

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 June 2020

Public Authority: Powys County Council
Address: Information.compliance@powys.gov.uk

Decision (including any steps ordered)

1. The complainant requested information relating to a planning enforcement matter. The Council provided some information, and withheld the remainder under regulation 13 of the EIR.
2. The Commissioner's decision is that the Council was entitled to refuse the request on the basis of regulation 13. The Commissioner does not require any steps to be taken.

Request and response

3. On 14 August 2019 the complainant requested the following information from the Council:
A copy of a Planning Contravention Notice in respect of [address redacted]
4. A Planning Contravention Notice (PCN) is used to obtain information so that an authority can determine whether enforcement action should be taken.
5. The complainant requested an internal review on 13 September 2019 on the basis that he had not received a response.
6. On 1 October 2019 the Council issued a refusal notice, refusing the request and citing the exceptions at regulations 12(4)(d), 12(5)(b) and 13 of the EIR.
7. The Council further provided the outcome of the internal review on 8 November 2019. It accepted that its initial response had been issued out of time.

8. Following a query from the complainant the Council conducted a further internal review of its refusal. It provided the outcome of this internal review on 13 November 2019. The Council interpreted the complainant's correspondence as confirming that he was content for names and contact details to be excluded from the scope of his request. The Council therefore provided the complainant with a redacted copy of the PCN citing regulation 13 in respect of the redacted information.

Scope of the case

9. The complainant contacted the Commissioner on 25 November 2019 to complain about the Council's response to his request. The complainant was unhappy with what he considered to be the Council's failure to take appropriate enforcement action in respect of a complaint he had submitted.
10. The Commissioner has considered whether the Council was entitled to withhold the outstanding information in response to the complainant's request. She cannot comment on the wider enforcement issue.

Reasons for decision

Regulation 13: personal data of third parties

11. 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.
12. 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).
13. In its second internal review letter the Council relied on regulation 13 in respect of all of the withheld information, despite saying that it

¹ As amended by Schedule 19 Paragraph 307(3) of the Data Protection Act 2018.

had taken into account the complainant's indication that he was content not to receive 'personal details'. The Council did not explain to the complainant in this correspondence how regulation 13 was engaged.

14. It appears to the Commissioner that the Council interpreted the complainant's reference to personal details as including only the name and address of the person who was the subject of the PCN. However the information that the Council continued to withhold is not limited to the name and address of the individual who was the subject of the enforcement complaint. It also includes information provided by that individual in support of their position. Therefore the Commissioner must first consider whether the withheld information is personal data. If it is not, then regulation 13 will not apply.

Is the withheld information personal data?

15. Section 3(2) of the Data Protection Act 2018 (the DPA) defines personal data as:

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

16. An identifiable living individual is a person 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.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The Commissioner has inspected the withheld information in this case. She is satisfied that it is personal data within the meaning of section 3(2) of the DPA. The information was provided to the Council by an individual, and that individual can be identified from the information provided. The information relates to the individual in the context of the PCN issued to that individual.
19. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".

21. 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.

22. 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

23. Article 6(1) of the GDPR provides 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.

24. 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.

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".

25. 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.
26. 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

27. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
28. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. In this case it is clear that the complainant is seeking access to the withheld information for a specific reason: he wants to know why the Council did not proceed with enforcement action in response to his complaint. The complainant alleged to the Commissioner that the Council's refusal to disclose the information was *"a further attempt to conceal wrongdoing or incompetence"*.
30. The Commissioner considers that there may be a wider legitimate interest, ie transparency about how the Council considers enforcement issues. There is also a general legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

31. The Commissioner must next consider whether disclosure of the personal data in question is necessary to meet the legitimate interest. 'Necessary' in this context 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 be the least intrusive means of achieving the legitimate aim in question.
32. Accordingly, the Commissioner has considered whether it is necessary to disclose the third party's personal data into the public domain in order to meet the legitimate interest in transparency. Disclosure would inform the public what information was provided to the Council in response to the PCN being issued. However it would not reveal the Council's decision making process. Nor would it inform the public how the Council considered that information and decided not to pursue enforcement action.
33. In light of the above the Commissioner is not satisfied that disclosure of the information in this case is in fact necessary to meet a legitimate interest as outlined above. Consequently the Commissioner is not satisfied that the Council may rely on Article 6(1)(f) as providing a lawful basis for disclosing the third party personal data.
34. It follows that disclosure of the withheld information under the EIR would be unlawful and would contravene the first DP principle. Consequently, the Commissioner finds that the Council was entitled to rely on regulation 13 of the EIR as a basis for withholding this information.

Right of appeal

36. 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

37. 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.
38. 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

Sarah O'Cathain
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