

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

Date: 3 June 2024

Public Authority: South Gloucestershire Council
Address: Council Offices
Badminton Road
Yate
Bristol
BS37 5AF

Decision (including any steps ordered)

1. The complainant has requested information about a particular planning application. South Gloucestershire Council (SGC) disclosed some information which fell outside of the scope of the request. At internal review, SGC said it held no other recorded information about the application. However, during the Commissioner's investigation it located information falling within the scope of the request, which it refused to disclose, citing regulations 12(5)(f) (Interests of information provider) and 13(1) (Personal data) of the EIR.
2. The Commissioner's decision is that regulation 13(1) was properly engaged. However, by initially handling a request for environmental information under FOIA, SGC breached regulation 14(1) of the EIR.
3. The Commissioner does not require further steps as a result of this decision.

Request and response

4. On 18 September 2023, the complainant wrote to SGC and requested information in the following terms:

“Correspondence between council planning officers and the applicant in relation to the planning application [reference number and address, redacted]. This should include any advice given to the applicant about how to proceed with a revised proposal on this site.”

5. SGC responded on 13 November 2023, under FOIA. It disclosed all the recorded information it said it held. It also said:

“I confirm there have been several phone calls and meetings of which there is no written record that I can disclose.”

6. The complainant requested an internal review on 13 November 2023, explaining that SGC had only disclosed information which post-dated the request. They said they wanted to see all preceding information, held at the time the request was received, including any advice given to the applicant by SGC.
7. SGC provided the internal review on 15 November 2023, stating that no other recorded information was held. It said any information which might previously have been held, had been deleted. It said its pre-application advice service only provides advice on the likelihood of schemes obtaining planning permission and that the applicant had not used the service for the development in question.
8. Following the Commissioner’s intervention, in which he explained that the request should have been dealt with under the EIR, on 8 January 2024, SGC provided the outcome of a new internal review under the EIR. It maintained its position that it held no recorded information falling in scope of the request.

Scope of the case

9. Following receipt of the revised internal review, the complainant remained dissatisfied with SGC’s claim that it did not hold recorded information falling within the scope of the request. They believed that

SGC was required to retain planning-related correspondence for four years¹.

10. During the Commissioner's investigation, SGC conducted further searches which located correspondence between the planning applicant and SGC. It said that this information was excepted from disclosure under regulation 13 (Personal data) and regulation 12(5)(f) (Interests of information provider) of the EIR. The complainant disagreed with SGC's application of these exceptions.
11. When considering this case, the Commissioner found that some of the new information which SGC located was created after the request was received. His position is that information falling in scope of a request will be the information that is held **at the time** the request is received. The Commissioner has therefore disregarded any information located by SGC which post-dates the request (ie which was created or received after 18 September 2023).
12. The analysis below considers SGC's application of regulations 13(1) and 12(5)(f) of the EIR to withhold the requested information. The Commissioner has also considered its general handling of the request under regulation 14 (Refusal to disclose information).
13. The Commissioner has viewed the withheld information.

Reasons for decision

Is the requested information environmental?

14. If information falls within the definition of "environmental information" at regulation 2(1) of the EIR, any request for it must be considered under the EIR.
15. Regulation 2(1)(c) of the EIR applies to information on:

"(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) and (b) as well as measures or activities designed to protect those elements..."

¹ <https://www.local.gov.uk/sites/default/files/documents/20210622%20-%20Planning%20and%20GDPR%20PAS%20guide.pdf> page 42

16. The withheld information is information on measures and/or activities (a planning application for building work on a piece of land) which are likely to affect the elements and factors of the environment.
17. The requested information therefore falls within the definition at regulation 2(1)(c) of the EIR and the request must be considered under the EIR.

Regulation 13 – Personal data

18. Regulation 13(1) 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.
19. In this case the relevant condition is contained in regulation 13(2A)(a)². 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').
20. 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.
21. 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?

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

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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

² As amended by Schedule 19 Paragraph 307(3) DPA 2018

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

25. 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.
26. The withheld information is correspondence and information sent from the planning applicant to SGC, and correspondence and information sent from SGC to the planning applicant, about the planning application which was the subject of the request. The application was for the erection of a domestic garage, at the applicant's residential property. The information comprises names, contact details and comments and observations on the planning application and the application process.
27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to identifiable individuals, in particular, the planning applicant. The planning applicant is a private individual, is named on the planning application documents which are in the public domain, the withheld information is information about his home and it has informed SGC's decisions about permitted development there (the application subsequently being refused).
28. The Commissioner is satisfied that this is information that both relates to, and identifies, the planning applicant personally; he is the data subject. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
29. The Commissioner notes that this is in line with the Tribunal's decision in the case of England & L B of Bexley v Information Commissioner (EA/2006/0060 & 0066) that the address of a private property constitutes the personal data of its owner/occupier³.
30. 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.

³ See, for example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013677/fs50623497.pdf> and https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432001/fs_50558963.pdf

31. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. 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”.

33. 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.

34. 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

35. 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”.⁴

⁴ 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”.

36. When considering the application of Article 6(1)(f) of the UK GDPR, 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.
37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) can be applied.

Legitimate interests

38. The Commissioner recognises that legitimate interests in the disclosure of the requested information under the EIR can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
39. 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.
40. The Commissioner accepts that the complainant is pursuing a legitimate personal interest in openness and transparency, in relation to a development which might affect them. They considered a revised planning application submitted by the planning applicant in September 2023 to be as problematic as the original application and they wanted to know whether this was as a result of advice provided to the applicant by SGC.

Is disclosure necessary to meet the above legitimate interest?

41. '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.
42. The Commissioner notes that the planning application has recently been refused and that a comprehensive account of the progress of the

application and the reasons for the refusal, have been published on SGC's online planning portal. However, when considering the complaint, he must consider matters as they stood at the time of the request (18 September 2023). At that point the application was still live and under consideration by SGC, and it had not yet published its decision. The Commissioner is satisfied that, at that time, the legitimate interests identified above could not be met by other means and that disclosure was therefore necessary.

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

43. 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 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.
44. 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 data subject expressed concern to the disclosure; and
 - the reasonable expectations of the data subject.
45. In the Commissioner's view, a key issue is whether the data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as their general expectation of privacy, whether the information relates to them in their professional role or to them as individuals, and the purpose for which they provided their personal data.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the data subject.
47. SGC said that the planning applicant would have no expectation that their communications would be disclosed, and it is clear to the Commissioner that they are candid, and contain some sensitive and personal information. The Commissioner has no difficulty accepting that

the applicant considered that this information, provided for the specific purpose of obtaining assistance with the planning application process, would not be disclosed to the wider world in response to an EIR request. It is information which concerns the planning applicant in a private, rather than public, capacity. The Commissioner is also satisfied that all information that the applicant was formally required to provide for the purposes of his planning applications has been published on the planning portal and is not being withheld under this exception.

48. As to the impact of disclosure, the Commissioner is aware that the application was subject to a number of objections and there was reportedly some friction within the local community, regarding it. The Commissioner considers that disclosure of the information into the public domain, while the application was still under consideration, would have been unnecessarily intrusive and distressing to the applicant, and it could have inflamed local tensions.
49. While the complainant was concerned that the revised application might reflect advice that the applicant had received from SGC, they were effectively anticipating the outcome of the application before the formal consideration process had been completed. In the event, with the full information before it, SGC determined that the application was not acceptable and it refused it.
50. Taking all the above into account, the Commissioner is satisfied that, at the time of the request, disclosure of the requested information would have been distressing and intrusive to the planning applicant and that this could not be justified by any wider benefit which would flow from the disclosure of the information. Based on the above factors, the Commissioner has determined that there was insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there was no Article 6 basis for processing and so the disclosure of the information would not be lawful.
51. Given the above conclusion that disclosure would not be lawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
52. His decision is therefore that SGC was entitled to apply regulation 13(1), by way of regulation 13(2A)(a), to refuse the request.
53. In view of this decision, it has not been necessary to consider the application of regulation 12(5)(f) to the same information.

Procedural matters

Regulation 14 – Refusal to disclose information

54. The Commissioner found that SGC originally considered this request under FOIA, when it fell to be considered under the EIR. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that SGC will have failed to comply with the provisions of the EIR.
55. The Commissioner finds that SGC breached regulation 14(1) of the EIR, which requires a public authority that refuses a request for information, to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which SGC issued (and indeed its internal review) failed to cite any exception contained within the EIR and was issued outside of the 20 working day time for compliance.

Right of appeal

56. 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

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF