

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 May 2023

Public Authority: Cheshire West and Chester Council

Address: The Portal
Wellington Road
Ellesmere Port
CH65 0BA

Decision (including any steps ordered)

1. The complainant has requested information from the Cheshire West and Chester Council (the Council) relating to a planning application.
2. The Commissioner's decision is that:
 - The Council was entitled to rely on regulation 12(3), regulation 13 and regulation 12(5)(f) when refusing the request.
 - The Council, on the balance of probabilities, does not hold any additional information in the scope of the request.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 18 February 2022, the complainant wrote to the Council and requested information in the following terms:

"Freedom of Information request and also pursuant to the Environmental Information Regulations.

All correspondence between the authority, between its officers, the applicant [name redacted] and the agent (d2 Architects). Any third parties, internal reports and correspondence, meeting records and notes relating to the relevant application and internal consultation responses.

I do not need any information already published on the Council website/planning portal.

Planning Application [application reference redacted] [address redacted] & Application Reference [application reference redacted].
Lawful Development Certificate [address redacted].”

5. The Council responded on 13 April 2022. It provided some information within the scope of the request and advised the remaining information was being withheld under regulation 12(3), regulation 12(5)(f), regulation 12(5)(b) and regulation (13).

Scope of the case

6. The complainant contacted the Commissioner on 18 October 2022 to complain about the way their request for information had been handled.
7. During the Commissioner’s investigation, the Council advised that it was no longer going to be relying on regulation 12(5)(b).
8. The Commissioner considers his investigation will focus on whether the Council was entitled to rely on regulation 12(3), regulation 12(5)(f), and regulation (13). The Commissioner will also consider whether the Council, on the balance of probabilities, holds any additional information within the scope of the request.

Reasons for decision

9. 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.

10. In this case, the information requested relates to planning information. Therefore, it is information on a measure affecting the elements of the environment and is thus environmental information for the purposes of the EIR.

Regulation 12(3) and Regulation 13 – personal data

11. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exception. 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.
12. In this case the relevant condition is contained in regulation 13(2A)(a). 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 General Data Protection Regulation ('GDPR').
13. 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.
14. 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?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.

18. 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.
19. Having seen the withheld information in this case, the Commissioner is satisfied that the information is related to personal data of junior staff, third parties and therefore falls within the definition of "personal data" in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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."

23. 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.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

25. Article 6(1) of the 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.
26. The Commissioner considers that the lawful basis most applicable in determining whether to disclose personal data in response to a request under the FOIA or EIR 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 child¹”

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.

28. 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

29. In considering any legitimate interest(s) in disclosing 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.

30. 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.

¹ 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) 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”

31. The Commissioner acknowledges there is a legitimate interest in the Council operating in an open, honest and transparent manner. The Commissioner also recognises that there is a strong public interest in how the Council make decisions regarding planning applications.
32. The complainant explained that disclosing the information would also demonstrate that the Council has nothing to hide and is acting appropriately when dealing with conflicts of interest.
33. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information.

Is disclosure necessary?

34. "Necessary" means more than desirable, but less than indispensable or of 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.
35. The Commissioner is not satisfied that disclosing personal data to the world at large would be the least intrusive means of achieving the complainant's interests in the requested information. The Commissioner is satisfied that the email content provides the complainant with details regarding decision making, processes and how the Council is dealing with any conflicts of interest that may arise.
36. For the above reasoning, the Commissioner has decided the Council was entitled to rely on Regulation 12(3) and Regulation 13 when refusing part of the request.

Regulation 12(5)(f)- interests of the information provided

37. Information can be withheld under regulation 12(5)(f) if disclosure would adversely affect the interests of the person who provided the information, where that person was under no legal obligation to supply it, did not supply it in circumstances which would entitle the council to disclose it (apart from the EIR) and has not consented to disclosure.
38. For this exception to apply, the council needs to demonstrate the harm that would arise from disclosure to the person(s) that supplied the information.
39. The Council advised that as the information was provided by an individual(s) during the process of this planning application and the individual(s) did not give consent for this information to be released, it would be exempt under regulation 12(5)(f). The Council also confirmed

that the individual(s) in question, were under no legal duty to provide the requested information.

40. The Council concluded that if the requested information were disclosed, it could adversely affect the interests of the individual(s) and likely cause harm and distress.

Public interest test

41. The Council acknowledged that there is a public interest in the requested information, as the public would want to be reassured that the Council is operating in an open and transparent manner.
42. The Council advised that the interests of the individual(s) who had provided information or opinions, would need to be considered. The Council explained that the adverse effect on these individuals would be high.
43. The Council explained that if the requested information were disclosed, opinions or comments would be released which could lead to harm and distress. The Council explained that when information is provided to it, it needs to ensure that it is upholding its duty to ensure information can be provided in confidence.
44. The Council concluded that the individual(s) in question have not consented to the release of the information.

Commissioner's Decision

45. The Commissioner is satisfied that if the withheld information is disclosed, it would have an adverse effect on the individual(s) involved. It may also prevent other individuals from confiding in the Council regarding similar matters.
46. For these reasons, the Commissioner has concluded that the Council was entitled to rely on regulation 12(5)(f) when withholding the requested information.

Regulation 12(4)(a) of the EIR – Information held/ not held

47. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request if it is not subject to an exception.
48. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.

49. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, and the civil standard of proof based on the balance of probabilities, must decide whether the public authority holds any information which falls within the scope of the request (or was held at the time the request was made).
50. In this case the complainant advised that they still believed some information was missing due to a telephone conversation between the complainant and a member of the Council's staff. The complainant sent the commissioner a copy of an email which advised the staff member would be having a meeting with their manager, yet no record of this discussion nor meeting had been provided.
51. The Council confirmed that it had conducted searches using back-office systems and Council staff emails, this is where the Council store all its planning related information.
52. The search criteria used by the Council included; the original planning application reference, the application number for the lawful development certificate, the address of the application site, the applicant's name and email address, the complainants name, the references to the requests for information, the acting agent of the complainant and relevant Council staff involved (i.e. Head of planning, Line manager and legal manager).
53. The Council explained that all records are held electronically, it confirmed that any recorded discussions regarding the judicial review had been provided to the disclosure officer. The disclosure officer then individually contacted staff members who had these discussions, for any additional information that may have been held.
54. The Council then confirmed that on receipt of the freedom of information request, searches were conducted on the Council's planning database software and staff emails using the search criteria mentioned above.
55. The Council concluded that no recorded information was ever destroyed and that any records relating to planning applications, planning casefiles, enforcement notices and reports are currently held indefinitely and archived as outlined in its Planning and Building Control Record Retention schedule. This is a statutory obligation under the planning legislation Town & Country Planning Act 1990 and The Town and Country Planning (Development Management Procedure) (England) Order 2015.

56. Based on the balance of probabilities, the Commissioner is satisfied that the Council does not hold any additional information within the scope of the request.

Right of appeal

57. 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

58. 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.
59. 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

**Catherine Fletcher
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