

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

Decision notice

Date: 6 July 2023

Public Authority: Historic England
Address: The Engine House
Fire Fly Avenue
Swindon SN2 2EH

Decision (including any steps ordered)

1. The Commissioner's decision is that Historic England correctly withheld some information within scope of the complainant's request about a property. The information is other's personal information and is excepted from disclosure under regulation 13(1) of the EIR. There was no breach of regulation 5(2) or 14(2) in relation to the timeliness of Historic England's response to the request.
2. It's not necessary for Historic England to take any corrective steps.

Request and response

3. The complainant made the following information request to Historic England (HE) on 21 February 2023:

"This is a request for information made under the Freedom of Information Act 2000 for information regarding my property at [redacted]. I am the property owner and am seeking the help of Historic England to get the property de-listed after it was wrecked by fire.

My application to de-list was submitted on [redacted]. The reference number on the Consultation report was Case number [redacted].

I would specifically like to have the following information released:

- 1) Copy of the Report and any recommendations made by or on behalf of Historic England regarding the regarding [sic] what remains of the property and the application to have it delisted.
- 2) Any information and communications pertaining to my de-listing application and the status of the property as a listed building between Historic England and the Department for Culture, Media and Sport (previously Dept for Digital Culture, Media and Sport) "DCMS";
- 3) Any decisions taken by DCMS and any decisions of Historic England relating to my application to de-list the property, reasons and evidence in support of such decision making; timetable for the taking of decisions including the final decision date if the decision has not been made at the date of this FOI request..."
4. HE responded on 21 March 2023. It handled the request under the EIR. HE disclosed some relevant information and withheld some under regulation 12(5)(d) (confidentiality of proceedings) and regulation 12(5)(f) (volunteered information). HE also withheld some information from a letter it disclosed, under regulation 12(3) (personal data).
5. The complainant's internal review request on 29 March 2023 focussed on the personal data redacted from the disclosed letter.
6. The complainant submitted their complaint to the Commissioner on 23 May 2023. Their complaint indicated that they hadn't received an internal review response from HE.
7. However, HE subsequently confirmed to the Commissioner that it had provided the complainant with an internal review on 6 April 2023, and it provided the Commissioner with a copy of this. HE's final position is that, under regulation 12(3), it had correctly withheld the personal information from the letter it disclosed.

Reasons for decision

8. Based on the complainant's internal review request and complaint to the Commissioner this reasoning will then focus on whether HE is entitled to withhold the information redacted from an email it disclosed to the complainant.
9. However, in their complaint, the complainant also indicates that they consider that HE timed their response to the request so as to deliberately frustrate the complainant's engagement with the report they had requested. The Commissioner will therefore also consider the timeliness of HE's response.

Regulation 13 – personal data

10. Under regulation 13(1) of the EIR, information is excepted from disclosure if it's the personal data of someone other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
11. In this case the relevant condition is contained in regulation (2A)(a)¹. This applies where disclosing 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).
12. First, the Commissioner must determine whether the withheld information is personal information as defined by the Data Protection Act 2018 (DPA). If it's not personal information, then regulation 13(1) of the EIR can't apply.
13. The Commissioner is satisfied here that the redacted information is personal information. Being names and contact information, it relates to other people who could be identified from it.
14. Second, the Commissioner must establish whether disclosing the information would breach any of the DP principles. The most relevant DP principle in this case is principle (a).

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

Would disclosure contravene principle (a)?

15. 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”.

16. In the case of an EIR request, the personal data is processed when it's 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.

17. 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

18. Article 6(1) of the GDPR sets out the requirements for lawful processing. It says 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.

19. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.

20. When he considers the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, the Commissioner has 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 writer of the letter.

21. 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

22. In considering any legitimate interest(s) in the 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.
23. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, 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.
24. In this case, the contents of a particular letter associated with matters arising from a fire at the complainant's property have been disclosed. However, the complainant has their own suspicions about who wrote the letter and wants the name of the letter-writer to be confirmed. That's very much an interest for the complainant only, but it's still a legitimate interest for them to have.

Necessity test

25. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering 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.
26. The complainant is aware that someone wrote to HE about their property and they have had the contents of that letter disclosed to them. In the Commissioner's view that goes a long way to satisfying the general legitimate interest in HE being transparent about a letter it's received about the complainant's property. However, it doesn't satisfy the complainant's legitimate interest in knowing who, specifically, wrote the letter. As such, the Commissioner has gone on to carry out the balancing test; balancing the complainant's legitimate interests with the legitimate interests and rights and freedoms of those who wrote the letter ('the data subject').

Balancing test

27. In balancing the complainant's and data subject's legitimate interests it's necessary to consider the impact of disclosure. For example, if the data subject wouldn't reasonably expect that the information would be disclosed to the public under FOIA or 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.

28. 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 individual.
29. In the Commissioner's view, a key issue is whether the data subject would 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.
30. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
31. The Commissioner considers that in the circumstances of this case, the data subject would have the reasonable expectation that their name, which was given to HE in a personal capacity, wouldn't be disclosed to the world at large as the result of an information request. And the Commissioner agrees with HE's position in its submission to him; that in the circumstances of this case, disclosing their name would be likely to cause them harm or distress. Disclosure might also deter other people from engaging with HE's work in the future, if they thought their name might be disclosed.
32. The Commissioner considers that the complainant's legitimate interest and the wider interest in transparency have been met to an adequate degree through the information HE has disclosed.
33. Based on the above factors, he is satisfied that the complainant's legitimate interest is not sufficient to outweigh those of the data subject and their fundamental rights and freedoms.
34. The Commissioner therefore finds that there is no Article 6 basis for processing and so disclosing the information in question wouldn't be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
35. The Commissioner's decision is that HE is entitled to withhold the information under regulation 13(1) of the EIR, by way of regulation 13(2A)(a).

Procedural matters

36. Under regulation 5(2) and regulation 14(2) of the EIR a public authority must disclose requested information or issue a refusal notice in respect of information it's withholding within 20 working days following the date of receipt of the request.
37. In this case, the complainant submitted their request on 21 February 2023, and HE provided a response and refusal notice on 21 March 2023. This was within 20 working days and so there was no breach of regulation 5(2) or 14(2).

Right of appeal

38. 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

39. 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.
40. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF