

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 22 March 2019

**Public Authority:** North Somerset Council  
**Address:** Town Hall  
Walliscote Grove Road  
Weston-super-Mare  
BS23 1UJ

### **Decision (including any steps ordered)**

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1. The complainant has requested information about planning matters relating to specific addresses. The Council disclosed some information under the terms of the Data Protection Act 1998 ("the DPA 1998"), but withheld the remainder under regulation 13(1) of the Environmental Information Regulations 2004 ("the EIR").
2. The Commissioner's decision is that the Council has correctly applied regulation 13(1), and that, on the balance of probabilities, all information (which does not represent the complainant's personal data) has been identified.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 31 March 2018, the complainant wrote to the Council and requested information in the following terms:

*We understand a site visit was carried out by [redacted name], Senior Enforcement Officer in respect of [Address 1 – redacted] on 1 February 2018.*

*We request a copy of your file note, any internal emails, external emails, correspondence sent or received, memoranda and letters together with any associated documents following the site visit. We also request all other correspondence, file notes, internal and external emails, memoranda or letters relating to [Address 2 – redacted] and [Address 3 – redacted], since 18 January 2017.*

5. The Council asked for clarification of the request on 4 April 2018:

*In relation to the part of your request asking for all correspondence since 18 January 2017 please can you specify the issue the correspondence relates to.*

6. On 5 April 2018, the complainant provided the following clarification:

*In terms of the correspondence, this relates to any correspondence, file notes, internal and external emails, memoranda or letters the Council have received from or sent to [redacted name of third party] and/or their agents and any other correspondence the Council is in possession of relating to [Address 2 – redacted] and [Address 3 – redacted], since 18 January 2017.*

7. The Council responded on 30 April 2018. It disclosed some held information that was the complainant's personal data (under the terms of the Data Protection Act 1998), but withheld the remainder under section 40(2) of the FOIA, on the basis that it represented the personal data of a third party.
8. The Council responded further on 10 May 2018. It maintained the application of section 40(2) of the FOIA, and stated that the information was also withheld under regulation 12(5)(b) of the EIR.
9. Following an internal review the Council wrote to the complainant on 28 June 2018. It maintained its position.

## Scope of the case

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10. The complainant contacted the Commissioner **on 25 July 2018** to complain about the way his request for information had been handled, and specifically that the Council was incorrect to withhold information under section 40(2) of the FOIA and regulation 12(5)(b) of the EIR. The complainant also raised concerns that further information was held that had not been considered by the Council.
11. The Commissioner understands that the requested information in this case is likely to fall under the terms of the EIR and not the FOIA, due to it relating expressly to planning application and enforcement matters.
12. The Commissioner has therefore proceeded to consider whether the Council has complied with regulation 13(1) and 5(1) of the EIR.
13. The relevant data protection legislation for the purposes of regulation 13(1) is the DPA 1998. This is because the request was made, and responded to, before the new Data Protection Act 2018 and General Data Protection Regulation came into force on 25 May 2018.
14. The Commissioner reminds all parties that this decision relates to the terms of the EIR, under which the Commissioner must consider whether information can be disclosed to the public.
15. The Commissioner also reminds all parties that, under regulation 5(3), the duty to provide environmental information under the EIR does not apply to the personal data of the requestor (for which a separate, and privileged, access regime is provided under data protection legislation). Whilst the Commissioner understands that the focus of the request in this case is on a third party, the complainant should refer to 'Other matters' in event that he wishes to request a copy of his personal data in the future.

## Reasons for decision

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### Regulation 13(1) – Personal data of third parties

16. Regulation 13(1) of the EIR states that third party personal data is exempt if its disclosure would contravene any of the data protection principles set out in Schedule 1 of the DPA 1998.
17. Personal data is defined by section 1 of the DPA 1998 as:

*...data which relate to a living individual who can be identified–  
a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual...*

18. The Council has explained that the request relates to three addresses, and seeks recent information about them. Address 1 is owned by a third party, and Address 2 and Address 3 are owned by the complainant. Both the complainant and the third party have raised concerns about alleged breaches of planning requirements. These concerns have been subject to investigation by the Council, and are the subject of continuing dispute.
19. The information withheld by the Council is various information relating to the third party, a neighbour of the complainant. The Council has explained that the information includes correspondence to and from the third party (or their representative), photographs taken of the third party's property, and internal Council correspondence and documentation about the third party.
20. The Council has advised that, due to the context in which it has come to hold the information, it considers the withheld information to be comparable to the content of complaints files, and as such has referred to the Commissioner's guidance on handling such information<sup>1</sup>.
21. In order for Regulation 13(1) to apply, the information being withheld must constitute personal data as defined by section 1 of the DPA. In this instance, the Commissioner has reviewed the withheld information. The Commissioner understands that this information specifically relates to the third party. The context of the request, and its specific referral to the third party, suggests to the Commissioner that there is no feasible way for information to be anonymised.
22. Having considered these factors, the Commissioner is satisfied that the withheld information represents personal data as defined by the DPA 1998.

*Would disclosure breach the data protection principles?*

23. The data protection principles are set out in Schedule 1 of the DPA 1998. The first principle, and the most relevant in this case, states that

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<sup>1</sup> [https://ico.org.uk/media/1179/access\\_to\\_information\\_held\\_in\\_complaint\\_files.pdf](https://ico.org.uk/media/1179/access_to_information_held_in_complaint_files.pdf)

personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

*Reasonable expectations of the data subject*

24. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
25. In the circumstances of this case, the Council contacted the third party to enquire whether they would consent to the disclosure of their personal data; in response to this the third party declined to provide consent.
26. Having noted the third party's refusal to provide consent, and the context that the information relates to; there is no indication to the Commissioner that the third party would expect their personal data to be disclosed to the public. The information relates to the Council's consideration of planning enforcement matters, and the Council has emphasised that any such consideration by the Council is not a public process, as any final determination by the Council may indicate whether or not an individual may have acted unlawfully.

*The potential consequences of disclosure*

27. The information relates to planning enforcement matters in relation to a third party. The Commissioner recognises that the disclosure of this information and may cause reputational damage and personal distress to the third party.

*Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure*

28. The Commissioner understands that the request relates to an ongoing dispute between the complainant and the third party about planning matters in respect of their respective properties.
29. It is evident to the Commissioner that these concerns are particularly important to the complainant and the third party, who each have representatives acting on their behalf.

30. However, having considered this context, it is reasonable for the Commissioner that the request has been made to pursue a private, rather than public interest, and the Commissioner is not aware of any compelling evidence that disclosure would serve a wider public value. In such a scenario, the Commissioner must conclude that insufficient legitimate interest has been evidenced that would outweigh the third party's rights and freedoms under data protection legislation.
31. The Commissioner emphasises that, whilst it is recognised that the complainant is connected to the circumstances in which the information has come to be held, this cannot inform the Commissioner's determination under the EIR, under which any disclosure of information is treated as being to the public, and not the requestor in isolation.

### **Regulation 5(1) – Duty to make information available on request**

32. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. A public authority may make information available on request by either disclosing it to the requestor, or explaining to the requestor how it has made the information publicly available and easily accessible to them (e.g. on a website).
33. Where there is a dispute between the information made available, and the information a requestor believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
34. In the circumstances of this case the Commissioner will determine whether, on the balance of probabilities, the Council holds any further information besides that exempt under regulation 13(1). For the reasons given in paragraph 14, this determination does not extend to the complainant's personal data.

### The Council's position

35. In response to the request, the Council has explained that the following searches were undertaken:
  - The planning case management system was searched by the relevant planning case reference numbers; and
  - The planning officer (assigned to the case) undertook a search of their emails using search terms including the property addresses and the names of the complainant and third party. The results of this search indicated that other planning officers may hold relevant emails, and those planning officers likewise undertook a search of their emails.

36. In response to this investigation, the Council has undertaken a further search across all staff email accounts (including councillors). This search used the individual search terms of the property names, postcodes, and associated planning case reference numbers. This further search identified additional information; some of this information (which the Commissioner understands includes photographs) represents the complainant's personal data and was provided to him on 24 January 2019 under data protection legislation, whilst the remainder represents the third party's personal data and has been withheld under regulation 13(1).

### Conclusion

37. The Commissioner understands that, in addition to the initial searches of the planning case management system and the relevant officers' email accounts, a complete search has now been undertaken across all Council email accounts. These searches have been based on the names of the involved parties, the addresses of the relevant properties, and the reference numbers of the associated planning cases.
38. There is no evidence that suggests the Council's searches have been flawed or inadequate, and in light of the Council's later search of all Council email accounts, it is reasonable for the Commissioner to conclude that all information that falls within the parameters of the request is likely to have now been identified.

### **Other matters**

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39. The complainant has raised concerns that the Council has previously disclosed information (that represents his personal data) to the third party referred to in this decision, and is dissatisfied with what he believes is a lack of consistency in the Council's approach to dealing with information requests.
40. The Commissioner is not able to comment on previous information requests under the EIR that she is not aware of. However, if the complainant believes his personal data has been improperly disclosed by the Council in any circumstance, he may submit a data protection concern to the Commissioner at: <https://ico.org.uk/make-a-complaint/your-personal-information-concerns/>
41. The Commissioner also reminds the complainant that access to his personal data is governed by data protection law. Advice to individuals on how to request a copy of their personal data is provided at: <https://ico.org.uk/your-data-matters/your-right-of-access/>

## Right of appeal

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42. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

43. 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.
44. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**