

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

**Date:** 21 June 2023

**Public Authority:** Network Rail  
**Address:** The Quadrant  
Elder Gate  
Milton Keynes  
MK9 1EN

**Decision (including any steps ordered)**

---

1. The complainant has requested from Network Rail the amount paid to landlords regarding the extension part of a contract.
2. Network Rail refused to confirm or deny whether it held such information under regulation 13(5)(personal data) of the EIR. The Commissioner's decision is that the public authority was entitled to rely on regulation 13(5) of the EIR as the basis for neither confirming nor denying whether it held the requested information.
3. The Commissioner does not require Network Rail to take any steps as a result of this decision notice.

**Request and response**

---

4. On 15 September 2022 the complainant made the following request for information:

"Any document that shows the consent that was obtained agreeing HGV vehicle access along the road and by who". And

"...what amount was paid to only my landlords on the extension part of the contract please?

5. Network Rail responded on 14 October 2022 and explained that it did not hold any further information, other than what had already been provided, relating to the first part of the request.
6. Regarding the second part of the request, Network Rail neither confirmed nor denied holding the information under regulation 13(5) of the EIR.
7. The complainant made a review request on 7 December 2022 concerning the exception cited.
8. Following an internal review, Network Rail wrote to the complainant on 7 February 2023 in which it maintained its original position. The review only considered the question at part two of the request as the complainant had not suggested that they were dissatisfied with its response to the first part and that this had been confirmed by the complainant.

### **Scope of the case**

---

9. The complainant contacted the Commissioner on 3 March 2023 to complain about the way their request for information had been handled.
10. After the Commissioner had sent his investigation letter to Network Rail it attempted informal resolution with the complainant. However, Network Rail and the complainant were unable to reach a resolution.
11. The Commissioner considers that the scope of this case is whether Network Rail was entitled to refuse to confirm or deny whether it held information on the amount paid to the landlords on the extension part of a particular contract.

### **Reasons for decision**

---

#### **Is the requested information environmental?**

12. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
13. Network Rail states that repair works are a measure which affects the landscape. If any information falling within the scope of the request was held, it suggests that it would fall under Regulation 2(1)(c) of the EIR. The Commissioner agrees with this analysis.

**Regulation 13(5) of the EIR – personal data (NCND)**

14. Regulation 13(1) 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.
15. Regulation 13(5)(a) of the EIR, provides that the duty to confirm or deny whether information is held does not arise if it would contravene one of the principles relating to the processing of personal data (as set out in Article 5 of the General Data Protection Regulation - UK GDPR) to provide that confirmation or denial.

16. Therefore, in the circumstances of this case, for the public authority to be entitled to rely on regulation 13(5)(a) as the basis for refusing to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:

- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;
- and
- Providing this confirmation or denial would contravene one of the data protection principles.

**Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?**

17. Section 3(2) DPA 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".

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

19. 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.

20. Network Rail argues that there is no means of confirming or denying whether it holds the requested information without identifying individuals. Network Rail has provided some background to this request which cannot be reproduced here as it would confirm or deny whether personal data is held.

21. The complainant has suggested that just providing a figure would not be personal data:

"a monetary figure with no identifying factors/characteristics to be included with the provision of this information...This would be a stand-alone document which even if it were to accidentally fall into some part of the public domain could not be used to identify individuals."

22. The Commissioner disagrees due to the context within which the request has been made. Contextual details connected to individuals were provided by the complainant to Network Rail in order to make the request. The EIR cannot be used to provide information solely to an individual but has to be made available to the wider world. If

information is held that can connect it to an individual, it is personal data that is being disclosed.

23. Given the circumstances of the request, if Network Rail were to confirm or deny whether it held information on the amount paid to a particular landlord it would, in effect, be confirming whether or not it had paid that landlord. Whether or not Network Rail had paid that landlord a sum of money is that landlord's personal data. Therefore the Commissioner accepts that confirmation or denial would constitute the disclosure of a third party's personal data.
24. The fact that confirming or denying whether the requested information is held would reveal personal data about the landlords does not automatically prevent the public authority from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
25. The Commissioner considers that the most relevant data protection principle is principle (a).

**Would confirming whether or not the requested information is held contravene principle (a)?**

26. Article 5(1)(a) GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

27. 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

**Lawful processing: Article 6(1)(f) GDPR**

28. 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before issuing a confirmation or denial that the requested information is held would be considered lawful.
29. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

'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'<sup>1</sup>.

30. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) 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, which is the landlord/s in this case.

31. 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**

32. In considering any legitimate interest(s) in confirming or denying whether a request for information under the EIR is held, the Commissioner recognises that such interest(s) can include broad general

---

<sup>1</sup> 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".

principles of accountability and transparency for their own sakes as well as case specific interests.

33. 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.
34. The complainant contends that they have a legitimate interest in the requested information being provided as –

“there appears to have been a series of ‘wrong-doings’ which include Network Rail not having identified correctly who owned the road by not considering Crofting legislation, Network Rail not having correct planning consent but only Permitted Development Rights which do not include accessing a work site over property that does not belong to them, Network Rail accepting a ‘sign off’ by parties that stood to gain financially from public funds which did not include the correct owners of, or the community served by the road to their detriment, and the emails from the landlords’ saying Network Rail were going to contribute to road repairs...”

The complainant pointed to the Commissioner's guidance which says that “‘wrong-doing’ can be a reason for public interest to take precedence over personal interest’ though they acknowledged that this factor was more valid for previous information requests they had made.

35. The complainant believes that because Network Rail is a “publicly funded company” it should be able to provide the information requested. The complainant suggests that taxpayers’ money has been “wrongly obtained” and that a right to privacy should not usurp the public interest and that providing it “will facilitate the administration of justice”.
36. By contrast Network Rail argues that information, if held, “relate[s] to the individuals’ private life (i.e. their home, family, social life) as opposed to their public life (i.e. their work as a public official or OFFICIAL employee)”. It has determined “a general interest in providing information about how Network Rail carries out works and the contractual arrangements it enters into”. Providing this type of information “allows for scrutiny of our actions and for the public to thereby engage in environmental decision making”.
37. The Commissioner considers that the requester does have a legitimate interest but that this does not necessarily outweigh a third party's reasonable expectation of privacy.

**Is confirming whether or not the requested information is held necessary?**

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR whether the requested information is held must therefore be the least restrictive means of achieving the legitimate aim in question.

39. The complainant argues that Network Rail has not complied with

"crofting legislation to identify ownership of croft land/infrastructure on it. Ownership of the infrastructure is not a 'private matter' as NR's FOI unit have said. It is laid down in statute. NR denied crofters their right to have been party to a contracts and, finding out the value of the contract extension would allow the injured parties seek some of the monies that should have been theirs. The purpose of the FOI request was to enable me request a % of what was paid to the landlords. There is wider public interest as NR failed to recognise statute effectively excluding crofters being of interest to other crofting communities and the Secretary of Rural affairs. NECESSITY - I believe the size of the community is irrelevant. An entire crofting community has been affected. Crofting legislation was introduced to remove a feudal system to ensure crofters rights were clear and they were not disadvantaged. NR know I repeatedly contacted my landlords to try and meet to seek a contribution from them towards repairs, but they always refused. Knowing the value of the contract extension will provide a necessary lever to enable the crofters seek monies they were entitled to a share of to help re-establish the essential services (emergency and postal) referred to in the documents."

40. Network Rail points to the Commissioner's guidance where it states:

"'Necessary' means that the processing must be a targeted and proportionate way of achieving your purpose. You cannot rely on legitimate interests if there is another reasonable and less intrusive way to achieve the same result."<sup>2</sup>

---

<sup>2</sup> [Legitimate interests | ICO](#)



41. The public authority argues that “there are less intrusive means of making Network Rail accountable”. The Regulator (the Office of Rail and Road) scrutinises Network Rail’s spending and publishes “a wide range of information about how we spend public money through our Transparency pages and Annual Report”. In this particular instance, it accepts

“that holding us to account for this particular action could only be achieved by confirming whether the amendment to the contract which the request presumes exists. There is no other means other than the EIR for a member of the public to access this information.”

42. Network Rail accepts that confirming whether it holds “the information in question is necessary to meet the narrow interest of investigating whether Network Rail has acted appropriately in this specific instance”. However, it does not believe that “meeting this interest is sufficiently important to justify” any interference with data subjects’ rights.

### **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 confirming whether or not the requested information is held against the data subject(s)’ interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to an EIR request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
44. The complainant has raised several legal points and told the Commissioner that there has been a recent report from “An Independent Complaints Assessor at the Department of Transport into the administrative process of Network Rail’s Complaint Handling process”. They suggest that Network Rail’s agreement to a recommendation by the assessor is “tantamount to Network Rail admitting they failed to consider legislation” and query whether it could be considered “plausible wrongdoing and therefore a reason to disclose”. However, these matters are beyond the Commissioner’s remit.
45. In the circumstances of this case, the Commissioner is not persuaded that confirming or denying whether the requested information is held is necessary. To do so would reveal to the world personal data about individuals. The legitimate interest might be achieved by seeking redress without Network Rail confirming or denying whether it holds this

information. The Commissioner agrees that it would be disproportionately intrusive to reveal personal data by confirming or denying whether it holds this information in the context of an EIR request.

46. The Commissioner considers that confirming or denying whether the requested information is held does not meet the three part legitimate interest test outlined earlier. The Commissioner does not accept that disclosure is necessary to meet the legitimate interest in knowing what, if any, amount was paid to the landlords in question. Though he understands the complainant's argument, he does not agree that this overrides their fundamental rights and freedoms over a matter which, although important to an individual/small group of individuals, is not of sufficiently wider interest to justify confirmation or denial.
47. The Commissioner has therefore concluded that the requirements of Article 6(1)(f) of the GDPR have not been met and so confirming or denying whether the requested information is held would not be lawful and thus breach principle (a). Network Rail was not obliged to confirm or deny whether the information requested by the complainant was held.

## Right of appeal

---

48. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**