

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 September 2023

Public Authority: Shropshire Council

Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant made a two-part request for information, part one was regarding an Enforcement Notice issued by Shropshire Council (the Council), part two was regarding foul water drainage. The Council refused to confirm or deny whether it held information for part one under regulation 13(5)(a) (personal data) of the EIR. It disclosed some information with regard to part two and applied regulation 12(3) to the rest.
2. 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. However, it breached regulation 5(2) of the EIR as it failed to respond within 20 working days.
3. The Commissioner also found that on the balance of probabilities, the Council disclosed all other information it held within the scope of the request
4. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

5. On 29 March 2023 the complainant made the following request for information:

“Copies of documents, maps, plans and all correspondence (letters, emails, telephone conversation notes/records, meeting notes) relating to:

a) the Enforcement Notice (under Building Act 1984 Section 59) issued by Shropshire Council to (name redacted) and (name redacted) of Castlehaven Care Limited, 69-71 Church Street, Bishops Castle SY9 5AD.

b) foul water, drainage and/or sewage at/within the following properties: 'The Pines', 'The Bungalow (at The Pines)', 'Shady Hollow' and/or the A488 highway within the village of Colebatch, Bishops Castle, Shropshire SY9 5JY between the dates of 14 November 2019 and 29 March 2023.”

6. The Council responded on 23 May 2023 and cited regulation 13(5)(a) to withhold the information for part one.
7. Regarding the second part of the request, the Council provided some information but withheld some under regulation 12(3) of the EIR.
8. The complainant requested an internal review on 26 May 2023.
9. Following an internal review on 9 July 2023, the Council upheld its reliance on the exceptions cited. However, it disclosed some further information with regard to a letter previously published and the dates of two conversations between the public protection officer and the business concerned.

Scope of the case

10. The complainant contacted the Commissioner on 9 July 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of this case is whether the Council was entitled to refuse to confirm or deny whether it held the information requested.

Reasons for decision

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

12. 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.
13. 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.
14. 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?

15. Section 3(2) DPA 2018 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. 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.
18. The Council argues that there is no means of confirming or denying whether it holds the requested information without identifying individuals. The Council has provided some background to this request which cannot be reproduced here as it would confirm or deny whether personal data is held.
19. The complainant has suggested that just providing the redacted information would not be disclosing personal data:

“the Council has previously provided the requested information for earlier dates and the request is for information that will have been generated within a more recent time period.” And “If the information relating to the matter has been previously provided, there is no reason why it should not be provided now. The information can be redacted in the usual way to remove the identities of (names redacted).”

20. 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 the Council 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.
21. Given the circumstances of the request, if the Council were to confirm or deny whether it held information it would, in effect, be confirming whether or not it was engaged with specific individuals which in turn would mean the release of personal data into the public domain which is not currently available to the general public. Therefore, the Commissioner accepts that confirmation or denial would constitute the disclosure of third-party personal data.
22. The fact that confirming or denying whether the requested information is held would reveal personal data about the parties involved 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.
23. 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)?

24. 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.”

25. 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

26. 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.
27. 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’¹.

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;

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 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”.

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.

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 confirming or denying whether a request for information under the EIR is held, 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.

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

"There is a Public Interest in providing the information. In September 2018 Shropshire Council has previously issued a Section 59 of the Building Act 1984 Legal Notice on Castlehaven Care Limited requiring The Pines Residential Home to stop discharging raw sewage onto the A488 road. As a public body, it is in the Public Interest for all matters regarding the Legal Notice to be made publicly available, irrespective of whether Shropshire Council has taken any enforcement action or not."

32. The complainant argued that: "The Council issued an Enforcement Notice (under Building Act 1984 Section 59) requiring the care home to improve their sewage treatment system. The Council has not taken any enforcement action against Castlehaven Care Limited and continues to use them as a supplier of care facilities. There is a conflict of interest in the matter, and it is of public interest if the Council is not taking enforcement action against a supplier, for whatever reason."

33. By contrast the Council argues that they have previously provided all the information held in response to requests by the complainant and their representatives and that, if held, any other information would relate to third party individuals. It has determined a general interest in providing information about how the Council carries out its duties and any potential actions taken. Providing this type of information allows for scrutiny of its actions.

34. The Commissioner considers that the complainant 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?

35. '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.

36. The complainant argues that:

"The Council refers to "a civil matter between the private parties". Shropshire Council is not a private party, but a public body who should be held accountable for its actions, or not.

It is not understood why, as a public authority, the Council will not provide the requested information."

37. The Council 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."²

38. The public authority considers that there are less intrusive means of making the Council accountable. They publish a range of information about how they process and use information as well as actions taken for compliance purposes through its accountability and transparency section of its website.

39. The Council does not accept that confirming whether it holds the information in question is necessary to meet the narrow interest in this specific instance, it does not believe that meeting this interest is sufficient to justify any interference with data subjects' rights.

² [Legitimate interests | ICO](#)

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

40. 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.
41. The complainant has raised the issue of the Councils alleged failure to take enforcement action and its continued use of the business concerned as well as an alleged conflict of interest. However, these matters are beyond the Commissioner's remit. If the complainant believes the Council has acted inappropriately towards the business concerned, this should be raised with the relevant local ombudsman.
42. 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 the Council 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.
43. 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 this case. Though he understands the complainant's argument, he does not agree that this overrides the 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.
44. 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). The Council was not obliged to confirm or deny whether the information requested by the complainant was held.

Right of appeal

45. 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

46. 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.
47. 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

**Deirdre Collins
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