

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2021

Public Authority: Causeway Coast and Glens Borough Council
("the Council")

Address: Civic Headquarters
Cloonavin
66 Portstewart Road
Coleraine
BT52 1EY

Decision (including any steps ordered)

1. The complainant has requested information in relation to an alleged complaint made regarding a property at which its client operates a business. The Council has relied upon regulation 13(5) of the EIR as a basis for refusing to confirm or deny that it holds the requested information.
2. The Commissioner's decision is that the Council has correctly relied upon the above exception and therefore she orders no steps to be taken.

Request and response

3. On 11 June 2019, the complainant wrote to the Council and requested information in the following terms:

"We refer to the above matter. Our client operates an anaerobic digester plant situate at [specified address].

We understand that complaints were made by [specified individual] in relation to smoke and burning at the adjacent property to the plant. We are instructed that a complaint was made on 10 November 2018.

We should be grateful if you could kindly confirm how these complaints have been actioned and provide further information in relation to these complaints made to the Environmental Health Officer.

We should be grateful if you could please treat this as a request for information under the Freedom of Information Act 2000."

4. The Council responded on 3 July 2019. It stated that it was treating the request as a request for environmental information and that it was refusing to confirm or deny whether it held the requested information, relying on the exception as set out in regulation 13(5) of the Environmental Information Regulations (EIR).
5. Following an internal review the Council wrote to the complainant on 6 August 2019. It stated that it was maintaining its reliance on regulation 13(5) of the EIR as a basis for non-confirmation or denial.

Scope of the case

6. The complainant contacted the Commissioner on 23 October 2019 to complain about the way his request for information had been handled.
7. The Commissioner has considered the Council's handling of the complainant's request, in particular whether it has correctly relied upon regulation 13(5) of the EIR.

Reasons for decision

Regulation 13: third party personal data

8. Regulation 13(5)(A) of the EIR provides that a public authority may refuse to confirm or deny whether information is held if to do so 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 (the GDPR).
9. Therefore, for the Council to be entitled to rely on regulation 13(5)(A) of the EIR to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and

- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

10. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as: -
"any information relating to an identified or identifiable living individual".
11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
12. 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.
13. The Council maintains that confirming or denying whether the requested information is held would result in the disclosure of a third party's personal data, namely the person who allegedly submitted the complaint.
14. The Commissioner's published guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. The Commissioner accepts that if relevant information is held by the Council, it will be personal data relating to the individual who allegedly made the complaints. Therefore the Commissioner also accepts that confirmation or denial in this case would result in the disclosure of personal data, in that either response would tell the public whether or not the individual had submitted the complaints specified by the complainant in its original request.
15. The complainant also asked for further information including details as to how the complaints were dealt with by the Council. The Commissioner accepts that confirming or denying that this information was held would also result in the disclosure of the individual's personal data because it would still reveal whether or not he/she had submitted complaints to the Council.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

16. The Council has stated that confirming or denying that relevant information is held would contravene principle (a) as set out at Article 5(1)(a) of the GDPR. This states that: *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*
17. In the case of a request for information under the EIR, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

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

18. 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"* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
19. The Commissioner considers that the condition 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".
20. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under the EIR it is necessary to consider the following three-part test:
21. (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
22. (ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) 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.

23. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.
24. The Commissioner requested the Council’s submissions as to its refusal to neither confirm nor deny whether it held the requested information. The Council was invited to refer specifically to the Commissioner’s guidance and to previous decisions when formulating its response. The Council provided an explanation as to its position, however it was rather general and not structured to include any consideration of the three part test below. The Commissioner has carried out her own consideration of this test and would remind public authorities that this should be an integral part of any analysis of their application of regulation 13 of the EIR.

(i) Legitimate interests

25. In considering any legitimate interests in confirming whether or not the requested information is held in response to a request under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency, which are important in themselves, as well as case specific interests of the complainant and the general public.
26. Furthermore, legitimate interests may include a broad range of interests. They can be the complainant’s own interests or the interests of third parties, and commercial interests as well as wider societal interests. They may be compelling or trivial, but trivial interests may be more easily overridden in carrying out the balancing test.
27. The Commissioner considers that there would be a general legitimate interest in the public knowing how the Council deals with complaints of an environmental nature, as it would show that the Council takes environmental health and safety seriously. There is also clearly a legitimate interest in the complainant knowing whether complaints were made regarding its client’s premises and how these were dealt with by the Council.
28. However, the Commissioner is of the view that the above legitimate interest does not carry significant weight in this case. Confirmation or denial that the requested information was held would only let the complainant and the public know whether information was held

regarding particular complaints from a specified individual, and whether or not the Council held any recorded information as to how those complaints were dealt with..

(ii) Is confirming whether or not the requested information is held necessary?

29. 'Necessary' means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
30. The Council did not explain whether it had considered the necessity test, however the Commissioner is satisfied that confirmation or denial of the relevant information being held by it would be necessary to meet the legitimate interests identified above. The Commissioner cannot identify an alternative measure by which the legitimate interests could be met.

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

31. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a request under the EIR, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
32. Again, the Council provided general arguments. It maintained that a data subject in such circumstances, i.e. one who has allegedly submitted a complaint, would not have a reasonable expectation that the Council would confirm or deny that such information was held. The Council also set out that the data subject would be likely to consider such confirmation or denial to cause unjustified harm. Further reasons for this, including the background to the case, were provided by the Council to the Commissioner in its submissions.

33. Based on the Council's general arguments, and on the further detail submitted by the Council as to the background to the case, the Commissioner accepts that the person who allegedly complained to the Council would have a reasonable expectation of privacy. In the Commissioner's view, any legitimate interest in knowing whether the Council holds records of the alleged complaint is clearly insufficient to outweigh the fundamental rights and freedoms of the data subject and therefore confirming or denying whether the requested information is held would not be lawful.

34. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner does not consider it necessary to provide an analysis as to whether confirming or denying if the requested information is held would be fair and transparent. The Commissioner has therefore decided that the Council was entitled to refuse to confirm or deny whether it held the requested information, as it constitutes personal data, on the basis of regulation 13(5)(A) of the EIR.

Right of appeal

35. 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

36. 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.
37. 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
Wycliffe House
Water Lane
Wilmslow
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