold the entirety of the requested information under regulation 13(1) by way of regulation 13(2A)(a) of the EIR. In view of this she has not gone on to consider the other EIR exceptions cited by the Council, namely regulations 12(5)(b) and 12(5)(f).

**Right of appeal**

48. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.

50. 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 .....**

**Deborah Clark  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**