

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 October 2021

Public Authority: Babergh & Mid Suffolk District Councils
Address: Surrey Heath House
Knoll Rd
Camberley
GU15 3HD

Decision (including any steps ordered)

1. The complainant requested information from Babergh & Mid Suffolk District Councils ("the Council") relating to objections to the proposed diversion of a footpath, specifically the names of objectors.
2. The Council refused to provide the requested information, citing regulation 13 (personal information) of the EIR.
3. The Commissioner's decision is that the Council correctly applied regulation 13 to the withheld information so does not require any steps to be taken.

Request and response

4. On 8 April 2021, the complainant wrote to the Council and requested information in the following terms:

"I would like to know the names of the objectors to the proposed diversion of Footpath (location name redacted)".

5. The Council responded to the complainant 20 April 2021 by stating:

"the Council believes all of the requested information should be exempted from release under Regulation 13(1) of the Environmental

Information Regulations 2004 (EIR) as it is personal data as defined under the Data Protection Act 2018”.

6. The complainant disputed the Council’s consideration of their processes:

“... I feel it prompts me to ask the question why you will not release this information when the personal data of objectors to a planning application are released and indeed published on line on your website!”

7. Following an internal review the Council wrote to the complainant on 27 April 2021. It confirmed its view that the refusal had been correctly applied, under regulation 13 (personal information).

Scope of the case

8. The complainant contacted the Commissioner on 23 June 2021 to complain about the way their request for information had been handled.

9. They told the Commissioner:

“I do not consider the council operates a coherent policy on disclosure of information in this particular case.”

10. And argued:

“I note that to function in a democratic and accountable way, the Council publishes Planning Application objector’s data. It could of course choose to treat objectors to public path order applications in the same democratic and accountable way, given that the process does not allow for anonymous objection once an order is referred to the Planning Inspectorate. Would it not be equitable for notices for public path orders to include a statement advising that personal data will be released? Given that the impact of an objection to a public path order is so much greater than that of an objection to a planning application, surely this is in the interests of democracy and fair to all?”

11. The scope of the Commissioner’s investigation is to determine if the council is entitled to rely on regulation 13 EIR to withhold the requested information.

Reasons for decision

Regulation 13 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) of the Data Protection Act 2018 is satisfied. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.
13. In this case the relevant condition is contained in regulation 13(2A)(a)¹ of the Data Protection Act 2018. 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('UK GDPR').
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.
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 DP principles.

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

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

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. In the circumstances of this case the Commissioner is satisfied that the withheld information both relates to and identifies any third party concerned as the requestor is asking, "*specifically for the names of objectors*". This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual 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 DP principles.
22. The most relevant DP principle in this case is principle (a)

Would disclosure contravene principle (a)?

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

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

24. 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, fair and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

26. 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*².

27. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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.
28. 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

29. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
30. 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.

² 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

31. In this case, the Commissioner accepts that the complainant has an interest in accessing the information requested as the complaint to the Council was about a footpath diversion, and the impact of any objection(s).
32. Whilst the Commissioner is unable to identify any wider legitimate interest in the public accessing the information, she is satisfied that there is a legitimate interest to the complainant in receiving this information.

Is disclosure necessary?

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question
34. The Commissioner accepts that the complainant would have no other means of getting the requested information and that therefore disclosure by the Council would be necessary to satisfy the complainant's legitimate interests in this case.

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

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject's would not reasonably expect that the information would be disclosed to the public under the 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.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual(s) expressed concern to the disclosure; and
 - the reasonable expectations of the individual(s).

37. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to someone in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. The Council considers:

"compliance with the request to disclose the information will in effect be making an unrestricted disclosure of personal data to the general public on the strength of the requesters' private interests. This constitutes a disproportionate and unwarranted level of interference with the individual's rights and freedoms, particularly their right to privacy and family life under the Human Rights Act 1998."

40. The Council also considers that any member of the public that raises objections within the public path order legislation, do so in the expectation that their identity would not be released in response to an FOIA/EIR request, essentially into the public domain.
41. The Council advised that:

"The planning legislation is specific in its requirements whereas the public path order legislation is silent on this point so the Council have been guided by FOIA/EIR."

42. In this case, the complainant is seeking information which relates to objections to the Council, and the specific names of objectors.

The Commissioner's decision

43. The Commissioner accepts, that any person contacting the Council with their objection to the footpath diversion order, does so in the expectation that their identities will be kept confidential. Therefore, any objectors in this case would have a reasonable expectation that their personal information would not be disclosed.
44. The Commissioner also accepts that disclosure of the identity of the individual(s) is likely to cause damage or distress to them, which would be unwarranted. Whilst the Commissioner accepts that the complainant has a legitimate interest in disclosure of the information in question, they have been unable to identify any wider legitimate interest that would outweigh fundamental rights and freedoms of the individual(s) in this case. The Commissioner therefore considers that there is no Article

6 basis for processing and so the disclosure of the information would not be lawful.

45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

46. 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

47. 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.
48. 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

Catherine Fletcher
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