

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

Decision notice

Date: 17 June 2024

Public Authority: Newport City Council
Address: Civic Centre
Godfrey Road
Newport
NP20 4UR

Decision (including any steps ordered)

1. The complainant requested copies of correspondence and communications between HRH The Prince of Wales (or officials acting on his behalf) and specific individuals and departments within Newport City Council (the Council) regarding issues around homelessness, rough sleepers, provision of housing and the Homewards initiative. The Council disclosed some information and withheld other information under sections 37(1)(aa) (communications with the heir to or second in line to the Throne) and 41 (information provided in confidence). During the course of the Commissioner's investigation the Council disclosed some additional information relevant to the request, maintained its reliance on section 37 for some information, withdrew reliance on section 41 and instead sought to rely on section 40(2) (personal information).
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any further information falling within the scope of the request, and it is entitled to rely on sections 37(1)(aa) and 40(2) as its basis for refusing to provide the remaining withheld information.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 12 July 2023, the complainant wrote to the Council and requested information in the following terms:

"I would like to request the following information via the Environmental Information Regulations (EIRs).....

Please note that I am only interested information generated between 1 February 2023 to the present day.

1. During the aforementioned period has Prince William (and or anyone able to correspond and communicate on his behalf) written to and communicated with the council. Please note that I am only interested in that correspondence and communications which mentions and or in any way relates to any and or all of the issues and topics listed below. If the answer is yes, can you, please provide copies of this correspondence and communication.
 - a. Homelessness and or a shortage of homes within the council's geographical area and or the issue of homelessness and or a shortage of homes anywhere else in the UK.
 - b. The problems faced by rough sleepers in the council's own geographical area and or in any other parts of the UK. This will include but will not be limited to the health and safety of those who are sleeping rough and have no proper protection from the elements.
 - c. The Prince's new Homewards initiative.
 - d. The Royal Foundation of the Prince and Princess of Wales.
 - e. The shortage of housing whether in the council's own geographical area and or in any other part of the UK.
 - f. The need to build and or to secure and or to provide more homes in the council's own geographical area and or in any other part of the UK.
 - g. The use of vacant land sites within the council's own geographical area and or in any other part of the country to provide new homes and or new facilities for those regarded as being homeless or those in urgent need of new houses.
 - h. The need to build more housing and or facilities for the homeless on either brown field or green field sites within the council's area.
 - i. The use of existing properties that are either empty and or derelict to provide new homes and or new services for the
 - j. The existing housing stock with the council's area.
2. During the aforementioned period did either the Royal Foundation of the Prince and Princess of Wales and or any employee and

representative of the Prince's Homewards initiative write to and or communicate with the council. Please note that I am only interested in that correspondence and communications which mentions and or in any way relates to any and or all of the issues and topics listed in question one (a to j). If the answer is yes, can you, please provide copies of this correspondence and communication.

3. During the aforementioned period did the council write to and or communicate with the Royal Foundation of the Prince and Princess of Wales and or any employee and or representative of the prince's Homewards initiate. Please note that I am only interested in that correspondence and communications which mentions and or in any way relates to any and or all of the issues and topics listed in question one (a to j). If the answer is yes, can you, please provide copies of this correspondence and communication".
5. The Council responded on 25 September 2023 and disclosed some information relevant to the request and confirmed that it was withholding the remaining information under sections 37(1)(aa) and 41(1) of the FOIA.
6. On 10 November 2023 the complainant requested an internal review of the Council's handling of the request. They stated that they were unhappy with "the quality and quantity of the information disclosed". The complainant reminded the Council that they had mentioned the EIR in their initial request and they also pointed out that correspondence and communications of HRH Prince William (and anyone acting on his behalf) were not automatically exempt from disclosure under the EIR.
7. The Council provided the outcome of its internal review on 14 March 2024 and disclosed some additional information relevant to the request. It also confirmed that it had considered the request under both the FOIA and the EIR.

Scope of the case

8. The complainant first contacted the Commissioner on 18 January 2024 to complain about the way their request for information had been handled and the delay in the Council providing the outcome of its internal review. The complainant contacted the Commissioner again on 16 March 2023 following receipt of the Council's internal review response to confirm they remained dissatisfied with the handling of the request. The complainant specifically asked the Commissioner to consider whether the Council held any additional information relevant to the request, whether the Council had handled the request under the correct access regime, and whether the Council had correctly applied the

exemptions cited. The complainant also expressed dissatisfaction with the delay in the Council providing the outcome of its internal review.

9. As stated earlier in this notice, during the course of the Commissioner's investigation the Council disclosed some additional information relevant to the request, maintained its reliance on section 37 for some information, withdrew reliance on section 41 and instead sought to rely on section 40(2) of the FOIA.
10. In light of the above, the scope of the Commissioner's investigation into this case is to:
 - establish the correct access regime for the request;
 - consider whether the Council holds any additional information falling within the scope of the request other than that which it has disclosed or withheld under an exemption;
 - determine whether the Council has correctly applied sections 37 and 40(2) to the remaining withheld information; and
 - consider any procedural matters associated with the handling of the request.

Reasons for decision

Correct access regime

11. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements...”

12. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
13. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
14. The Council confirmed to both the complainant and the Commissioner that it has considered the request under both the FOIA and the EIR. Specifically, in correspondence with the Commissioner, the Council confirmed that it had considered those parts of the request relating to the exposure of homeless individuals to the elements, the need to build or provide more homes, the use of vacant sites and the need to build more facilities for the homeless on brown or green field sites to constitute environmental information as defined by regulation 2(1) of the EIR –parts (1)(b), 1(f), 1(g) and 1(h) of the request. The Council also confirmed to the Commissioner, that any environmental information held relevant to the request has been disclosed to the complainant and it was not seeking to rely on any EIR exceptions to withhold any environmental information held relevant to the request.
15. The Commissioner has considered the wording of the request and he is satisfied that at least some of the information, if held, would constitute environmental information as defined by regulation 2(1) of the EIR. He notes that the Council has considered the request under both the FOIA and the EIR.
16. Whilst accepting that parts of the requested information, if held, is likely to constitute environmental information, having considered the content of the information that the Council has continued to withhold relevant to the request, the Commissioner is satisfied that it is too far removed from activities which would affect, or be likely to affect, the elements or

¹ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/>

factors and measures referred to in regulation 2(1). He is therefore satisfied that the withheld information does not fall within the definition of environmental information as set out in regulation 2(1)(a) to (f) of the EIR, and that the Council was correct to consider such information under the FOIA.

Section 1 FOIA/ Regulation 5 EIR - Information held relevant to the request

17. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
18. Regulation 5(1) of the EIR states that 'a public authority that holds environmental information shall make it available on request.' This is subject to any exceptions that may apply.
19. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. The Commissioner will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held.
20. The Council confirmed that any information relevant to the request would be held electronically. It advised that full searches were undertaken of email records of all relevant staff including – the Chief Executive, the Leader of the Council, the Head of Housing and Communities and officers within its Homelessness team.
21. The Council confirmed that it had not had any direct communication exchanges with Prince William or any other member of the Royal Family. The Council also explained that the searches undertaken would have identified all relevant information as all discussions taking place with the Royal Foundation were in relation to the Homewards Initiative and as such it was confident that any correspondence searched using the term "Homewards" would identify all information falling within the scope of the request.
22. The Commissioner is satisfied that the Council has carried out adequate searches for information held within the scope of the request. He also notes that the Council has confirmed that it did not have any direct communication exchanges with Prince William as all exchanges were with the Royal Foundation on his behalf.

23. In the Commissioner's view, there are no grounds to believe that the Council holds any further recorded information within the scope of the request to that either disclosed to the complainant or withheld under exemptions as described above.
24. The task for the Commissioner here is to make a decision based on the civil standard of the "balance of probabilities". Having considered all of the available evidence, the Commissioner finds that, on the balance of probabilities, the Council does not hold any further information falling within the scope of the request, other than that which it has disclosed and the information that it has continued to withhold.

Section 37(1)(aa) – Communications with the heir to and second in line to the Throne

25. Section 37(1)(aa) exempts information relating to communications with the heir and second in line to the Throne.
26. Section 37(1)(aa) is a class-based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question (in this case information relating to communications with the heir to the Throne), it is exempt from disclosure under FOIA. It is not subject to a balance of the public interest test.
27. Communications with the heir are not necessarily made directly by, or to, HRH The Prince of Wales. The exemption will also include communications made or received on his behalf by his officials.
28. For the exemption under section 37(1)(aa) to be engaged the information must constitute, or relate to, a "communication". So, for example, an internal note held by a government department that simply references the heir will not fall within this definition unless it specifically relates to a relevant communication.
29. The information which the Council has continued to withhold under section 37(1)(aa) comprises parts of documents received by the Council from the Royal Foundation.
30. Having viewed the withheld information, the Commissioner is satisfied that it forms communications made, or received by, officials on behalf of HRH The Prince of Wales about matters that fall within the terms of the complainant's request. Therefore, he considers that the exemption at section 37(1)(aa) has been correctly engaged.
31. There is no need for the information to be sensitive in any way for the exemption to apply. It is sufficient that the information falls within the class of information described by the exemption. The Commissioner

therefore finds that the information is exempt by virtue of section 37(1)(aa).

32. As the exemption at section 37(1)(aa) is absolute, there is no further consideration to be made, including no public interest test to consider.

Section 40 – personal information

33. Section 40(2) of FOIA 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 section 40(3A)(3B) or 40(4A) is satisfied.

34. In this case the relevant condition is contained in section 40(3A)(a)². 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 (UKGDPR).

35. 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 section 40 of FOIA cannot apply.

36. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

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

39. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA

40. 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.
41. In this case, the information which the Council has withheld under section 40(2) comprises names and contact details of third parties who were the sender, recipient or copy recipient in the emails which the Council has disclosed. The third parties include a reporter, employees of the Royal Foundation and officers of other public authorities such as other local authorities.
42. The Commissioner is satisfied that the withheld information (names and contact details of individuals) clearly relates to third party individuals. He is satisfied that this information both relates to and identifies the third parties concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
43. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
44. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

45. Article 5(1)(a) of the UK GDPR states that:

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

46. In the case of an FOIA 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.
47. 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 UK GDPR

48. 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" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
49. 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"³.

50. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the FOIA is Article 6(1)(f); legitimate interests. In considering the application of this provision in the context of a request for information under FOIA 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 interests, fundamental rights and freedoms of the data subject.

51. 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

52. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

³ 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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

53. 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.
54. The complainant has not submitted any representations to support the view that the names and contact details of the third parties concerned should be disclosed under the FOIA.
55. The Commissioner accepts that there is a legitimate interest in disclosure of information which promotes transparency and accountability.

Is disclosure necessary?

56. '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.
57. In the Commissioner's view disclosure of the names and contact details of the third parties concerned is not necessary to meet any legitimate interest in disclosure. This is because the substance of the emails (with the exception of the information which has been withheld under section 37 of the FOIA) has been disclosed. The Commissioner considers that any legitimate interest in disclosure has therefore been satisfied through the information which the Council has already disclosed.
58. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
59. The Commissioner has therefore decided that the Council is entitled to withhold the names and contact details of the third parties concerned under section 40(2), by way of section 40(3A)(a).

Other matters

60. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are

matters of good practice which are addressed in the code of practice⁴ issued under section 45 of the FOIA.

61. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
62. In this case the complainant requested an internal review on 10 November 2023 and the Council did not provide the outcome of its internal review until 14 March 2024. It is clear that in this case the Council failed to complete its internal review within the Commissioner's guidance. The Commissioner expects the Council to ensure that reviews it handles in the future adhere to the timescales he has set out in his guidance.
63. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"⁵ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁶.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

64. 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

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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