

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

Date: 9 October 2019

Public Authority: Powys County Council

Address: information.compliance@powys.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about a planning enforcement complaint relating to his property. Powys County Council ('the Council') stated that the information requested was exempt under section 41 of the FOIA. During the course of the Commissioner's investigation, the Council agreed that the correct access regime for the request was the EIR as opposed to the FOIA. The Council then sought to rely on regulations 12(5)(f) and 13 to withhold the information requested. The Commissioner has investigated and found that the information is exempt from disclosure under regulations 5(3) and 13(1) as it contains the personal data of the complainant and the personal data of third parties. The Commissioner does not require any steps to be taken.

Request and response

2. On 17 January 2019 the complainant wrote to the Council and requested information in the following terms:

"We request a copy of the 'letter of complaint' alleged to have been received by PCC Planning department in May 2018, in which allegations have been made regarding the supposed mandatory requirement for us to have removed an extension to our property, [address redacted]. [name redacted] of the PCC Planning department stated the existence of this letter in an email which she copied to us, from [name redacted]'s

PCC email address, on Thu 01/11/18 at 15:13, using 'cc' to email address: [email address redacted]".

3. The Council responded on 7 February 2019 and stated that the information requested was exempt under section 41 of the FOIA.
4. On 7 February 2019 the complainant requested an internal review of the Council's refusal of the request. He asked whether the Council could provide "a redacted copy of the letter in question thus maintaining the confidentiality of the originator".
5. The Council provided the outcome of its internal review on 25 February 2019 and upheld its decision that section 41 of the FOIA applied to the request.

Scope of the case

6. The complainant contacted the Commissioner on 7 March 2019 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation the Council agreed that the request should have been considered under the EIR as opposed to the FOIA. It reconsidered the request under the EIR and introduced reliance on regulations 12(5)(f) and 13(1) as the basis to withhold the information in question. The Council also acknowledged that some of the withheld information constituted the complainant's own personal data, although it did not formally state it was relying on regulation 5(3) of the EIR.
8. For clarity, a requester's own personal data is exempt under regulation 5(3) of the EIR. Personal data is defined by the Data Protection Act 2018 ('the DPA') as any information relating to a living and identifiable individual. The Commissioner accepts that some of the withheld information is actually the complainants' own personal data. The separate right of access provided by article 15 of the General Data Protection Regulation ('the GDPR') therefore applies. This notice only relates to the information that falls under the scope of the EIR.
9. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the information held relevant to the request.

Reasons for decision

Is the information environmental?

10. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

“any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

11. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
12. In this case the withheld information relates to a complaint about an alleged breach of planning consent. The Commissioner considers that planning rules (and the enforcement of those rules) are “measures” affecting the elements of the environment and therefore the EIR is the correct is the correct legislation to apply.

Regulation 5(3) – the exemption for personal data - the complainant’s own personal data

13. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. The withheld information in this case is a letter of complaint sent to the Council about an alleged breach of planning control at the complainant's property. The complainant is clearly identifiable from the information and the information is significant and biographical to him. The letter makes reference to the complainant by name and their address. In addition the letter contains the name and contact details of the author of the letter and also refers to another third party by name.
17. In its response to the Commissioner's enquiries, although the Council acknowledged that some of the withheld information does constitute the personal data of the complainant, the Council did not cite regulation 5(3) or consider the complainant's request as a Subject Access Request.
18. In her published guidance, "[Personal data of both the requester and others](#)" the Commissioner makes it clear that in circumstances where, the personal data of the applicant is very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
19. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA or regulation 5(3) of the EIR.
20. Taking the above into account, the Commissioner is satisfied that the information is the complainant's own personal data. This is because the requested information relates to complaints concerning their property. The Commissioner therefore finds that regulation 5(3) is engaged for some of the withheld information and as this is an absolute exception there is no public interest test to apply.
21. Having viewed the withheld information, the Commissioner notes that some of the information could be released without disclosing the complainant's own personal data, namely the name and address of the author of the letter and the reference by name to another third party.

The Commissioner has therefore gone on to consider whether the Council was correct to apply regulation 13 of the EIR to the information contained within the withheld information which does not constitute the complainant's own personal data.

Regulation 13 – third party personal data

22. 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.
23. 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.
24. 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 DP principles.
25. The Commissioner is satisfied that the name and address of the author of the letter and the reference by name to another third party relates to living individuals who may be identified from that data. The requested information therefore falls within the definition of personal data as set out in the DPA.
26. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. Article 5(1)(a) of the GDPR states that:

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

30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate 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"¹.

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, 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.

¹ 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) 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".

34. 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

35. In considering any legitimate interest in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
36. 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.
37. In this case, the Commissioner accepts that the complainant has a legitimate interest in knowing the identity of the individual who wrote to the Council about an alleged breach of planning at his property. However, the Commissioner also notes that in his internal review request the complainant asked the Council to reconsider his request by providing a redacted copy of the letter "*thus maintaining the confidentiality of the originator*". In light of this and the fact that the Commissioner has been unable to identify a wider legitimate interest in disclosure of the identity of the person who wrote the letter of complaint to the Council, or the name of another third party, the Commissioner does not consider there is a legitimate interest in disclosure of the information in question. The Commissioner is satisfied that the Council correctly applied regulation 13 to the information in question.
38. As the Commissioner has found that the withheld information is exempt under either regulation 5(3) or 13 of the EIR, she has not gone on to consider the Council's application of regulation 12(5)(f) to the information in question.

Other matters

39. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

Correct access regime

40. Article 15 of the GDPR gives an individual the right to request copies of personal data held about them – this is referred to as the right of subject access. When the Commissioner viewed the information in question, it was immediately apparent that it contained personal data

relating to the complainant. The Council also acknowledged in its response to the Commissioner that some of the withheld information contains personal data relating to the complainant, although it did not formally state it was relying on regulation 5(3) to withhold it.

41. In the Commissioner's opinion, responsibility for applying exemptions and determining whether a request should be considered under the FOIA, EIR or the DPA rests with the public authority and not the requestor. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In this case the Council should have instigated its own procedures for handling subject access requests much earlier in its dealings with the complainant. Ideally, this should have been at the time it received the request.
42. The approach of the Commissioner where a request is made for information which is the requester's own personal data is that the public authority should deal with the request as a subject access request. This action should be taken without it being necessary for the requester to make a further request specifying article 15 of the GDPR.
43. The Commissioner therefore recommends and expects the Council to now consider whether the information requested, which is exempt from disclosure under section 5(3) of the EIR, could be disclosed to the applicant in accordance with its obligations under article 15 of the GDPR.

Right of appeal

44. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Joanne Edwards
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