

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

Decision notice

Date: 27 March 2023

Public Authority: Herefordshire Council
Address: Plough Lane
Hereford
HR4 0LE

Decision (including any steps ordered)

1. The Commissioner's decision is that Herefordshire Council ('the Council') is entitled to withhold some of the information in a report about the River Lugg catchment under regulations 12(4)(d), and 13 of the EIR. These exceptions concern material still in the course of completion and personal data respectively.
2. It is not necessary for the Council to take any corrective steps.

Request and response

3. The complainant made the following information request to the Council on 7 November 2022:

"I am requesting a copy of a document commonly referred to as 'The Lugg Report' which I believe was prepared by The Wye and Ask Foundation and passed to Herefordshire Council Ecology Dept. It is a report (possibly written by Gail Davies Walsh) outlining the predominant characteristic qualities and issues within the Lugg Catchment in relation to land use and nutrients. The Report has been referred to in both the Nutrient Management Board meetings and Technical Advisory Group Meetings."

4. The Council initially withheld the entire report under regulation 13 of the EIR as it considered it all to be personal data. Following its internal review the Council disclosed a copy of the report with redactions made under regulation 12(4)(d) and regulation 13 of the EIR.
5. The Council has subsequently also applied regulation 12(5)(e) to the information in the report to which it has applied regulation 12(4)(d). That exception concerns commercial or industrial information.

Reasons for decision

6. This reasoning covers the Council's application of regulations 12(4)(d) and/or regulation 12(5)(e) and regulation 13 to information redacted from the requested report, which is known as the 'Lugg Report'.
7. In its submission to the Commissioner the Council has provided the following background. The Council commissioned the Wye & Usk Foundation to undertake a 'Strategic Assessment of the River Lugg Catchment' ie the Lugg Report. The purpose of the assessment was to identify 'hot spots' which are contributing to overall phosphorous impact in the river and to propose a range of interventions which the Council could consider funding and delivering to reduce the impact.
8. Phosphate levels have risen in recent years on the Rivers Lugg and Wye and are exceeding the conservation targets set by Natural England. Through the Nutrient Management Board and Cabinet Commission the Council is working with regulatory bodies, water authority, the farming community including NFU Farm Herefordshire and Herefordshire Construction Lobby Group to tackle these issues.
9. The apportionment figures for pollution demonstrate approximately two thirds diffuse (land use) and one third point source (treatment works). Therefore there is considerable tension between interested parties namely farming and housing developers.

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

10. Under regulation 12(4)(d) of the EIR a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
11. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three 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. However, regulation 12(4)(d) is

subject to the public interest test.

12. The Council has confirmed in its submission to the Commissioner that it is relying on the first limb of the regulation – material which is still in the course of completion. It notes that this limb can include information created as part of the process of formulating and developing policy, where the process is not complete.
13. The Council says it is aware of the Upper Tribunal decision in the case of *Highways England v Information Commissioner & Manisty* (2018) UKUT 423 (AAC). This highlighted that a decision as to whether a finished document is a piece of work which is complete and separate in its own right needs to be based on the circumstances in each individual case. The Council says it is also aware of the Commissioner's findings in previous decision notices, that a document which is itself finished may still fall within the scope of this arm of the exception if it effectively forms part of the 'material'. If the finished document forms part of the wider 'material' which is still in the course of completion, and, if a withheld document is a separate and complete document in its own right, then the exception will not be applicable as the information is distinct from the material which is still to be completed.
14. The Council's position is that although the 'Lugg Report' is clearly a finished document, it is not a separate and complete document in its own right and is not distinct from the material still to be completed. It considers the Commissioner's decision in IC-180541-C0R8¹ to be pertinent in this case. As with that case, the Council says, the information contained in the report, the proposals and recommendations put forward, form part of the process of determining the policy regarding phosphate levels and how to address these going forward. At the time of the request, and still at the time of writing, the Council is still formulating and developing this policy – nothing has been settled and no final decisions have been made.
15. The Council says it is actively considering a number of potential opportunities and has discussed those opportunities in its submission. They are schemes on which the Council would work directly with landowners. Therefore the information and recommendations in the Lugg Report form a vital part of the process of determining the Council's future policy on this issue, which is clearly ongoing and on which no final decision has yet been made.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022871/ic-180541-c0r8.pdf>

16. Although there is a great deal of public interest in the issue, in transparency and openness, as well as environmental impacts and assessments, the Council has noted that the explanatory memorandum to the EIR (COM/2000/0402) states that: '... the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether and on what terms, a venture should be entered into'.
17. The Council considers that a safe thinking space is required in this instance, whilst it continues to formulate and develop a policy. Some of the recommendations in the report which are being actively considered as to whether or not they form part of any future policy, have not previously been made publicly known. The original Cabinet report set out delegated powers to the Assistant Director in order to address phosphates through particular schemes. It did not specify one of the recommendations that is set out in the Lugg Report (which the Commissioner has not reproduced in this notice). Whilst the Council considers whether or not this recommendation/proposal should form part of its future strategy, it needs a safe thinking space to consider it.

The Commissioner's conclusion

18. The Commissioner is satisfied that the information the Council has redacted from the Lugg Report under regulation 12(4)(d) can be categorised as information that relates to material in the course of completion, with that material being the policy on phosphate levels in the River Lugg catchment and how to address this. At the time of the request and, the Commissioner understands, at the date of this notice, no final policy has been formulated. The Commissioner therefore finds that regulation 12(4)(d) is engaged in respect of some of the information redacted from the Lugg Report. He has gone on to consider the public interest.

Public interest test

19. Against disclosure, the Council considers the arguments for non-disclosure successfully made in IC-180541-C0R8 are also pertinent to this case. That is, that disclosing the withheld information, "at this stage" [ie at the point of the request], would hinder and distract officers, and hinder the development of the policy. This is because the public would not have access to the full information necessary to make a well informed and balanced decision about the issue in question.
20. Indeed, the Council says, much of the Cabinet Commission's work to progress matters is in private with stakeholders; regulatory bodies, food producers in particular poultry and the farming community, and this is where the most progress has been seen to date. The Nutrient Management Board is a public forum and little progress has been made

through this route because it is subject to considerable challenge from all sides. Disclosing the withheld information would distract from the work officers are doing would take up officer hours and is likely to harm both the Council's reputation and the progress it is making in this matter.

21. The Council says that currently it is leading the way at a national level; it is advising other local authorities on this issue and linking with national leads in this sphere of work. Disclosing the withheld information before the policy is fully formulated and developed would be hugely detrimental to this ongoing work and the reputational risk incurred through disclosing sensitive information would be significant.
22. Once a policy has been formulated, that policy and the data which formed the basis for it, the Council says it will make the policy publicly available. As it has already publicly stated, the Cabinet Commission is seeking to produce recommendations and a new action plan later this year.
23. For their part, the complainant has said that there is fundamental public interest in the information.
24. The Commissioner considers that there is greater public interest in the Council having a safe space to consider the Lugg Report's findings and recommendations, and to put together an action plan to its planned timetable and away from possible distraction by the public. It plans to publish its final policy and associated data once that policy has been developed. The complainant has not put forward compelling arguments for the Report's findings' early disclosure and the general public interest in transparency has been met to a satisfactory degree through the information the Council has disclosed.
25. Because he has found that the information to which the Council has applied regulation 12(4)(d) engages that exception, it has not been necessary for the Commissioner to consider the Council's application of regulation 12(5)(e) to the information.

Regulation 13 – personal data

26. 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.
27. In this case the relevant condition is contained in regulation 13(2A)(a)1. 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').

28. 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.
29. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosing that data would breach any of the DP principles.

Is the information personal data?

30. Section 3(2) of the DPA defines personal data as, "any information relating to an identified or identifiable living individual".
31. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
32. 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.
33. 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.
34. The Council has applied regulation 13 to a series of maps in the Lugg Report. These show the land immediately surrounding the River Lugg and its tributaries in the county, with these areas further broken down into catchment and sub-catchment areas.
35. The Council has explained that Herefordshire is an extremely rural county with a very low population. The current (2021 census) estimate of the county's resident population is 187,100. Two-fifths of residents live in the most rural areas of the county. Herefordshire has the fourth lowest overall population density in England (the ninth lowest of all 'top tier' local authorities in England & Wales) at 86 people per square kilometre, and the population is scattered across the 842 square miles of the county. The areas in question shown on the maps are likewise extremely rural and cover a small area of the county. The Council considers that it would be very easy for someone with local knowledge or through the information already available e.g. Land Registry records, to check the maps and identify who the relevant landowner and / or farmer working the land in question is. Therefore the Council believes that individuals can be indirectly identified from this information. As such the information falls under the definition of personal data as set out in the data protection legislation.

36. The soil sampling the Wye & Usk Foundation undertook was undertaken in relation to other land use projects. This information has been integrated with mapping in relation to geology etc to identify where high levels of phosphate are likely to occur. This is shown on the maps contained in the report, broken down by catchment and sub-catchment area. The Council argues that it is possible for this information to be linked to the landowner / farmer of the land in question. Other maps contained in the report show the level of engagement or otherwise that each landowner / farmer has had with the Wye & Usk Foundation.
37. The Commissioner agrees. Given the low population density in the areas covered by the maps, it would be possible for someone just with local knowledge, or for others if they combined the information in the maps with other information in the public domain, to identify specific individuals who own or work the land covered by the maps.
38. In the circumstances of this case and having considered the maps in question, the Commissioner is satisfied that the information relates to certain landowners and farms. He considers that this information both relates to and identifies those individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA. This is in line with the Commissioner's decision in FER0260420 which concerned a map reference².
39. The fact that information constitutes the personal data of identifiable living individuals 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.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. 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". The data subjects in this case are the landowners and/or farmers that the Council has discussed.
42. 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.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2010/529228/FER_0260420.pdf

43. 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

44. 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.
45. 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 child³".
46. 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.

³ 2 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".

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

Legitimate interests

48. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
49. 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.
50. In this case, the complainant has said that the Lugg Report is considered to be a useful and important independent review that would potentially help restore "the beleaguered Wye Catchment" and that "the authors, commissioners, participants and public have the right to expect that a commissioned report of this magnitude is shared and made accessible."
51. The health of the River Lugg catchment, including sub-catchments the reviewer engaged with and information about levels of phosphates in those areas is a legitimate interest for the complainant to have. There is also a wider local legitimate interest in the review of this catchment and, potentially a national interest, and a general public interest in public authorities being transparent and open.

Is disclosure necessary?

52. '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.
53. The Commissioner agrees that disclosing the redacted information would be necessary to meet the above legitimate interests.

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

54. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.

55. 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
56. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. In their complaint to the Commissioner the complainant has said that they do not agree with the Council's reasoning behind its redaction of some of data. But they then go on to say that they "understand that the information may be controversial and that an individual could then be the focus of 'public concern and frustration' if identified." However the complainant does not agree that all the redacted information would identify individuals or that this would necessarily cause distress or harm to them. They consider that there is no suggestion that the information was provided with an expectation of secrecy.
59. In its submission to the Commissioner the Council has argued that the individuals concerned have no reasonable expectation that this information [which the Commissioner has found to be those individuals' personal data] would be made public, and they have not consented to the information about them and their land being disclosed.
60. The Council has gone on to say that the landowners / farmers whose land is detailed on these maps are not legally required to engage with the Council through the Nutrient Management Board or Cabinet Commission, or the Wye & Usk Foundation on this issue. They have provided access for soil sampling and have engaged on a voluntary manner, based on goodwill, with a wish to address collaboratively a common problem.
61. Disclosing the information could, the Council says, lead citizen science groups and local lobby groups to make judgements privately or publicly

about individual farmers within the catchment. As it has mentioned above there is already considerable tension between farming and housing developers on this issue.

62. The Council says that if negative judgements were made and conclusions reached that individual farmers were doing something 'wrong' based solely upon the data illustrated in the maps being disclosed publicly, it could lead to the farmers concerned disengaging or refusing to take part. Disclosure would be hugely damaging for the Council's relationship with the farming community, especially as it is beginning to successfully engage with them through the Cabinet Commission. In such a rural county it is vitally important for the Council to continue to have a good relationship with the farming community.
63. Disclosing the individuals' personal data through releasing the information contained in the Lugg Report would also be likely to have a detrimental effect on the Council's relationship with them on projects such as Natural Flood Management and the Nature Recovery Strategy. They would be less likely to share their information with the Council or allow the Council access to their land if they felt it would disclose personal data which had the potential to cause them unnecessary and unjustified damage and distress.
64. Disclosure would also be likely to harm the Council's relationship with the Wye & Usk Foundation which is working with it on numerous projects. This includes a wetlands project, which is also aiming to tackle the issue of high levels of phosphates.
65. The complainant has themselves said that the data subjects – that is the landowners and farmers – could be the subject of public concern and frustration. The Commissioner agrees. The public has concerns about the state of rivers generally – and the factors that may be contributing to their poor health. And the Council has noted that tensions exist between landowners/farmers and developers. The Commissioner therefore considers that the landowners and farmers would not expect their personal data to be disclosed and that disclosing it would, in the circumstances, cause them distress. The public interest in the Lugg catchment is met, to a satisfactory degree, by the elements of the Lugg Report that the Council has disclosed and by the fact that the Council intends to publish more information from and associated with the Report in the future.
66. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.

67. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

68. The Commissioner has therefore decided that the Council was entitled to withhold the information in question under regulation 13 of the EIR.

Right of appeal

69. 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

70. 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.

71. 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

Cressida Woodall
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