

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

Decision notice

Date: 26 November 2024

Public Authority: Gwynedd Council
Address: Council Offices
Shirehall Street
Caernarfon
Gwynedd
LL55 1SH

Decision (including any steps ordered)

1. The complainant requested from Gwynedd Council (the Council) information relating to landowner consultations for the Definitive Map Modification Order (DMMO). The Council withheld the information under regulation 12(5)(b) (course of justice) and regulation 13 (personal information) of the EIR.
2. The Commissioner's decision is that regulation 12(5)(b) of the EIR is not engaged. Regulation 13 of the EIR is engaged, but only in respect of some of the withheld information. He also finds the exception at regulation 5(3) of the EIR applies, as some of the information is the complainant's own personal data.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - To disclose copies of the consultation responses. The Council must redact the personal information to which regulation 5(3) applies and the types of personal information specified at paragraphs 63 and 64 of this notice.
4. The Council must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 5 February 2024, the complainant wrote to the Council and requested information in the following terms:

"I would like all information held by Gwynedd Council in response to the landowner consultations for the DMMO.

The consultations packs were sent to the following:

1. [name redacted]
2. [name redacted]
3. [name redacted]
4. [name redacted]
5. [name redacted]
6. Gwynedd Council, Housing and Properties Department
7. BANGOR UNIVERSITY, Estates Department
8. [address redacted]
9. Botanic House, Gardd Botanegol, Treborth
10. Rivendell, Gardd Botanegol Treborth, Ffordd Treborth
11. School of Plant Biology, Treborth
12. Prifysgol University Cymru Bangor, Ffordd Treborth
13. Gwynedd Council, Education Department
14. Officer in Charge, National Rail, Bangor
15. Secretary Penrhosgarnedd Football Club
16. [name redacted]
17. [name redacted]
18. Network Rail, Waterloo General Office
19. [name redacted]
20. [name redacted]

Please provide the full responses received from all landowners on this list.

I also request all information provided by any other parties in relation to the landowner consultation."

6. On 29 February 2024 the Council responded and handled the request under the EIR. It withheld the information requested and cited regulation 12(5)(b) (the course of justice) of the EIR.
7. On 1 March 2024 the complainant asked for an internal review.
8. On 16 April 2024 the Council provided its review response. It stated where no responses were received, there is no information which would fall within the scope of this request.

9. It also said the information contains personal data about third parties, and cited regulation 13 of the EIR. The Council did not make reference to its original response – regulation 12(5)(b) of the EIR.

Reasons for decision

10. This reasoning covers why the Council was not entitled to rely on regulation 12(5)(b) of the EIR and regulation 13 to some parts of the request. It also covers regulation 5(3) of the EIR.

Regulation 5(3) – the complainant's own personal data

11. Regulation 5(3) of the EIR provides that where a request for information constitutes the personal data of which the applicant is the data subject, that information is exempt from the duty to disclose provided for under regulation 5(1).
12. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
13. The two main elements of personal data are therefore that the information must relate to a living person, and that the person must be identifiable.
14. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
15. 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. The Commissioner notes some information relates to the complainant. Therefore, the complainant is identifiable from the information which is significant and biographical to them. Although the Council does not appear to have considered this aspect, the Commissioner is satisfied that some of the withheld information constitutes the complainant's own personal data, and that the exception at regulation 5(3) of the EIR is engaged. He has therefore applied this exception himself, proactively, to prevent disclosure.

Regulation 12(5)(b) – course of justice

16. Regulation 12(5)(b) allows a public authority to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
17. By “adversely affect” this means there must be an identifiable harm to or negative impact on the interests identified in the exception. Also, the threshold for establishing adverse effect is high, because it is necessary to establish that disclosure “would” have an adverse effect.
18. The exception is wider than simply applying to information which is subject to legal professional privilege (‘LPP’). Even if the information is not subject to LPP it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.
19. The Council stated the exception relates to the course of justice and conduct of an inquiry, and the decision, it said, will inevitably lead to a public inquiry. The Council said “there is a statutory process for sharing information received in a landowner consultation, which ensures all interested parties have equal access to the information used in the decision.”
20. The Council explained to the Commissioner that there is a process under the Wildlife and Countryside Act 1981. This, it said, is as a result of an application by Pentir Community Council, for a Modification to the Definitive Map of public rights of way across the former Treborth School site.
21. It further explained that this application along with supporting evidence, was submitted to the Council by the Community Council. On receipt of an application, the Council (as Highways Authority) is required to hold what is referred to as landowner consultation.
22. This is in order to seek evidence and information about the history and use of the alleged footpath. To make a determination on whether a public right of way exists, the Council has to establish the factual position in relation to the use, what evidence there is in support of and against the application. This gives every party an opportunity to submit factual information based on their knowledge. It is not an opportunity to argue for or against a modification.
23. The Council provided the Commissioner with a sample of the withheld information.

24. The Council said that, whatever decision it ultimately reached, it was likely to lead to a public inquiry being held. This would be governed by procedure rules which include provision for disclosure of evidence to all interested parties. The Council stated, in the event that an order is made, the Council will be obliged to publish notice of that order.
25. There are statutory provisions quoted in the review decision which require making the information relied upon in the decision, available for inspection and copy on request. The Council said, that is the prescribed process for publishing information, and it is a statutory requirement on the Council. It allows for a consistent and fair sharing of information with all interested parties when an order is made.
26. The Council further explained that the process is designed to enable the Highway authority to consider an application for a modification order, submitted in this case, by a Community Council to undertake a specific consultation and to consider those responses. The Council said "If it makes an order [sic] then disclosure will establish two particular matters; (a) the basis for that order and (b) constitute a formal statement of the evidence taken into account."
27. The Council said in the interests of justice - regulation 12(5)(b) of the EIR, aspects remain relevant and that it requires the classification of all documentation into relevance for decision-making. This would be relevant for any challenge or objection to the decision and possible grounds.
28. The Council stated that releasing the information requested – all correspondence received in response to the landowner consultation, into the public domain at this point, would undermine this process and the fair determination of the order. The Council said it would also create a precedent for all other modification applications against a process which provides for disclosure. It noted that the disclosure is on application and not on general publication.
29. The complainant's view is that early disclosure of the information would support better decision-making. He said it would enable informed public participation in the process; ensure transparency in evidence gathering and evaluation; allow proper scrutiny of the factual basis for decisions; support equal access to information for all interested parties and promote good administrative practice.
30. The Commissioner has viewed the withheld information, considered the complainant's argument and the Council's reasoning. The Commissioner finds that the Council failed to explain why disclosing the information would adversely affect the course of justice.

31. Although the Council has pointed to a formal process for the sharing of information, it has not explained the reason for the importance of the process to be followed, and what harmful consequences would arise if were not followed.
32. The Town and Country Planning Act 1981 provides a mechanism for ensuring that the evidence supporting any proposal for a DMMO is made public. The Act was passed almost a quarter of a century prior to the EIR and in an era in which there was no automatic right of access to environmental decision-making. Therefore the Commissioner considers that the purpose of the relevant parts of the Act was to create a right of access to environmental information where none previously existed – rather than to place restrictions on what information could be shared and when.
33. Even if the Commissioner is wrong on that point, neither the Act nor the public authority has explained what harmful consequences would arise in the event that the process is not followed. Given that disclosure under EIR is disclosure to the world at large, it is not credible for the Council to argue that any party would have privileged access to the information.
34. Even if the Commissioner accepted that one party would have greater access, it is not clear how that would adversely affect any public hearing (if indeed there even is one).
35. It is not sufficient for a public authority to assert that disclosure would be contrary to a formal or even a statutory process. It must be able to demonstrate that departing from that process would inject some form of unfairness, or lead to an unjust outcome (or both).
36. In this case, the Commissioner cannot see why any public inquiry (where future existence is less than certain) would even be affected by disclosure, not to mention suffer an **adverse** effect.
37. Therefore, regulation 12(5)(b) of the EIR is not engaged and the Council was not entitled to rely on this exception. In view of this, it is not necessary to consider the public interest test.

Regulation 13 – personal information

38. Regulation 13(1) of EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and if its disclosure would otherwise breach any of the data protection principles.

39. 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 UK General Data Protection Regulation ('UK GDPR').
40. The Council stated to the Commissioner that concerning regulation 13 matters, "it is difficult to convey the issue without reference to the correspondence" and provided the information to the Commissioner.
41. Some of the withheld information in this instance, constitutes the personal data of a third party. The Council's position is not all of the withheld information is personal data, some of it relates to organisations and not individuals. The Council said it considers personal information is the responses, which includes postal or email addresses of the respondents. It also includes information as to other users of the road, and their evidence of use and interaction with the owners.

The complainant's arguments

42. The complainant argued the information requested is not personal in nature, and any personal information can be redacted. He said the information is based on factual evidence that is public knowledge. The Council responded to this, it said the information contains personal data about individuals and third parties, including information about their addresses and the activities of both themselves and their families. With regard to redactions, the Council accepted that this is a possibility, but said the essence of the information provided by individuals is based around their personal experience.
43. The Council stated the individuals' identities can still be gathered from other information and knowledge, and that this would involve redacting significant parts of the evidence.
44. The complainant argued all landowners that submitted information to the Council, did so knowing that this is a public process and their information will be made available to the public. The Council said this is accepted in principle but reiterated there is a procedure and mechanism in place for disclosure. The Council said, "where such a procedure exists within an adjudicatory process, it has been established in order to provide a fair and consistent process."
45. The complainant argued the landowner consultation includes information held by the Council from its Housing and Properties Department, and its Education Department. He said this cannot be classed as personal information and believes it could be released.

46. The complainant said the Council had previously released "user evidence statements which contain the same type of information". The Council's response was that this has been in accordance with the consultation requirements. It argued disclosure of the information under the EIR would constitute a publication of the information in general.

The Council's position

47. The Commissioner asked the Council whether it had identified any legitimate interests in disclosure, the Council said the applicant, although he is linked to the land, has no demonstrable legitimate interest in the information. The Council emphasised that the information was collected for a specific purpose of determining an application for the Modification Order. It stated there are provisions for disclosure and in the conduct of Public Inquiries, which provide for appropriate disclosure of information which is regulated by the independent Inspector who would consider the matter. The Council also argued that disclosure is not necessary.
48. The Council stated some of the information may relate to the individuals' public lives because they were responding in an official capacity. With regard to reasonable expectations, the Council said there is a reasonable expectation that the information will be considered as part of the determination of the Modification Order process. It explained they would have a legitimate expectation that the information would be managed and processed in accordance with this process.
49. The Council confirmed the individuals have not been asked whether they are willing to consent to the disclosure of their personal information.
50. The Council described the consequences of disclosure, it said "the existence or otherwise of the footpath has been contentious in the locality. As landowners affected the individual respondents to the consultation may be contacted or approached in relation to their submissions by other interested parties."
51. The Council explained to the Commissioner, the legitimate interests of the public are protected under the provisions of the Wildlife and Countryside Act 1981 in relation to this matter. It said there is a formal process for determining the application, and the Inquiry procedure which will ensure appropriate disclosure takes place within that framework.
52. The Council stated the information includes matters which relate to the use of a roadway by individuals. It confirmed some of the information may include personal data in relation to others, but that the information is not focused on particular individuals "save where it relates to interactions with the owners."

53. Having viewed the withheld information, the Commissioner notes that it relates to users of the roadway in question, and includes postal or email addresses of the respondents and factual evidence about land use. However it also goes beyond this and includes matters that, in the Commissioner's opinion, relate to the private lives of some of the individuals concerned.
54. 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.
55. 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.
56. The Commissioner accepts there is a legitimate interest in the Council operating in an open, honest and transparent manner. The Commissioner also recognises there is a strong public interest in information provided by landowners relating to the environment. Also, in how the Council make decisions regarding planning applications, i.e. making determinations on the status of a footpath.
57. The Commissioner acknowledges the complainant considers he has a legitimate interest in disclosure of the information. The complainant argued; "It is for the benefit of the public and for the fairness of this DMMO process that this information is released." He believes that by withholding this information, the Council is not being fair and transparent.
58. The complainant said the Council is able to base its decision to make a DMMO order on selective information which it holds, making it an unfair process which he argues is detrimental to him and his family.
59. The Commissioner regards that in this instance, the complainant is pursuing a legitimate interest – albeit that it is largely a private interest. The decision to make, or not make, this specific DMMO will only affect a small number of people – but it appears that the effect on those people would be significant.
60. In the Commissioner's view, being able to understand the determinations of the status of a footpath, satisfies the general legitimate interest in the Council being transparent about its decision-making. To include personal information i.e. postal addresses or email addresses and their responses, would add little value to the information.

61. The Commissioner does not consider all individuals that submitted information to the Council, would expect their information to be made available to the public.
62. However, where information is provided to the Council in order for it to determine a DMMO application, there will be an expectation that some information may eventually be published. It is not clear whether this would include the names and identifying information of those who contribute. Where information has been submitted by an individual on behalf of an organisation, the Commissioner does not consider that that individual should have a reasonable expectation their name will be withheld. However, he accepts such individuals would have a reasonable expectation their contact details would be withheld.
63. In respect of the individual landowners, the Commissioner notes that the withheld information includes their names and contact details – which would identify them.
64. However, there is also other information in the withheld information that would identify those individuals and which the Commissioner considers the individuals concerned would have a reasonable expectation would not be disclosed. This includes details of their:
 - occupation;
 - medical history;
 - presence at, or awareness of, specific events;
 - interactions with other people.

Conclusion

65. Having considered the circumstances of this case, the Commissioner is satisfied that, in respect of the landowners, the rights and freedoms of the individuals outweigh the legitimate interests identified. The Commissioner's decision is the Council was entitled to apply regulation 13(1) of the EIR to withhold some of this information – but it is possible to anonymise the remainder – which can now be disclosed.
66. In conclusion, the Commissioner requires the Council to disclose copies of the consultation responses, but without releasing any of the specified personal information detailed in paragraphs 63 and 64 of this notice.

Other matters

Engagement with the Commissioner

67. The Commissioner is concerned with the Council's delays in providing him with its submissions and the withheld information. He also has concerns with the Council's reliance on the exceptions. In response to the information request, the Council only cited regulation 12(5)(b) of the EIR, and within its review response, the Council cited only regulation 13 of the EIR. The Council did not make reference to its original response of applying regulation 12(5)(b) of the EIR. On investigation, the Council then relied on both of these exceptions for withholding the requested information. The Commissioner finds this inconsistency of the use of exceptions is poor practice.
68. It is also noted that the Commissioner had to remind the Council to answer the questions posed in his letter regarding its application of regulation 12(5)(b) of the EIR. The Council was also reminded to inform the complainant of its revised position and to explain to him its reasons for refusing the request under this exception. In addition to this, the Council had to be reminded to clarify the withheld information and to make clear which parts fell within scope of the request.
69. The Commissioner expects public authorities to provide accurate, candid and timely submissions at the first time it is asked.

Subject Access Requests

70. As noted above, it is apparent from the withheld information that some of it is the complainant's own personal information. It is not apparent that the Council has considered its obligations under the Subject Access Request (SAR) provisions of the UK GDPR.
71. Whilst he cannot compel it to do so as part of an EIR decision notice, the Commissioner would strongly recommend the Council to reconsider the request and respond in accordance with its SAR obligations.

Right of appeal

72. 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

73. 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.
74. 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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