

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

Decision notice

Date: 18 July 2018

Public Authority: Mid and East Antrim Borough Council

Address: foi@midandeantrim.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about a Public Rights of Way investigation. Mid and East Antrim Borough Council ('the Council') provided some information but withheld other information under section 31 of the FOIA. The Commissioner's decision is that the request should have been handled under the EIR. The Commissioner has found that some of the withheld information constitutes the complainant's own personal data and therefore exempt under regulation 5(3) of the EIR, the Council correctly applied regulation 12(4)(d) to other information and the Council correctly withheld some information under regulation 13 whilst having misapplied it to other information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the documents withheld under regulation 13, with the exception of any third party personal data relating to members of the public or junior officials contained within them.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 15 December 2016, the complainant wrote to the Council and requested information in the following terms:
 - "1. *Details of the process which has led to the Council sending me a Public Rights of Way Assertion Agreement, and in particular details of how and why the process was first instigated, namely the name of person or persons who contacted the Council and the name of the Councillor who pursued the complaint.*
 2. *Copies of all maps, records and other documents held by the Council in relation to the proposed right of way from Port Road over my property to the foreshore".*
5. The Council responded on 20 December 2016 and provided some information relevant to part 1 of the request but withheld information about the names of third parties under section 41 of the FOIA.
6. On or around 27 March 2017 the complainant requested an internal review of the Council's handling of the request.
7. The Council provided the outcome of its internal review on 25 April 2017 and confirmed that the remaining information held relevant to the request was exempt under section 31 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 26 June 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Council agreed that the correct access regime for the request was the EIR as opposed to the FOIA. The Council reconsidered the request under the EIR and confirmed it considered the withheld information to be exempt under regulations 12(4)(d) and 13. The Council also acknowledged that some of the withheld information constituted the complainant's own data. It confirmed that it considered this information to be exempt under regulation 5(3) of the EIR.
10. For clarity, a requester's own personal data is exempt under regulation 5(3) of the EIR. Personal data is defined by the Data Protection Act 1998 ('the DPA') as any information relating to a living and identifiable individual. The Commissioner considers that some of the withheld information is actually the complainants' own personal data. The

separate right of access provided by section 7 of the DPA therefore applies. This notice only relates to the information that falls under the scope of the EIR.

11. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the remaining information held relevant to the request, or whether it correctly applied regulations 5(3), 12(4)(d) and 13 to the information.

Reasons for decision

Is the information environmental?

12. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

13. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
14. The information requested by the complainant relates to an investigation into a Public Right of Way (PROW) Assertion Agreement. The right of way in question crosses the complainant's land. The Commissioner is of the view that issues relating to how land is registered and information held relating to it is likely to affect the use of that land and thus have a

direct effect on it. The Commissioner therefore considers that the information requested in this case falls under the definition of Environmental Information set out in the EIR.

Regulation 5(3) – the exemption for personal data - the complainant's own personal data

15. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR did not require the Council to disclose this information.
16. There is no right of access to personal data about oneself under the EIR, as regulation 5(3) provides that information is exempt if it constitutes the personal data of which the applicant is the data subject. Personal data is defined in section 1 of the Data Protection Act 1998 ('the DPA') as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
17. The withheld information in this case comprises evidence collected and analysed as part of the PROW investigation. It includes letters that the Council sent to the complainant and notes of meetings/site visits that involved the complainant. The Council considers these documents to be the complainant's own personal data and exempt under regulation 5(3). The Council also confirmed that it had advised the applicant to submit a subject access request in order to obtain the information in question, but to date, it has not received the £10.00 fee requested or proof of identification from the complainant.
18. Having viewed all the withheld information, it is clear to the Commissioner that letters sent to the complainant clearly comprise his personal data. However, she notes that some of the other information which the Council has withheld under regulations 12(4)(d) and 13 also contain information relating to the complainant, including references to his name. For example, within the evidence forms collected as part of the investigation. The complainant is clearly identifiable from the references within this information and the information is significant and biographical to him. The Commissioner is satisfied that this information is also the complainant's personal data.

19. The Commissioner finds that regulation 5(3) is engaged for some of the withheld information and as this is an absolute exception there is no public interest test to apply.

Regulation 12(4)(d) – Material still in the course of completion

20. Under Regulation 12(4)(d) a public authority may refuse to disclose recorded information if it relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
21. If the information in question falls into one of those categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.
22. The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.
23. The information which the Council has withheld under this exception includes spreadsheets analysing usage of the PROW, a summary of interviews, a compilation of responses received from members of the public, a draft report and notes of a site visit.
24. The Council advised that the possibility of a right of way at the site in question was noted in 2008 and an active PROW investigation commenced in 2012. The Council stated that, despite the length of time which has elapsed since the investigation started it is still ongoing. The Council referred to the Commissioner's guidance on regulation 12(4)(d)¹ which states that:

"Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete".

¹ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

The Council believes the withheld information falls within this definition as no decision has been made as to whether the path in question is a PROW. The Council also stated that, in light of the time that the investigation has been ongoing, further evidence will be required prior to a decision being taken in relation to the matter.

25. The Commissioner would note that the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception. In this case, however, the information relates to a proposal to assert a PROW which, at the time of the request, the Council was not yet at the decision making stage and the investigation into the matter had not been concluded. It is clear that the process of considering whether the path is a PROW was still ongoing at the time of the request. The Commissioner has also taken into account the fact that the Council will require further evidence in order to conclude its investigation and make a decision on the matter. Until this process has been concluded the Commissioner is satisfied that the information withheld under regulation 12(4)(d) relates to material which is still in the course of completion and as such the exception is engaged.

Public interest test

26. Under regulation 12(1)(b), public authorities can only withhold information under regulation 12(4)(d) if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2), a presumption in favour of disclosure must be applied to the consideration of the public interest.

Public interest arguments in favour of disclosing the information

27. The Council submitted somewhat limited arguments in relation to its public interest arguments. However, it accepts that disclosure would “further the understanding of the decision making; facilitate the accountability and transparency”.
28. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability and understanding in the Council’s decision making process relating to the public right of way. The Commissioner also accepts there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.

Public interest arguments in favour of maintaining the exception

29. The Council considers that disclosure of the information requested whilst an investigation into the right of way is ongoing would have a negative impact on the decision making process and rather than further public understanding of the matter, early disclosure may give an incorrect impression.
30. The Council does not consider it would be possible to correct any potential for the information to give a misleading or inaccurate impression by providing any contextual information. The withheld information may lead the public (including the complainant) to an incorrect assumption about the outcome of the investigation. As stated earlier in this notice, the Council requires further evidence in order to complete its investigation and make a decision about the right of way, particularly as the investigation has been ongoing since 2012. The Council considers that premature disclosure of information relating to the investigation could be perceived as including the outcome of the investigation, which it does not consider to be appropriate.
31. The Council pointed out that rights of way issues can be very emotive in the local community with strongly opposing views on either side of the argument. The Council considers that it is important that there is a safe space to review evidence relating to the public rights of way "*out of the glare of public pressure*".
32. The Council advised the Commissioner that once the investigation is complete, the recommendations report and supporting material would be available for disclosure. This would facilitate understanding of the decision making process and assist with any potential challenges to the decision.

Balance of the public interest arguments

33. In considering such matters, the Commissioner is mindful that disclosure under the EIR is a disclosure to the world at large. In a case such as this one, the decision for the Commissioner is whether the information requested should be placed in the public domain. The Commissioner recognises that the complainant has personal reasons for making the request in this case, as the PRWO crosses land that he owns. However, neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant because the EIR is about disclosure to the public and public interests and not any private interests.
34. The Commissioner accepts that there is always a general public interest favouring the disclosure of environmental information. Such disclosures

inform public debate on the particular issue that the information relates to.

35. The Commissioner considers that there is a public interest in promoting transparency and improving public understanding about rights of way in the Council's area. Disclosure would also allow for greater transparency and accountability in how the Council is conducting its investigation into establishing whether the path in question is a PROW. The Commissioner understands that the issue of PROWs is one that is of interest to the public, particularly those living near to it or wishing to use it.
36. However, the Commissioner also recognises the strong public interest arguments in favour of the maintaining this exception. The Commissioner believes that there are occasions when a 'safe space' is needed by public authorities to allow them to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media involvement. The need for a 'safe space' is to allow free and frank debate and it is the Commissioner's view that this is required regardless of any impact that the disclosure of information may have.
37. The Commissioner considers the 'safe space' to be about protecting the integrity of the decision making process and whether it carries any significant weight will be dependent on the timing of the request. In this case, the timing of the request is important. The Council advised the Commissioner that the investigation into the PROW is not yet complete. In addition, the Council confirmed that it will require further evidence in order to reach a decision on the status of the path in question. The Council has also confirmed that once the investigation has been completed, the recommendation report and supporting material would be available for disclosure.
38. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner considers that the timing of the request in this case weighs heavily in favour of maintaining the exception given that the investigation was not finalised at the time the request, was received and that it was still subject to further evidence gathering, the Commissioner accepts that disclosure would present a real risk of prejudice to the 'safe space' to the decision making process associated with the PROW. In summary, the Commissioner has concluded that the public interest in maintaining the exception at Regulation 12(4)(e) outweighs the public interest in disclosure of the information.

Regulation 13 – the exception for third party personal data

39. Regulation 13 of the EIR provides an exception to disclosure of personal data where the applicant is not the data subject and where disclosure of the personal data would contravene any of the data protection principles.

Is the requested information personal data?

40. In order to engage regulation 13 the information sought must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:

- from that data,
- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

41. The information that the Council has withheld under regulation 13 comprises of the following:

- Letters sent to third parties
- A response to a question raised by a third party about the status of the PROW investigation
- A list of contact details of individuals interviewed as part of the investigation
- Notes of a meeting in 2014
- An email from a third party about knowledge of the path
- User Evidence forms completed by third parties about the path, its usage and history
- A summary of some of the answers within the User evidence form organised according to criterion.

42. In correspondence with the Commissioner, the Council appears to acknowledge that the documents withheld under regulation 13 *contain* third party personal data as opposed to comprise entirely of third party personal data. The Council indicated that it considered that names, contact details and "*information within correspondence and witness statements which may identify a third party*" to constitute personal data. However, the Council also provided a schedule to the Commissioners to indicate which exception(s) it considered applicable to each document

and this schedule indicated that the Council had withheld the entirety of the documents in question under regulation 13.

43. On viewing the information the Council has withheld under regulation 13, it is clear to the Commissioner's that the documents contain a mixture of third party personal data (including names, contact details and biographical information about their use and knowledge of the path), the complainant's own personal data (references to his name), and other information which would not constitute personal data once any identifiers have been removed.

Names, addresses and contact details of individuals

44. The Council has withheld the names and contact details of individuals who are either affected by the PROW, live near it, have knowledge of it and/or have used the path in question. The information has been provided to the Council in the form of User Evidence Forms (UEF's) and other correspondence. The names, contact details and in some cases the age of the individual provided to the Council clearly constitute their personal data.

Other information within correspondence which may identify a third party

45. As well as names and contact details of individuals, the correspondence and UEFs also contain biographical information which could identify a living individual. For example, the UEFs ask questions around an individual's knowledge of/usage of the path. The Commissioner considers that this information is biographical information about the individual and, if disclosed into the public domain, could identify them. The Commissioner therefore considers that such information also constitutes personal data.

Names and contact details of Council officers

46. The Council has also withheld details of officers from correspondence, including their identities and their contact details. Although the Council has indicated that it has withheld information relating to a number of officers, the Commissioner has only been able to establish one officer named in the withheld information. The Commissioner considers that the names of any officers constitutes their personal data.

Names and contact details of elected representatives

47. The Council advised the Commissioner that it had withheld the names and contact details of two elected representatives. However, again, the Commissioner has only been able to find reference to one of these individuals within the withheld information. This information again clearly comprises their personal data.

The complainant's own personal data

48. There are several references within the information withheld under regulation 13 which relate to the complainant, including references to his name. The Commissioner considers that this information constitutes the complainant's own personal data and is therefore exempt under regulation 5(3), as detailed earlier in this notice.

Summary of the Commissioner's position as to whether the information withheld under regulation 13 constitutes personal data

49. It is the Commissioner's view that the documents that the Council has withheld in their entirety under regulation 13 could be redacted in order to remove any personal data (both third party data and the complainant's own personal data) and thus anonymised. For example, the Council has withheld a summary of responses received about the PROW entitled "Answers organised for criterion". The majority of this information does not constitute personal data as it comprises primarily of "Yes/No" answers and unlikely to lead to the identification of a living individual. However, this document does contain a number of references to the complainant as land owner, information which would constitute his personal data, and therefore exempt under regulation 5(3).
50. The remainder of this notice will go on to consider those parts of the information withheld under regulation 13 which the Commissioner considers constitutes third party personal data.

Would disclosure breach one of the data protection principles?

51. Having accepted that some of the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
- personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

52. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the

individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

The Council's position

53. The Council confirmed that individuals/witnesses who were interviewed/consulted on the location and use of the path were informed that their personal data would not be made public. The Council therefore considers that the individuals would have a reasonable expectation that the Council would only process their personal data for the purposes it was collected for ie to investigation whether the path is a PROW.
54. The Council advised that the individuals whose personal data have been withheld reside within the local area and are likely to be known to the complainant. The Council considers that disclosure of the information in question, prior to any decision having been made regarding the path, could have a detrimental impact on relationships between the complainant and the third parties, particularly if the final outcome is not to the satisfaction of either party.
55. In relation to personal data relating to officers and elected representatives the Council did not submit any detailed representations other than to confirm that, ordinarily it did not disclose the name of individuals below Head of Service level. The Council did not submit any representations in relation to personal data about elected representatives.
56. The Council confirmed that in determining whether there is a legitimate interest in disclosure of the information withheld under regulation 13 it took the following into consideration:
 - *"Further the understanding of, and participation in, debate of issues of the day;*
 - *Facilitate the accountability and transparency of public authorities for decisions taken by them;*
 - *Facilitate the accountability and transparency in the spending of public money; and*
 - *Allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions".*

57. The Council acknowledged that disclosure would facilitate transparency in its decision making. However, it also contends that disclosure may lead to confusion about the subject matter associated with the request. For the reasons outlined in paragraph 30 of this notice, the Council does not consider it would be possible to provide any contextual information to prevent the information being misinterpreted or confused. The Council explained that once a decision has been made about the path, the recommendation report and supporting material will be available for disclosure. This would enhance understanding of the process and assist with any potential challenge. The Council does not consider that there is any wider legitimate interest in disclosure of the withheld information at the time of the request.

The Commissioner's position

Information about members of the public – names, contact details and other biographical information which would may identify a third party

58. The Commissioner accepts that the individuals who were consulted about the PROW would have had a reasonable expectation that their personal data would not be disclosed into the public domain.
59. The Commissioner recognises that the subject of PROWs is an emotive one and one which has the potential to provoke a vigorous response from local residents concerned about any impact the matter may have on their homes and lives. The Commissioner also considers that disclosure of personal data relating to third parties who were consulted about the PROW in this case could lead to potential conflict, or worse, between members of the community. She accepts that disclosure has the potential to cause significant unwarranted harm to the interests of the persons who submitted the representations to the Council.
60. The Commissioner considers that there is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability and understanding in the Council's decision making process relating to the public right of way. The Commissioner also accepts there is a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
61. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals concerned to release their personal data. Disclosure would not have been within the reasonable expectations of the individuals and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in matters

relating to the right of way, but she does not consider that any legitimate interests in disclosure outweigh the individuals' reasonable expectations and right to privacy. The Commissioner has therefore decided that the Council was entitled to withhold this information under the exception at regulation 13(1).

Names and contact details of Council officers

62. The Commissioner is satisfied that junior officials would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their name being redacted from any disclosures made under FOIA. The Commissioner does not consider that it is necessary for the names of junior members of staff working in the Council to be disclosed in order to meet any legitimate interest in accountability and transparency.
63. In conclusion, the Commissioner does not consider that any legitimate interests of the public in accessing the information are sufficient to outweigh their right to privacy. As such the Commissioner has concluded that the Council correctly applied regulation 13(1) to this information.

Names and contact details of elected representatives

64. The Council has not submitted any representations in relation to the personal data of an elected representative that it has withheld.
65. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
66. The Commissioner considers that elected officials should have a greater expectation of scrutiny when it comes to their involvement in any matter. Elected representatives exist in a public facing position with public responsibilities and the Commissioner therefore considers that they would have a reasonable expectation that information relating to their position as elected representative, and the roles they undertake in that capacity would be publicly available. In short, elected officials are not in the same position as other members of the public when it comes to disclosure of their names. They can expect their names to be disclosed in circumstances where ordinary members of the public might expect the opposite.
67. In the absence of any specific representations from the Council in respect of the application of regulation 13(1) to personal data relating to elected representatives, the Commissioner does not consider that they

would have a reasonable expectation that their names and contact details would be withheld in the context of their involvement in the PROW investigation in this case.

68. The Council has not provided details of any mitigating personal circumstances in relation the elected representatives or any information relating to the consequences of disclosure on the individuals. In the absence of such arguments, the Commissioner considers there to be limited adverse consequences of disclosure on the elected representatives.
69. The Commissioner considered whether the legitimate interests of the public are sufficient to justify any impact of disclosure on the rights and freedoms of the elected representative. The Commissioner considers there is a limited public interest in knowing the identity of the elected representative who contacted the Council about the matter in the interests of transparency and accountability, and disclosure would be necessary to achieve it. Given the limited impact of disclosure the Commissioner concludes that disclosure of the elected representative's details would be both fair and lawful. The Commissioner therefore finds that the Council has incorrectly applied regulation 13 to this information.

Right of appeal

70. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

71. 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.
72. 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

Andrew White
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