

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

**Decision notice**

**Date:** 2 November 2020

**Public Authority:** Preston City Council  
**Address:** Town Hall  
Lancaster Road  
Preston  
PR2 2RL

**Decision (including any steps ordered)**

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1. The complainant requested from Preston City Council (the Council) information in relation to complaints submitted against Boulevard Community Centre (BCC). The Council disclosed some information but decided to redact personal data of third parties.
2. The Commissioner's decision is that the Council was correct to withhold the personal details of individuals who submitted complaints against BCC under regulation 13(1) (personal information) of the EIR.
3. The Commissioner does not require the Council to take any further steps.

## Background information

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4. BCC manages a property in Preston which is used as a prayer room.
5. Between 16 January 2019 and 21 March 2019, the Council has received three planning enforcement reports, from three different individuals who complained that BCC is in breach of conditions for using this property and about noise pollution.
6. It appears from the submissions in this case that on 1 October 2019 a visit from a Council representative took place at the property in question. During this meeting, representatives of BCC presented their position in relation to the complaints received.

## Request and response

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7. On 11 October 2019, the complainant wrote to the Council in relation to some complaints that the Council had received from third parties, and requested information of the following description:

*"...We would request that the information you have received is passed onto us including names and addresses so that our lawyers can investigate this further and if necessary bring forward necessary proceedings in court."*

8. On 28 October 2019, the Council responded, refusing to provide the information requested. It cited the exemption provided under section 40(2) of FOIA (third party personal data) as its basis for this refusal.
9. The complainant wrote back to the Council on 15 November 2019, expressing their dissatisfaction with the Council's response. This communication was considered by the Council as a request for internal review.
10. On 26 November 2019, the Council provided the complainant with the outcome of its internal review. The Council changed its position by:
  - a. applying the EIR as the applicable legislation for the request; and
  - b. disclosing a document containing three complaints submitted to the Council with the complainants' personal details redacted. The Council decided to withhold this information citing regulation 13 of the EIR – personal data.

## Scope of the case

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11. The complainant contacted the Commissioner on 21 February 2020 to complain about the way his request for information had been handled.
12. In their submission to the Commissioner, the complainant brought to the Commissioner's attention that in the outcome of its internal review the Council mentions some "*most recent complaints*" which were withheld under the exception provided in regulation 12(5)(b) of the EIR – the course of justice.
13. During the course of her investigation, the Commissioner sought clarifications from the Council regarding the exceptions applied in response to the request above. The Council confirmed that the "*most recent complaints*" mentioned in the outcome of its internal review were received after 11 October 2019 and after receiving queries in relation to this information, the Council handled it as a new information request and dealt with it separately.
14. Therefore, the following analysis covers only the application of regulation 13(1) of the EIR in relation to the personal data redacted in the document containing three complaints against BCC which was disclosed in the outcome of the Council's internal review on 26 November 2019.

## Reasons for decision

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### The correct legislation

#### Regulation 2(1) – is the information environmental?

15. 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..."*

16. 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. The Commissioner has produced guidance<sup>1</sup> to assist public authorities and applicants in identifying environmental information.
17. In the present case, the withheld information consists of the personal details of three individuals, such as: full names, home addresses, telephone numbers and email addresses, who submitted complaints about breaches of conditions and excessive noise relating to a building occupied by BCC. The Commissioner notes that the personal details of the data subjects, regarded in isolation, would not constitute an element or factor of the environment; or a measure that could have an impact to the elements or factors of the environment as elaborated in regulation 2(1) of the EIR.
18. However, the Commissioner considers that in the context of the information request in question, the core of which were complaints for breaches of conditions and noise pollution, the information requested falls within the scope of "measures" as defined by regulation 2(1)(c).
19. Therefore, the Commissioner considers that, in its internal review procedure, the Council was correct to handle the request under the EIR.

### **Regulation 13 - personal data**

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[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

20. 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.
21. In this case the relevant condition is contained in regulation 13(2A)<sup>2</sup>. 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").
22. 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(1) of the EIR cannot apply.
23. 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?*

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

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

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. 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.
27. 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.
28. As explained above, the withheld information in this case consists of personal details of three individuals who submitted complaints to the Council. The Commissioner accepts that the individuals in this case

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<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA.

would be identifiable from the information and that this information would relate to them. Therefore, she finds that the information in the context of this request would fall within the definition of "personal data" in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

29. 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.

30. The most relevant DP principle in this case is contained in Article 5(1)(a) of the GDPR which states that:

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

31. 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.

Lawful processing: Article 6(1)(f) of the GDPR

32. 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 this Article applies.

33. The Commissioner considers that the lawful basis most applicable here 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"<sup>3</sup>.*

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<sup>3</sup> 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:-

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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 legitimate interest(s) or fundamental rights and freedoms of the data subject.
35. 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

36. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, 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.
37. 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.
38. In the present case, the Commissioner understands that the complainant has a legitimate interest in knowing the details of the alleged breaches of conditions and noise complaints as the complaints relate to the complainant specifically, and the complainant believes that they are malicious in nature.

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*"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".*

39. The Commissioner also notes that the Council in its internal review outcome has disclosed copies of the complaints submitted which describe the nature of the concerns raised by three individuals, the personal details of whom were redacted.

*Is disclosure necessary?*

40. "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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
41. The Commissioner has considered whether disclosure of personal details of three individuals who submitted those complaints against BCC is necessary to meet the legitimate interest in transparency that she has identified above.
42. The Council does not believe that it is necessary to disclose the personal data of the individuals who submitted the complaints. It stated that
- "Although the requester feels the complaints have been made maliciously, there is no evidence to suggest this to be the case and the individuals who submitted the complaints have a reasonable expectation that the Council would not disclose their names and addresses to the organisation they are complaining about."*
43. The Council added that these complaints were submitted in a private capacity and the individuals who complained *"will have the expectation their information will be kept confidential, especially when it relates to their private lives and domestic environment."*
44. The Council told the Commissioner that it did not contact the data subjects in order to ask them whether they consent to the disclosure of their personal data, because it believed that the policy it has in place relating to the handling of this type of personal data means that individuals who submit complaints have the expectation that their personal data will not be disclosed.



45. In support of this the Council provided the Commissioner with a copy of its Local Enforcement Plan<sup>4</sup>, which in paragraph 7.1 states *"The Local Planning Authority will protect the identity of complainants and will treat such details as confidential."* The Council concluded its response to the Commissioner stating that *"Although there is a private interest in the disclosure of the names and addresses, the Council does not believe the private interest alone is sufficient enough to disclose the identities of the complainants."*
46. In light of the above, the Commissioner has been unable to identify any convincing reasoning that suggests that disclosure of personal data of the individuals in question was necessary in order to meet the legitimate interest in this case.
47. 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).
48. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in transparency, she does not need to go on to conduct the balancing test and has not done so.
49. Therefore, the Commissioner finds that regulation 13(1) of the EIR is engaged in respect of the withheld information and the Council was not obliged to disclose the withheld personal data.

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<sup>4</sup> [https://www.preston.gov.uk/media/873/Local-Enforcement-Plan/pdf/Local-Enforcement-Plan-August-2015\\_1.pdf?m=636936142211800000](https://www.preston.gov.uk/media/873/Local-Enforcement-Plan/pdf/Local-Enforcement-Plan-August-2015_1.pdf?m=636936142211800000)

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

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

51. 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.
52. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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