

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2019

Public Authority: Fermanagh and Omagh District Council

Address: Townhall, 2 Townhall Street
Enniskillen, County Fermanagh
BT74 7BA

Decision (including any steps ordered)

1. The complainant has requested information from Fermanagh and Omagh District Council ("the Council") in relation to the investigation process for the assertion of a public right of way in County Tyrone, Northern Ireland. The Council disclosed the requested information, with some information redacted under section 40(2) of the FOIA.
2. The Commissioner's decision is that the Council wrongly handled the request under the FOIA. In failing to consider the request under the EIR, it breached the requirement of regulation 14 of the EIR.
3. The Commissioner finds that the Council was entitled to rely on regulation 13 (personal information) of the EIR to withhold the withheld information. No steps are required.

Background to the request

4. In 2010, Dalradian Gold Limited (DGL) acquired land at Curraghinalt, Omagh, County Tyrone, and in 2014 was granted planning permission for an exploration tunnel investigation on that land. A further planning application, for an underground mine, was lodged by DGL in 2017. The project, if approval is granted, is set to last 25 years and DGL has estimated that £750 million will be spent on it.
5. In 2016, the Council received correspondence calling for it to use its statutory powers of investigation to assert that there is a Public Right of Way over the Green Road from Greencastle to Rousky, County Tyrone, which would be highly significant as this is in the vicinity of the proposed Dalradian gold mine operation. The complainant has requested information in relation to the Assertion of Public Right of Way investigation being carried out by the Council.

Request and response

6. On 12 March 2018, the complainant wrote to the Council and requested information in the following terms:-
 1. Correspondence from residents received in February 2016.
 2. Correspondence to the 25 stakeholders identified at paragraph 2.13 of Summary of the Assertion Report dated November 2016.
 3. Copies of all other correspondence, internal file notes, internal e-mails, reports, attendance notes, from January 2016, not already disclosed to us between July 2017 and January 2018.
7. The Council responded to the complainant on 12 April 2018, disclosing the requested information in parts 1 and 2 of the request with redactions and citing the exemption under section 40(2) (personal data of a third party) as a basis for those redactions. It refused to disclose the information requested in part 3, citing section 12(1) (cost limit) as a basis for non-disclosure.
8. The complainant was not satisfied with that response and requested an internal review, the result of which was provided to her on 3 May 2018. The reviewer determined that the complainant should be provided with the information requested in part 3 of the request,

subject to redactions, and upheld the original decision in respect of parts 1 and 2 of the complainant's request.

Scope of the case

9. The complainant contacted the Commissioner on 30 May 2018 to complain about the way the Council handled part 2 of her request for information.
10. The Commissioner has considered the Council's handling of part 2 of the complainant's request, specifically the Council's redaction of names and contact details from the correspondence it disclosed in response to part 2 of the request.
11. During the Commissioner's investigation, she reconsidered the request and the withheld information and concluded that the information was environmental and that the Council should have dealt with the request under the Environmental Information Regulations 2004 (EIR).

Reasons for decision

Access regime

12. As set out above, the Council responded to the request under the FOIA. However, it is the Commissioner's view that the request was for environmental information and that the Council ought to have dealt with it under the EIR rather than the FOIA.
13. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors*

referred to in (a)...as well as measures or activities designed to protect those elements..."

14. The Commissioner has considered the wording and focus of the request. As it is regarding the legal process surrounding the assertion of a public right of way, the Commissioner now considers that it is a request for information which is a measure as set out in regulation 2(1)(c) which is likely to affect or protect the elements of the environment. Therefore, the Commissioner considers that the request was for environmental information as defined by regulation 2(1) of the EIR.

Regulation 13 – personal data of third parties

15. The Commissioner considers that the arguments provided by the Council in respect of its application of section 40(2) of the FOIA to the withheld information are comparable to what would be required when considering the application of regulation 13. She has therefore used her discretion and considered them below rather than requiring the Council to issue a fresh response in line with the EIR; this is to ensure that the complainant is not disadvantaged by any further delay.
16. In this case the Council cited section 40(2) in respect of the redacted information in part 2 of the complainant's request. The Council confirmed that it was applying section 40(2) in conjunction with the condition listed in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the DPA). The DPA has since been superseded by the General Data Protection Regulation 2018 (GDPR) and the Data Protection Act 2018, however the 1998 Act was still in force at the time of the complainant's request and as therefore been considered under the 1998 legislation.
17. 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 applicant and where one of the conditions listed in regulation 13(2)(a)(i) and (ii) is satisfied.
18. In this case the relevant condition is contained in regulation 13(2)(a)(i) as the Council's position is that disclosure of this information into the public domain would be unfair and unlawful, which would contravene the first data protection principle as set out in the DPA.

19. The Council states that, following two preliminary site visits in June and August 2016, 25 different stakeholders were contacted as secondary evidence groups on 2 and 3 September 2016. Each group was issued with an evidence form and a map for them to demonstrate where, if at all, they felt the public right of way was located. The Commissioner has viewed the information detailing correspondence to the stakeholders.
20. The Commissioner is satisfied that the information in question is the personal data of individuals other than the requestor. This is because the individuals can be identified from their names and contact details on the correspondence. The other information which has been withheld by the Council is the names of the organisations which the individuals represent, save for the names of organisations which are public authorities, in which case the names and contact details of the individuals representing those organisations were also disclosed. The Commissioner does not usually consider the names of organisations to constitute personal data, however in this case the organisations whose names are being withheld are small, voluntary groups, and in some cases individual landowners. Disclosure of which of those groups received and responded to correspondence from the Council regarding the public right of way could lead to identification of the individuals who received the correspondence and responded on behalf of the small voluntary groups. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would be unfair.
21. When considering the fairness and the first data protection principle the Commissioner has taken the following factors into account:
 - the individuals' reasonable expectations of what would happen to their information;
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (i.e. the consequences of disclosure); and
 - whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects.

22. The Commissioner has first considered individuals' expectations. The Council states that the individuals in question, both the landowners and those who represented the small voluntary groups, would have a reasonable expectation that the Council would keep their personal information in confidence and not disclose it into the public domain in this specific context. A representative of one of the small voluntary groups indeed specifically requested anonymity in relation to the public right of way consultation process.
23. The Council stated that, as part of the Assertion of Right of Way process, the identities of the 25 stakeholders will be disclosed as part of the discovery process, as the Assertion process requires a County Court determination. However, at the time of the request, such a determination would have been at least 18-24 months away so, whilst the stakeholders would have been aware of future disclosure, they still had a reasonable expectation that the Council would keep their details confidential at the time of the request.
24. The Council states, and the Commissioner is otherwise aware, that both the proposed DGL gold mine and the interlinked public right of way issue have divided the community and caused heightened tensions. Some people believe very strongly that the gold mine will have an adverse environmental impact on the area, whilst others believe that it will be of great economic benefit, creating jobs and increasing tourism to the area.
25. The Council has expressed serious concerns about the possible consequences of the information being released, and has provided evidence of harassment of individuals over their views regarding the gold mine. The disclosure of a map drawn up by DGL, pinpointing homes in the area with the initials of the 'head of house' beside them, has caused locals on both sides of the argument to fear for their safety. If the information was to be disclosed, the individuals and organisations concerned would be likely to be very distressed and fear reprisals.
26. The Commissioner has next considered whether there is any legitimate interest in disclosure of the information which would be sufficient to justify the negative impact of disclosure on the data subjects. The Commissioner accepts that this is an area of great public interest, and that disclosure of the information would be of legitimate interest to both the complainant and the wider public. However, all papers regarding the ongoing planning application and assertion of public right of way are uploaded regularly onto the Council's website,

with appropriate redactions made and explained. The legitimate interest of the public can be served by reading the information available at www.fermanaghomagh.com/your-council/freedom-of-information, which can be accessed free of charge.

27. The Commissioner has concluded that, whilst there is some legitimate interest in disclosure of the information redacted under regulation 13(1) of the EIR, this is not sufficient to justify the distress which would be caused to the data subjects by disclosure, particularly as the legitimate interest can be served in large part by accessing the information available through the link above. The Commissioner therefore considers that regulation 13(1) of the EIR applies to the withheld information.

Regulation 14 – refusal to disclose information

28. In the circumstances of this case the Commissioner has found that, although the Council originally considered this request under the FOIA, it is the EIR that actually apply to the requested information.
29. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information specifies, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under FOIA.

Right of appeal

30. 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

31. 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.
32. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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