

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

Date: 9 December 2020

Public Authority: Bishop's Castle Town Council
Address: The Town Hall
Bishop's Castle
Shropshire
SY9 5BG

Decision (including any steps ordered)

1. The complainant has requested information from Bishops Castle Town Council ("the Council") in relation to the felling of a birch tree.
2. The Commissioner's decision is that the Council was correct to apply Regulation 13(1) to withhold some of the information. However, she finds that some of the information is not personal data and therefore, the Council was not correct to apply Regulation 13 in order to withhold it. The Council correctly applied Regulation 5(1). However, the Council also breached regulation 5(2) by failing to provide information within 20 working days and regulation 11(1) as it failed to provide an internal review within 40 working days.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - To disclose the information which is not personal data.
4. The Council 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

5. On 12 July 2019, the complainant wrote to the Council and requested information in the following terms:

"Now that the council has made a final decision regarding this matter, and the birch tree has been felled, I want to understand fully how this decision was arrived at...

I am therefore making a formal request to see all of the records and documentation relating to this decision, covering the period from October 16 2018 (the date of my wife's initial request) to the date when the tree was felled, July 1st 2019.

The records I am requesting are:

- *All relevant emails both to and from the Town Clerk, the Assistant Town Clerk and any councillors involved in this issue. As councillors use their own email addresses (as listed on the council website), any emails relevant to this issue to or from these addresses should also be included.*
 - *All emails sent to/received from any allotment holders regarding the birch tree or in which the birch tree is mentioned.*
 - *All correspondence/requests for quotations/quotation for work dealing with the tree with and from any of your contractors.*
 - *All correspondence with and the full report from the Tree Warden referred to in the June council meeting.*
 - *Any other relevant records not referred to above."*
6. The Council responded on 19 August 2019 and cited section 41 of the FOIA – information provided in confidence, as the basis for withholding information.
7. The complainant made a request for an internal review on 8 September 2019. The Council responded to this on 9 September 2019, advising that it was not relying on section 41 of the FOIA, but it was now relying on the Data Protection Act 2018. It did not however, provide an internal review.
8. The complainant sent several emails asking for a response regarding their request for an internal review. The Council responded on 10 October 2019, advising that it would be *"...undertaken in the November meeting so you will not receive a reply before 19 November 2019."*

9. Following the complainant contacting the Commissioner, the Commissioner wrote to the Council on 4 November 2019. She reminded the Council that it is a statutory requirement, under the EIR, for a public authority to respond to an internal review request as soon as possible and no later than 40 working days after the date it received the request for information.
10. The Council provided an internal review on 14 November 2019, in which it advised that all correspondence had been provided and that it had also considered the request under the EIR.
11. The Council explained to the Commissioner that the relevant regulation of the EIR that is being applied is regulation 13 – Personal data.

Scope of the case

12. The complainant contacted the Commissioner on 11 October 2019 to complain about the way his request for information had been handled. During the Commissioner's investigation, she contacted the Council to advise that, as the request was likely for environmental information, it would need to be considered under the EIR.
13. The Commissioner also reminded the Council that it is a statutory requirement for a public authority to respond to an internal review request under the EIR, as soon as possible and no later than 40 working days after the request for review has been received.
14. The Commissioner considers that the scope of this case is to determine if the Council has correctly applied section 13 of the EIR to the withheld information. She will also consider if, on the balance of probabilities, the Council was correct when it says no further information is held in relation to the request, under section 5(1) of the EIR – right of access to information.

Reasons for decision

Regulation 5

15. Regulation 5(1) of the EIR states that:

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

16. In case where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The Council's response

18. The Council has explained that all information in relation to the Birch Tree is held electronically. It advised that it has used key words, such as "birch" and "tree" to search for any information held, in relation to the request.
19. The Council has also explained that no information in relation to the birch tree has been deleted by the Council. However, it did confirm that a Councillor had deleted some emails prior to the complainant's request being made. It also advised that all information held in relation to the request has been provided.

The Commissioner's position

20. Both the Council and the complainant have provided evidence to the Commissioner. The information that the complainant has been provided with, is the same as that which the Council has provided to the Commissioner.
21. The Commissioner acknowledges that when the Council received the request, it failed to respond correctly. The Council originally failed to provide all the information to the complainant, as it only provided a small number of emails. The Council did provide the remainder of the information over a two month period.
22. The Commissioner notes that an email was provided by both the complainant and the Council, which shows that a Councillor advised that they had deleted all emails that would fall within the scope of the complainants request.
23. The Commissioner is satisfied, from the evidence provided, that the information was deleted as the Councillor believed that the matter had been dealt with and was deleted before the complainant made their request for information.

24. The Commissioner also notes that the emails in question, were deleted from a Councillor's personal email address, as this is what was used throughout the Council at the time. Additionally, the emails were deleted in accordance with the Council's retention policy, which states that "we delete all information deemed to be no longer necessary".
25. From this evidence, the Commissioner is satisfied that, on the civil standard of the balance of probabilities, the Council has provided all of the information that it holds in relation to the request. She does however, understand that the complainant would have concerns about the Council not providing all the requested information due to the way it has provided the response.
26. The Commissioner therefore considers that the Council complied with its obligations under regulation 5(1) of the EIR.

Regulation 13 personal information

27. 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) of the Data Protection Act 2018 is satisfied.
28. In this case the relevant condition is contained in regulation 13(2A)(a)¹ of the Data Protection Act 2018. 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').
29. 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.
30. 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?

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

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

“any information relating to an identified or identifiable living individual”.

32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. 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.
34. 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.
35. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names and email addresses of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
36. 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.
37. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

38. 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”.

39. 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.
40. 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

41. 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.
42. 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.
43. 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.
44. 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

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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) 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".

45. 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.
46. 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. 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.
47. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason. The complainant wants the requested information as they did not believe that the decision to fell a birch tree had been handled appropriately.
48. The Commissioner considers that there may be a wider legitimate interest, such as transparency about the Council's environmental considerations, or how processes are carried out. There is also a general legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

49. '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.
50. 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 who provided information to the Council regarding the tree in question. However, it would not reveal the Council's decision making process. Nor would it inform the public how the Council considered that information.
51. The Council has explained that all of the information has been provided and/or it is readily available online, other than for the necessary redactions to personal data.
52. The Commissioner notes that it is also important to acknowledge that Regulation 13 of the EIR is different from other exemptions in

that its consideration does not begin with an expectation of disclosure. As Regulation 13 is the point at which the EIR and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.

53. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

54. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA 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.
55. 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.
56. 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.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. The Council has explained that when an individual contacts it, they are not contacted to ask if they are willing for disclosure of their personal details. It continued that an individual would have the expectation that their details are not disclosed.

59. The Council has also explained that should the information be unredacted, it could cause unnecessary and unjustified distress. As a Council, it believes that it has a duty of care of individuals who contact it.
60. The Council has informed the Commissioner that the complainant has been provided with all the required information regarding the birch tree and that the only information withheld, is personal data. The individuals whose personal data it is, have the expectation that their details are not disclosed.
61. The Commissioner considers that it is clear that there has been a breakdown of trust between the Council and the complainant, due to the circumstances described above.
62. 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.
63. 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.
64. The Commissioner has therefore decided that the Council was entitled to withhold the requested information under regulation 13(1) by way of regulation 13(2A)(a) of the EIR.

Procedural Matters

Regulation 5(2)

65. Regulation 5(2) of the EIR says that the authority must make the information available as soon as possible and no later than 20 working days after the date of receipt of the request.
66. In this case, the Council failed to respond in full to the request within 20 working days. The complainant submitted their request for information on 12 July 2019. The Council only provided the full response on 19 August 2019. As such, the Council breached regulation 5(2) of the EIR.

Regulation 11

67. Regulation 11(1) provides that

11.—(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's

request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

68. Regulation 11(4) requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
69. The complainant wrote to the Council on 8 September 2019 asking for an internal review to be carried out.
70. The Council responded on 10 October 2019, following two reminder emails from the complainant, advising that the internal review response would be "realistically...undertaken in the November meeting, so you will not receive a reply before the 19 November 2019".
71. On 4 November 2019, the Commissioner reminded the Council that it was a statutory requirement to respond within 40 working days of the date of the request.
72. The Council provided the internal review response on 14 November 2019. As this is over 40 working days, Regulation 11(4) of the EIR has been breached.

Other matters

73. In regard to procedural matters, the Council breached regulation 5(2) of the EIR, as it did not provide the response within 20 working days of the date of the request. The Council also delayed providing a response to the complainant after they asked for an internal review, which is a breach of regulation 11(1). This was provided after the Commissioner contacted the Council.
74. The Commissioner expects that the Council will provide full and complete responses to any other FOIA/EIR requests that it receives, within the statutory time limits going forwards.
75. The Commissioner also notes that on a few occasions, she had to chase the Council for responses to her questions. Whilst she acknowledges that the Council may not have been able to provide a full response due to Covid-19 restrictions, she expects the Council to inform the Commissioner of any delays. She also requires the Council to respond to any questions asked, in detail, rather than

assuming/determining the Commissioner has already been provided with the answer.

76. While the Commissioner recognises that the PA has now changed Councillors email addresses, from the evidence provided, it is clear that there has been poor record management, specifically due to emails being deleted. The Commissioner welcomes the change that the Council has made by using Council email addresses.
77. The Commissioner has instructed the Council to review emails that it has redacted. She notes that the Council has been inconsistent with its redactions, such as removing names and/or job titles within one email chain but then providing this information in a different email chain. She has also noted that the Council has provided the complainant with two of the same document, both with redactions, but these are different on each one. The Commissioner reminds the Council that it should be consistent when redacting information. She does accept that the majority of the redacted information was done so correctly.

Right of appeal

78. 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

79. 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.
80. 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

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