

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

Decision notice

Date: 26 June 2019

Public Authority: Forestry Commission
Address: England National Office
620 Bristol Business Park
Coldharbour Lane
Bristol
B516 IEJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the plans to develop the Whinlatter Mountain Centre and a feasibility study that has been commissioned to assess its economic and environmental impact. She also asked to know who has commissioned the study, who has conducted it and who it has been circulated too. The Forestry Commission (the commission) refused to disclose all information citing sections 41 and 43 of the FOIA and regulations 12(5)(e) and 12(5)(f) of the EIR.
2. The Commissioner's decision is that the entire request should have been considered under the EIR. With regards to the feasibility study, the feasibility cost estimate and email chain accompanying it, the Commissioner is satisfied that regulation 12(5)(e) applies and that the public interest rests in maintaining this exception. With regards to the invoices, the Commissioner has decided that the commission has failed to demonstrate sufficiently that this information is exempt from disclosure under the EIR and therefore it should be disclosed, with any personal data relating to the two private founders (those other than the commission itself and the Lake District National Park Authority LDNPA) being redacted.
3. In respect of who commissioned the study and to who it was circulated, the Commissioner is satisfied that the identities of the two private

founders (again those other than the commission itself and the LDNPA) is exempt from disclosure under regulation 13 of the EIR.

4. With regards to who has conducted the study, the Commissioner has decided that the identity of the companies involved should be disclosed, with the exception of any personal data relating to the two private founders.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the invoices with any personal data relating to the two private founders redacted.
 - Disclose the identity of the companies which conducted the study with any personal data relating to the two private founders redacted.
6. The public authority must take these steps within 35 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

7. On 16 August 2018, the complainant wrote to the commission and requested information in the following terms:

"Richard Leafe, CEO of the Lake District National Park, mentioned at a meeting recently that there is a 'Lake District National Park Gondola Feasibility Study'.

This is a quote from today's Times newspaper: *Steve Ratcliffe, director of sustainable development for the Lake District National Park, said it was working on the plans for Whinlatter with the Forestry Commission, which owns the land. He said a feasibility study was being conducted "to assess the potential impacts and benefits for the environment, communities and the economy".*

I would be grateful if you could please send me details of the feasibility study and any other relevant information such as who commissioned and will pay for the study, who is conducting the study and the circulation list of those involved with the study. I do not mind if the study is currently only partially completed.

I would also like details of the plan for the Whinlatter Mountain Centre please, including anticipated timeframes, if these are available.”

8. The commission responded on 23 August 2018. It stated that the requested information is exempt from disclosure under sections 41 and 43 of the FOIA and 12(5)(e) and 12(5)(f) of the EIR.
9. The complainant requested an internal review on 28 September 2018.
10. The commission carried out an internal review and notified the complainant of its findings on 23 October 2018. It upheld its previous application of the exemptions and exceptions cited under both the FOIA and the EIR.

Scope of the case

11. The complainant contacted the Commissioner on 24 October 2018 to complain about the way her request for information had been handled. She stated that she is deeply concerned about the deliberate attempts to hide information regarding potential development in a National Park with UNESCO World Heritage Site status. The complainant confirmed that both the commission and the LDNPA have signed confidentiality agreements with the express purpose of hiding information. The complainant believes the information should be disclosed, as it is in the public interest to do so.
12. The Commissioner has reviewed the information and she satisfied that all of it should be considered under the EIR. The withheld information relates to and is information on a proposal that will or is likely to affect the elements of the environment. It therefore falls within the definition of environmental information at regulation 2(1)(a) and (c) of the EIR.
13. The Commissioner will first consider the application of regulation 12(5)(e). She will also consider the application of regulation 13, as it is apparent (although it has not specifically been stated) that this has been applied to the personal data of two individuals. She will only go on to consider regulation 12(5)(f) of the EIR if it is necessary.

Reasons for decision

Regulation 12(5)(e) – commercial interests

14. The Commissioner will first consider the feasibility study, the email chain, feasibility cost estimate and invoices the commission has

withheld. She will then go on to consider the remaining elements of the request later in this notice.

15. On the 19 July 2018 (three days after submitting this request) the complainant submitted a request to the LDNPA for the same feasibility study that has been requested here. The Commissioner issued a decision notice on 23 May 2019 upholding the application of regulation 12(5)(e) of the EIR. The decision can be accessed via the following link:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615021/fs50784929.pdf>

16. As the requests were made within 3 days of each other and relate the same development proposal, the Commissioner considers regulation 12(5)(e) of the EIR applies to the feasibility study for the same reasons she explained in her decision notice of 23 May 2019.
17. With regards to the feasibility cost estimate and email chain, the Commissioner is satisfied that regulation 12(5)(e) applies to this information and the public interest rests in maintaining this exception again for very similar reasons to that already explained in the above decision notice.
18. The cost estimate provides a detailed breakdown of costs and projections and this information could be used by rivals wishing to set up similar or competing schemes to the disadvantage of the third parties involved. The email chain is between the third parties involved and attaches the cost estimate. The email chain also briefly discusses where the proposal is up to and what is now needed. The third parties involved (including the LDNPA) and the commission have already invested time and money into considering this proposal and its merits and they all have real concerns that premature disclosure would adversely effect their commercial interests. As noted in the above decision notice the discussions were at a very early stage at the time of the request and the LDNPA has said that it will fully engage with the public if and when a firm proposal has been agreed, prior to planning and during the formal planning process should it get that far.
19. The Commissioner decided in the above decision notice that the public interest rested in maintaining the exception and those public interest test arguments equally apply here and to this additional information. She said that the parties involved should be afforded the private space to discuss proposals and options without the fear of premature disclosure. It is in the public interest to maintain the confidentiality of early discussions both to protect the commercial interests of the parties involved and to encourage and support such informal engagement

between public authorities and individuals/organisations wishing to informally discuss plans and enterprises.

20. Turning now to the invoices, the commission stated that this information also falls within the scope of "who will pay for the study" element of the request. The commission stated that it is not in its commercial interests to disclose how much it has paid for work of this nature on behalf of the group (the four 'founders' subject to the confidentiality agreement). The founders have worked in collaboration and the work commissioned is owned by all founders; not just the commission. It argued that future negotiations are likely to be negatively impacted by a third party having an understanding of what the commission is willing to pay. It stated that it would not be in the public interest for the commission to be compromised when aiming to negotiate the best possible deal for services.
21. No further arguments have been submitted. The Commissioner is not convinced that disclosing the fees it paid for this study on behalf of the group would adversely affect its ability to negotiate future work and costs with this provider or any other. If there is a fixed fee there is little negotiation; just a comparison between providers and if they are individually negotiated the commission would still be in a position to obtain more than one quote for comparison. Additionally, if they are individually negotiated the fees paid here will not be directly comparable to future schemes.
22. Without any additional or more compelling arguments, the Commissioner has no alternative but to conclude that this information is not exempt from disclosure under section 12(5)(e) of the EIR. No other exception has been claimed for this information (12(5)(f) was claimed in relation to the feasibility study and accompanying information but not in relation to the invoices) and no arguments have been submitted to suggest that the firms' commercial interests (i.e. those that conducted the study) would be affected. This information should therefore be disclosed with the personal data of the two private founders redacted (please see the Commissioner's decision in relation to regulation 13 of the EIR later in this notice).
23. Turning now to who conducted the study, although not specifically stated, the Commissioner understands that the commission wishes to withhold this information under regulation 12(5)(e).
24. The commission has said that disclosing who carried out the five elements of the feasibility study could inform people of the nature of the study, for example the work done by one company may indicate what types of development are being considered, and it considers that all contributors to the study should be treated in the same way. One

company for example is also a small company and any adverse publicity they receive as a result of their involvement in the study could have a disproportionate impact on their business.

25. The commission confirmed that it has not seen anything to suggest that the companies involved were made aware that their involvement in the study would be made public at any time. It stated that whilst they should probably appreciate the 'risks' of forced information disclosure under FOI/EIR when working for a public authority it has not been able to ascertain whether or not they were aware that the commission or the LDNPA may be required to disclose their details.
26. The Commissioner considers there are a number of reasons why a particular company is commissioned to carry out a particular service and even if a company specialises in a particular topic or in this case type of development, confirmation of that, does not in itself disclose the specific details of the proposals under consideration (the specific details which the Commissioner has already agreed are exempt under regulation 12(5)(e)). The Commissioner is also of the opinion that if there is any negative publicity this is generally in relation to the idea of development in this particular area and what has been specifically proposed, which is more reflective of the founders involved rather than companies specifically commissioned to consider the feasibility of the proposals.
27. Additionally, it is the Commissioner's opinion that private companies are now well aware of the FOIA and the EIR when conducting services for public authorities and the need for public transparency and accountability. This is not a reason to prevent disclosure.
28. These arguments are insufficient to support the application of regulation 12(5)(e). The Commissioner therefore has no alternative but to conclude that this exception does not apply and the identity of the companies concerned should be disclosed with the exception of one, who is also one of the private founders to which regulation 13 of the EIR applies (again please see below).
29. With regards to who commissioned the study and to whom it has been circulated, the commission has said that the study was commissioned by the four 'founders' who are signatories to the confidentiality agreement and in terms of who it has been circulated to, it has been shared internally on a need to know basis with only senior members of staff and, more obviously LDNPA and the two private founders. It argued that whilst it is known that both the commission and the LDNPA are involved and the study has been circulated to them (which means that the information is already publically available and regulation 6(1) applies to this element of the requested information) the identity of the two private individuals who are also 'founders' and to whom the study has

been circulated is not. It stated that it considers the disclosure of their details as unfair processing of their personal information as they participated in the confidentiality agreement in order to help maintain confidentiality. They would have no expectation that their details would be made public by either of the public bodies which they have been working in collaboration with (i.e. the commission and LDNPA). The commission also said that given the controversial nature of the issue which is the subject to the feasibility study it does not consider that, given the protection of individuals provided for in the Data Protection Act, that their details should be disclosed.

30. The complainant's request refers to a quote in the Times Newspaper which details the involvement of the commission and the LDNPA. It is understood therefore that the complainant wishes to know who the other two private founders are.
31. Although not specifically stated, it is apparent that the commission considers the two remaining founders' identities to be exempt information under regulation 13 of the EIR. The Commissioner will therefore now proceed to consider the application of this exception.

Regulation 13 – personal data

32. Regulation 13(1) of the 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.
33. In this case the relevant condition is contained in regulation 13(2A)(a)¹. 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 General Data Protection Regulation ('GDPR').
34. 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 regulation 13 of the EIR cannot apply.
35. 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.

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

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

37. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
38. 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.
39. 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.
40. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the two remaining founders. The complainant has asked to know who the two remaining founders are. Their names and therefore identities are quite obviously information that both relates to and identifies the founders concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
41. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
42. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

43. 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".

44. 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 if to do so would be lawful, fair and transparent.
45. 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

46. 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*” lawful bases for processing listed in the Article applies.

47. 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”².

48. In considering the application of Article 6(1)(f) of the 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 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 data subject.

49. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

² 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) 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”.

Legitimate interests

50. In considering any legitimate interest(s) in the disclosure of 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.
51. 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.
52. The Commissioner considers there are clear legitimate interests in the disclosure of this information. There is a legitimate interest in knowing who is party to a development proposal, which if it goes ahead, would have a significant impact on the Whinlatter Mountain Centre and surrounding area. As the complainant has pointed out the development proposal will affect the National Park, which has UNESCO World Heritage Site status. There also appears to be quite a significant amount of objection to the development of this area, especially locally.

Is disclosure necessary?

53. '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.
54. The Commissioner is of the opinion that disclosure would be necessary to meet the legitimate interests identified and there are no other less intrusive means of achieving these interests. Disclosure would provide the complainant and other concerned members of the public with more transparency and accountability and enable them to understand more closely who is involved and who is proposing the development of this area.

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

55. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under 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.

56. 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.

57. In the Commissioner's view, a key issue is whether the individuals concerned 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.

58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

59. At the time of the request the data subjects were still in the very early stages of discussions with the commission and LDNPA. All parties were still considering ideas and options and no firm proposal or plan had been agreed. At this time the data subjects had the reasonable and fair expectation that their identities and the plans they proposed would remain private and confidential. As did the LDPA and the commission, the data subjects expected to have the private thinking space to consider their options and discuss these on a confidential basis with the authorities involved. They had no expectation that this information could be disclosed at this early stage in the process.

60. The data subjects would reasonably only expect their identities to be disclosed once a firm proposal has been agreed and the LDNPA wishes to then consult the public. Disclosure prior to this would be against their expectations and would cause them distress and upset.

61. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

62. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

63. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.
65. 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

Samantha Coward
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