

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

**Date:** 1 December 2022

**Public Authority:** Portsmouth City Council  
**Address:** Civic Offices  
Guildhall Square  
Portsmouth  
Hampshire  
PO1 2AL

**Decision (including any steps ordered)**

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1. The complainant has requested information from Portsmouth City Council (the council) regarding a number of site visits by the council's enforcement officers to a named address. The council provided some information but withheld part of the information under section 40(2) of FOIA (personal information). The council later accepted that the information fell under the scope of the EIR and regulation 13(1).
2. The Commissioner's decision is that the council was correct in citing Regulation 13(1) of the EIR to the information it withheld. However, it breached regulation 5(2) of the EIR by providing information beyond the legislative timeframe. The council also breached regulations 14(2) and 14(3) of the EIR as it incorrectly issued its refusal under FOIA and not the EIR.
3. The Commissioner does not require the council to take any further steps.

**Request and response**

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4. The complainant made a request on 9 January 2022. This request was refused by the council, citing regulation 12(4)(b) of the EIR.
5. On 8 February 2022, the complainant wrote to the council and narrowed their request in the following terms:
  - “Can you please supply the following information [relating to a specific address] which is of particular interest;
    - All material (including logs, notebooks, e-mails, letters etc) concerning site visits made on the 28/10/19, 10/12/19, 18/12/19, 19/12/19, 26/01/20, 27/01/20, 11/02/20, 6/03/20, 6/08/21, 9/08/21, 16/08/21, 23/08/21, 6/09/21, 16/09/21, 8/10/21, 12/10/21, 15/10/21, 18/10/21, 25/10/21, 27/10/21, 8/11/21, 11/11/21, 15/11/21, 23/11/21, 1/12/21, 8/12/21 & subsequent visits made to date. An e-mail from [name redacted] PCC Planning Enforcement sent 07/01/2022 at 0801hrs refers.
6. The council responded on 9 March 2022. It issued a refusal notice disclosing a summary and stating that some information was ‘not held’. The correspondence held between the council and the third party was exempt under section 40(2) FOIA as it was the latter’s personal data.
7. The complainant asked for an internal review.
8. Following an internal review on 6 April 2022, the council wrote to the complainant and provided further information that had been placed in the public domain, stated that some information was not held, and maintained that some information was third party personal data and withheld it.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 7 April 2022 to complain about the way their request for information had been handled. They were not content that some information had only been provided at internal review stage. The complainant argued that the information in the public domain was there three months before they made their request. They asked that all the information minus necessary redactions be provided.
10. The Commissioner contacted the council on 24 November 2022 to confirm the chronology of the request and to ask why it had changed from considering the request under the EIR to the FOIA. The council accepted that the requested information should have remained under

the EIR and agreed that regulation 13(1) was the correct exception which it later confirmed to the complainant.

11. The Commissioner considers that the scope of this request is the council's citing of regulation 13(1) EIR to the information it withheld and any procedural errors that may have occurred.

## **Reasons for decision**

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### **Regulation 13 - personal data of an individual other than the requester**

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 ('the DP principles'), as set out in Article 5 of the UK 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, he 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".

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<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a third party data subject – who is identifiable from the request. He is satisfied that this information both relates to and identifies the data subject concerned. 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 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. Article 6(1) of the UK 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” lawful bases for processing listed in the Article applies.

27. 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”<sup>2</sup>.

28. 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.

29. 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**

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<sup>2</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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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”.

30. 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.
31. 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.
32. Here the interest is not trivial, though it is unclear whether the complainant is pursuing a private concern or whether there is a broader public interest. The Commissioner recognises that there may be a general public interest in transparency and ensuring that planning rules are being enforced consistently and fairly.

### **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 complainant believes that disclosure is necessary because they want to see what the council may hold in relation to a particular address and any enforcement activity that may or may not have taken place. However, the Commissioner does not consider that publication to the world at large is necessary. The requester/complainant could have gone to one of the bodies that consider whether rules have or have not been correctly enforced such as the Local Government and Social Care Ombudsman.
35. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

### **The Commissioner's view**

36. The Commissioner has therefore decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

**Regulation 5(2)**

37. Regulation 5(2) states: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
38. As the council provided some information at the internal review stage nearly a month after the time for compliance, it breached regulation 5(2) of the EIR.

**Regulation 14 – Refusal to disclose information**

39. Regulations 14(1) and (2) of the EIR state that where a public authority intends refusing a request for environmental information it must issue a refusal in writing, within 20 working days of receipt of the request.
40. Regulation 14(3) states that the refusal should specify the reasons for non-disclosure, including any non-disclosure exception relied on.
41. The council refused the request citing reasons under FOIA. By failing to inform the complainant, within 20 working days, that it was relying on exceptions under the EIR to refuse some information, the council breached regulations 14(2) and 14(3) of the EIR.

**Right of appeal**

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42. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.

44. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**