

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 October 2023

Public Authority: Stoke-on-Trent City Council
Address: Civic Centre
Glebe Street
Stoke-on-Trent
ST4 1HH

Decision (including any steps ordered)

1. The complainant requested a specified "due diligence" report connected to a proposed development site at Spode. Stoke-on-Trent City Council (the 'Council') ultimately disclosed the report with parts of it redacted under the following EIR exceptions:
 - Regulation 12(4)(e) – the disclosure of internal communications
 - Regulation 12(5)(e) – the confidentiality of commercial or industrial information
 - Regulation 12(5)(f) – the interests of the person who provided the information
 - Regulation 13 – personal data
2. During the Commissioner's investigation, the Council disclosed the names of two individuals named in the report. The Commissioner's decision is that the Council has properly relied on Regulations 12(4)(e), 12(5)(e) and 13(1) of the EIR to withhold the remaining redactions within the disclosed report. Given that Regulation 12(5)(f) has been cited in addition to Regulation 12(5)(e) (and in some cases to both Regulations 12(5)(e) and 13(1)) for some parts of the report, the Commissioner has not deemed it necessary to consider the Council's application of Regulation 12(5)(f).
3. No steps are required as a result of this notice.

Background

4. The Commissioner understands that there are plans to develop Stoke-on-Trent's Spode site under a City Council flagship £10 million 'Levelling Up' project with a mix of housing, retail and workspace.
5. The Council explained it had carried out a competitive tender to find a developer for the site. The successful tender was from a company called Nimrod (references to Nimrod are to Nimrod Holdings Group Ltd) and a lockout agreement was entered into to allow them to develop their proposal. The lockout agreement has now expired. At the same time, concerns regarding the award to Nimrod under the tender process were raised with the Leader of the Council and City Director from an unsuccessful bidder.
6. Following these complaints, Grant Thornton were requested to carry out further "due diligence" into Nimrod and provide their views to the Council. The due diligence report produced by Grant Thornton is what has been requested by the complainant in this case. The report is comprised primarily of opinions given by Grant Thornton and addressed to the Council in respect of two commercially sensitive subjects relating to Nimrod and its associates.
7. Following the expiration of the lockout agreement, the Council said it has decided not to progress the disposal and scheme with Nimrod. However, the Council has also confirmed that the scheme has not stalled and said it is reviewing its objectives for the site and will make this clear and public when decisions are taken in the near future.
8. In addition, the Council told the Commissioner it is likely to carry out a new tender process for the site in due course based on its reviewed objectives.
9. Furthermore, the Council has advised that the requested report is a politically sensitive issue.

Request and response

10. On 22 March 2023, the complainant wrote to the Council and requested information in the following terms:

"I would like a copy of the due diligence report by Grant Thornton relating to the Spode site."
11. The Council responded, late, on 16 May 2023. It refused to provide the requested report, citing the following EIR exceptions:

- Regulation 12(4)(e) – the disclosure of internal communications
 - Regulation 12(5)(e) – the confidentiality of commercial or industrial information
 - Regulation 13 – personal data
12. The complainant requested an internal review on 16 May 2023, which the Council provided, late, on 19 July 2023. The Council revised its position and disclosed a redacted copy of the report, with some information withheld under Regulations 12(4)(e), 12(5)(e) and 13 of the EIR. It additionally applied Regulation 12(5)(f) – the exception for the interests of the person who provided the information – to parts of the disclosed report.

Scope of the case

13. The complainant contacted the Commissioner on 19 July 2023 to complain about the way her request for information had been handled. Her grounds of complaint, which primarily focussed on the balance of the public interest, were relayed by the Commissioner to the Council for consideration as part of its investigation response.
14. As well as considering all the exceptions applied in this case, the complainant confirmed she wanted the Commissioner to consider the extent of the Council's application of Regulation 13(1) to the redacted personal data within the report.
15. During the course of the Commissioner's investigation, the Council reconsidered its position in relation to two of the previously withheld names contained within the report and released them to the complainant on 6 October 2023. It had previously indicated that more names would be released but amended its position for the reasons set out under the Commissioner's consideration of Regulation 13(1) below.
16. It was not clear to either the complainant or the Commissioner where Regulation 12(5)(f) had been applied within the report. However, during the course of his investigation, the Council clarified this for the Commissioner; this exception has been applied to parts of page 5, 6, 7, 8, 10, 15, 17 and 18.
17. In this case, the Commissioner has determined whether the Council was entitled to withhold the remaining redacted parts of the disclosed report under Regulations 12(4)(e), 12(5)(e), 12(5)(f) and 13(1) of the EIR. He has also considered whether the Council was correct to handle the request under the EIR.

Reasons for decision

Is the requested information environmental?

18. 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;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
19. Having reviewed the withheld information, the Commissioner believes that the requested information is likely to be information on Regulations 2(1)(a) the elements of the environment, namely land, and 2(1)(c), with the requested due diligence report being a 'measure', given that it assesses potential delivery partners for the proposed scheme. For procedural reasons, he has therefore assessed this case under the EIR.
20. The Commissioner has viewed the withheld information and has first considered the Council's reliance on Regulation 12(4)(e) of the EIR.

Regulation 12(4)(e) – internal communications

21. The Council has confirmed that Regulation 12(4)(e) was applied to the emails at page 21 (Annex C) of the disclosed report.
22. Regulation 12(4)(e) provides that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will fall under the exception.
23. The withheld information in this case consists of correspondence between Council officers regarding the due diligence undertaken in relation to the Spode scheme named in the request. The Commissioner is satisfied that the information constitutes internal communications and that the exception is, therefore, engaged.

Public interest test

24. When Regulation 12(4)(e) is engaged, the public authority must carry out a public interest test. Under Regulation 12(1)(b) of the EIR, the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under Regulation 12(2), it must apply a presumption in favour of disclosure.
25. The Commissioner's guidance for public authorities confirms that public interest arguments should focus on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception which is to protect a public authority's need for a 'private thinking space'.¹ This needs to be weighed against the competing public interest factors in favour of disclosure. The Commissioner has considered the relevant factors below.

Public interest in disclosure

26. The Council has acknowledged that there is a genuine public interest in "openness, accountability and transparency of public activities", in this case around due diligence.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/the-public-interest-test/>

27. The Commissioner recognises that disclosing information relating to due diligence can enhance answerability and provide reassurance in the effectiveness and probity of the decision making process.

28. The complainant has argued that the Spode site is:

“...a highly significant site of historic and economic importance. It is owned by the council which purchased the site in a multi-million pound deal following Spode falling into administration in 2008”.

29. The complainant also argued that “very large amounts of public money” have already been spent on this project and that “very significant levels of public money are earmarked for future development”. She highlighted that “Levelling Up” has been a “flagship policy” and that the scheme is a matter of local significance affecting the community and individual tenants and businesses on the site. As a result, the complainant has asserted that there is “significant public interest in the public being properly informed on decisions made regarding this site and consequential environmental impacts”. She also highlighted that if the scheme stalls, there are significant risks to public money.

Public interest in maintaining the exception

30. The Commissioner recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction. This may carry significant weight in some cases, particularly when the issues in question are still live or only recently decided.

31. At the time of the request, the Council has argued that the requested information related to a planning enforcement case which was still considered to be live. The Council has argued that communications were exchanged between officers regarding the planning application and subsequent planning enforcement case in the belief that they would be private.

32. The Council argued that to release this information into the public domain would adversely affect the premise of having a safe space to think, deliberate and discuss current internal matters that lead to critical decisions for the authority.

33. The Council also said:

“... when balancing this with the public interest in withholding the information... we would like to add that due to the timing of the request this supports our opinion that the public interest lies in favour of withholding it.

This is because, although the Council has now made a decision not to progress works with the company that is subject to the report; the Council has not made an official public announcement to date in relation to the company; and the Council is still working on live matters in connection with this company that relates to information contained within the report being requested."

Balance of the public interest

34. The Commissioner recognises that there is a public interest in the openness and transparency of the decision making process where prospective delivery partners are being assessed to deliver planning and development schemes, particularly such a well known scheme as is the case with the Spode site. He also recognises that there is a public interest in the accountability of local government regarding such decisions.
35. The Commissioner is sometimes sceptical of public authority arguments regarding 'chilling effects', as officials should be able to defend their positions and be undeterred by the possibility of future disclosure of information. He is also mindful of the strong public interest in 'Levelling Up' initiatives and the importance of the issue to the city of Stoke-on-Trent in particular.
36. However, the Commissioner also considers that the 'safe space' and 'chilling affect' arguments made by the Council are weighty factors in favour of maintaining the exception in this case, as development schemes are frequently controversial. He is satisfied that disclosure would be likely to prevent Council officers corresponding internally with frankness and candour, which could damage the quality of advice and may lead to poorer decision-making in the future. He has taken into account that, given the importance of this project as a whole, it is important to protect all discussions from unfair scrutiny which could negatively affect the outcome, until the project comes to fruition.
37. The Commissioner recognises that the need for a safe space is strongest when an issue is still live. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008).
38. Given the often contentious nature of planning and development proposals and decisions, the Commissioner considers that councils should be able to have a free and frank exchange of views to enable robust decision-making. Combined with the fact that a redacted version of the requested report has already been disclosed and that the information under consideration here relates to 'live' issues, he

considers that the importance of enabling internal deliberations to inform decision making, which is what the exception is designed to protect, outweighs the public interest in disclosure.

39. The Council is therefore entitled to rely on regulation 12(4)(e) to withhold the information at Annex C of the report.
40. Having concluded that Regulation 12(4)(e) is engaged, the Commissioner will next consider the Council's reliance on Regulation 12(5)(e) of the EIR, which has been applied to the majority of the redactions within the disclosed report.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

41. Regulation 12(5)(e) states:

“A public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

42. The purpose of this exception is to protect any legitimate economic interests underlying commercial confidentiality. The exception is broken down into a four-stage test, all four elements of which are required in order for the exception to be engaged:

- The information is commercial or industrial in nature;
- Confidentiality is protected by law;
- The confidentiality is protecting a legitimate economic interest;
- The confidentiality would be adversely affected by disclosure.

43. The Commissioner's guidance² on Regulation 12(5)(e) states:

“For information to be commercial in nature, it needs to relate to a commercial activity, either yours or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

particular, information about your revenue or resources is not generally commercial information, unless the particular income stream comes from a charge for goods or services. Examples include planning: information about development plans for land.”

44. The Commissioner accepts that the redacted information under Regulation 12(5)(e) within the report is commercial in nature. It relates to ongoing discussions and negotiations relating to the Spode scheme. It is worth noting that the complainant has also stated that she accepts this information is commercial in nature.
45. The Commissioner will next consider whether the withheld information was provided in confidence. The complainant disputes that all the redacted Regulation 12(5)(e) information meets the remaining three tests for this exception. She believes that some of the withheld information in the report may be in the public domain; in support of her view, the complainant submitted a hard copy of the Council’s press release of 22 March 2022 and provided the associated URL.³ Additionally, she provided a copy of a Private Eye article⁴ (although users have to subscribe to access it).
46. The Commissioner has reviewed the content of both articles against the content of the report. He has not been able to locate the specific details contained within the redacted parts of the report in these published articles. To the best of his knowledge, the withheld information is not in the public domain.
47. In its submissions to the Commissioner, the Council has explained that:

“This report contains detailed information regarding the concerns, the financial and business affairs of Nimrod, its Directors and the opinions of Grant Thornton provided to the Council confidentially. This information is not only commercially sensitive but contains personal information, it also provides the advice and recommendations provided to the Council.

The information is about the viability and financial and business affairs of companies and individual Directors, it reaches judgements on whether the Council should transact business with them and effectively rates them. Information was supplied by [name redacted] to Grant Thornton to assist their review solely for the purpose of advising Stoke-on-Trent City Council. This

³ <https://www.stokesentinel.co.uk/news/stoke-on-trent-news/multi-million-pound-plans-transform-8279171>

⁴ <https://www.private-eye.co.uk>

meets the common law position that information was communicated in circumstances that impart an obligation of confidence and that disclosure would be an unauthorised use of this information. Stoke-on-Trent and Grant Thornton have a contract for the work carried out by Grant Thornton the status of the contractual position of the report is set out on page 2 of the report (which in its self is marked commercially sensitive throughout)".

48. The Commissioner notes that the report includes the following clauses:

"We stress that the Report is confidential and prepared for the Addressee only, and should not be shared with Nimrod or [name redacted]. We agree that an Addressee may disclose our Report to its professional advisers in relation to the Purpose, or as required by law or regulation, the rules or order of a stock exchange, court or supervisory, regulatory, governmental or judicial authority without our prior written consent but in each case strictly on the basis that prior to disclosure you inform such parties that (i) disclosure by them is not permitted without our prior written consent, and (ii) to the fullest extent permitted by law we accept no responsibility or liability to them or to any person other than the Addressee.

The Report should not be used, reproduced or circulated for any other purpose, in whole or in part, without our prior written consent, such consent will only be given after full consideration of the circumstances at the time. These requirements do not apply to any information, which is, or becomes, publicly available or is shown to have been made so available (otherwise than through a breach of a confidentiality obligation)."

49. The Council also said:

"The information was submitted to Grant Thornton in confidence by those interviewed including the companies. Grant Thornton provided their honest and candid opinion to the Council in confidence. The information provided is the financial equivalence of legal advice which is provided under absolute privilege."

50. In the Commissioner's view, the withheld information is sufficient to impose an obligation of confidence upon the Council, Grant Thornton and those interviewed for the due diligence report.

51. The Commissioner has also considered whether the withheld information has the necessary quality of confidence (it must not be trivial, nor in the public domain) and the reasonable expectations of the parties involved. Having done those things, he accepts that the information is subject to confidentiality provided by law. The information therefore has the

necessary quality of confidence and the Commissioner is satisfied that the second test is met.

52. To satisfy the third test, as the Commissioner's guidance explains, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person or persons the confidentiality is designed to protect. The Council needs to consider the sensitivity of the information at the date of the request and the nature of harm that would be caused by disclosure. The Council also needs to establish that disclosure would cause harm (on the balance of probabilities – ie more probable than not). If a third party's interests are at stake, the Council needs to consult with them, unless it has prior knowledge of their views.

53. The Council has argued:

"The confidentiality is required to protect the economic interest of the companies, if this were to be released some of the companies may lose market and investor confidence and cease to be a going concern."

And:

"Disclosure would have an adverse effect due to the complexities involving the companies and their relationships and is more substantial than remote. It goes into financial and business affairs in detail. Companies such as Nimrod and Directors provide information which is commercially sensitive to trusted third parties to enable due diligence to take place, without this confidentiality key information may not be supplied which would damage the council's ability to take informed decisions in the public interest."

54. The Council has argued that, as the owner of the Spode site, it has a clear economic interest in its development and, because of its reliance on private developers, the Council is operating in a commercial arena. It said that the information in the Grant Thornton report is commercially confidential because it will impact on the Council's ability to develop the site, and the Council, therefore, has a legitimate economic interest in maintaining its confidentiality.

55. The Council provided further arguments in relation to the adverse effects, which it considers to be threefold, concerning Grant Thornton, the Council itself and Nimrod. Disclosing these arguments would indirectly disclose some of the withheld content which means that the Commissioner has not cited them here. However, they have been taken into account. Whilst the EIR and other cited legislation seek to provide a safe space for those giving honestly held opinions, and whilst professionals do frame their advice very carefully, the Council has

argued that there is a clear and economic interest in Grant Thornton being able to keep its opinion confidential, thus enabling it to broach sensitive subjects with their clients without the risk of becoming in costly and reputationally damaging litigation over potentially defamatory opinions.

56. The Council has argued that disclosure would adversely affect its own commercial interests, because it would impact its ability to develop the Spode site.
57. The Council also explained that it is still in negotiation with Nimrod over the terms under which Nimrod will exit the Spode site. The Council argued that disclosure of the report would significantly prejudice the Council's ability to finalise these negotiations between the parties.
58. The Council also said that if professional services firms' opinions on sensitive issues like this are vulnerable to publication it will be less able to source frank advice in similar circumstances in the future. This in turn would adversely affect the Council's ability to benefit from quality advice in relation to those projects. In this case, the Council argued this would significantly prejudice its ability to develop an already difficult site, to the detriment to the city of Stoke on Trent.
59. In relation to Nimrod, the Council said it had clearly set out why Nimrod would view the information as commercially sensitive. The Commissioner has noted its arguments, although these have not been reproduced as he considers them to be sensitive.
60. The Commissioner is satisfied that the third and fourth tests have been met in this case. He has reviewed the redacted material withheld by the Council under Regulation 12(5)(e) and finds that the Council has correctly applied the exception.

Public interest test

61. Having concluded that Regulation 12(5)(e) is engaged, the Commissioner must next consider the associated public interest test.

Public interest in disclosure

62. The Council said:

"It is not disputed that this is an important site of historical and economic significance and that the Council is using 'Levelling Up' Funding, all of these are matters of public interest. The Council also agrees that there is a public interest to be formed about decisions regarding the site."

63. The complainant reiterated her arguments in favour of disclosure as set out under Regulation 12(4)(e) above.

Public interest in maintaining the exception

64. Against disclosure, the Council said:

“It is vital and in the public interest that a Council is able to receive professional analysis from trusted third parties, such advice must be able to be given in confidence, if it is not third parties would be reticent to supply information, analysis and advice. This would mean the Council would not be able to make decisions with access to this advice, which goes against the public interest.

It is also important that companies such as Nimrod and Directors provide information which is commercially sensitive to trusted third parties to enable due diligence to take place, without this confidentiality key information may not be supplied which would damage the council’s ability to take informed decisions in the public interest and decisions made without due diligence would be likely to impact on the public purse. It is not in the public interest to damage the methods the Council uses in order to reach decisions.

The public interest is further not served through the release of the redacted information in this report because following the expiration of the lockout agreement the Council has decided not to progress the disposal and scheme with Nimrod. The scheme has not stalled and Council is reviewing its objectives for the site and will make this clear and public when decisions are taken in the near future. As the Council is not proceeding with Nimrod it is difficult to argue that disclosure of this information would be in the public interest.”

Balance of the public interest

65. The Commissioner acknowledges there is always some public interest in disclosure, eg to promote transparency, accountability and greater public awareness and understanding of decisions surrounding the Spode site.
66. He acknowledges the complainant’s concerns about the amount of public money spent on the facility to date and the likely future spend, together with her point about the impact on the environment.
67. However he considers that significant weight should be given to the public interest in protecting the commercial confidentiality of the redactions made under Regulation 12(5)(e) within the report.

68. In the Commissioner's view, the fact that the development is not proceeding with Nimrod lessens the public interest in further or full disclosure of the report. He does not consider that releasing details relating to commercial confidentiality of a scheme that is not proceeding would serve the public interest any further, but could have a significant impact on the company concerned.
69. This means that the Commissioner's decision, whilst informed by the 'presumption in favour of disclosure' under the EIR (Regulation 12(2)), is that the exception provided by Regulation 12(5)(e) was applied correctly to the complainant's request.
70. Finally, the Commissioner will consider the Council's reliance on Regulation 13(1) of the EIR for the withheld names in the report.

Regulation 13 – personal data

71. 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.
72. In this case the relevant condition is contained in Regulation 13(2A)(a).⁵ 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').
73. 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.
74. 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?

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

“any information relating to an identified or identifiable living individual”.

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

76. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
77. 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.
78. 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.
79. The Council explained it had withheld the individual names and contact details of local authority officers below the level of Strategic Manager. It explained that it takes the approach that the names of Council staff who are key decision makers and Senior Managers should usually be provided. In addition, the Council said that the names of external individuals referred to in the report have been redacted.
80. As set out in the 'Scope' section of this notice, the Council has released the names of two individuals (who are officers of the Council) contained in the report. It has withheld the names of six others.
81. The Commissioner is satisfied that the withheld information in this case is personal information, given that names belong to and identify living individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
82. 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.
83. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

84. 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."

85. 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.
86. 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

87. 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.
88. 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”.⁶
89. 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.

⁶ 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”

90. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

91. The complainant has not submitted any specific legitimate interest arguments, other than stating she would like the names of those who are sufficiently senior.
92. The Council has not submitted any specific legitimate interest arguments.
93. The Commissioner can see a legitimate interest in the names of those connected to the report being disclosed in terms of accountability and in that of openness and transparency.
94. The Commissioner is not satisfied that these legitimate interests could be met by any less intrusive means than publication and therefore disclosure is necessary.
95. However, where disclosure is necessary to meet a legitimate interest, the legitimate interest must still be balanced against those individuals' rights and freedoms. In assessing the balance, the Commissioner will take into account the individuals' reasonable expectations and the consequences of disclosure, as well as the strength of the interest in disclosure.
96. The Council has questioned why three of the names are even included in the report given that the "relationship between these individuals and the subject matter of the report is tenuous and indirect, which reduces the public interest in disclosure".
97. The Council has given additional information to the Commissioner about the six individuals which he is not reproducing here as it may inadvertently allow for reidentification; the information has been taken into account.
98. Whilst the Council has said it has not consulted directly with any of the individuals over the potential disclosure of their names, it stated that it believes it is "highly unlikely" that they would volunteer to have their names released, given the pejorative subject matter of the report (redacted or otherwise). It argued that any such consultation may also jeopardise the Council's ongoing negotiations with Nimrod over the Spode site.
99. In addition, the Council is concerned about potential damaging consequences and adverse inferences being drawn.

100. Disclosing the remaining names, contrary to their reasonable expectations, is likely to cause them distress. The Commissioner is therefore satisfied that the rights of the data subjects outweigh the legitimate interests and thus there is no lawful basis for the information to be disclosed. Regulation 13(1) of the EIR is therefore engaged.
101. Having examined the report, the Commissioner is satisfied that the Regulation 12(5)(f) redactions have been applied either in addition to Regulation 12(5)(e), or to both Regulation 12(5)(e) and Regulation 13(1) where an individual has been named in that redaction. Having found below that Regulations 12(5)(e) and 13(1) are properly engaged for all the redactions to which they have been applied within the report, the Commissioner has not deemed it necessary to consider the Council's reliance on Regulation 12(5)(f) of the EIR.

Other matters

102. Although the complainant has not complained about the delays with the substantive response (which exceeded the statutory 20 working days timeframe) and the internal review result (which exceeded the recommended 20 working days' timescale), the Commissioner has made a record of them for monitoring purposes.

Right of appeal

103. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

104. 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.

105. 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

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF**