

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

Date: 14 July 2021

Public Authority: Rhondda Cynon Taf County Borough council

Address: freedomofinformation@rhondda-cynon-taff.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about the collapse of a dormice bridge on a particular road in February 2016. Rhondda Cynon Taf County Borough Council (the Council) withheld the information requested under section 43 of the FOIA. During the Commissioner's investigation, the Council reconsidered the request under the EIR and sought to rely on regulation 12(5)(b) to withhold the information requested. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) to the withheld information. The Commissioner also identified third party personal data within the withheld information which she has determined is exempt under regulation 13 of the EIR. The Commissioner does not require any steps to be taken.

Request and response

2. On 11 June 2019 the complainant wrote to the Council about the collapse of the dormice bridge on the A473 on 8 February 2016. He referred to his previous freedom of information request dated 11 June 2018, which had been refused by the Council under section 43 of the FOIA. He explained that he had reluctantly accepted the refusal in 2018 but as another year had passed he wanted to "*submit a second FREEDOM OF INFORMATION request*" for the information in question. In his letter dated 11 June 2018, the complainant requested information in the following terms:

"In December 2017 I was informed that no further information could be supplied to me because of pending legal action. I have heard nothing since and I am now becoming very frustrated at the lack of information (and perhaps lack of progress) on this matter. I therefore feel forced to make a FREEDOM OF INFORMATION demand for all relevant information (letters, notes of meetings, emails etc) on this subject"

3. The Council issued a refusal notice on 1 August 2019 stating that the information requested was exempt under section 43 of the FOIA.
4. On 12 August 2019 the complainant requested an internal review of the Council's refusal to provide the information requested.
5. The Council provided the outcome of its internal review on 25 October 2019 and upheld its decision that the information requested was exempt under section 43 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 7 November 2019 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Council agreed that the request should have been considered under the EIR as opposed to the FOIA. The Council reconsidered the request under the EIR and stated that it was now seeking to rely on regulation 12(5)(b) to withhold the information requested.
8. During her examination of the withheld information, the Commissioner identified that some of the information relates to the personal data of a third party. Given that she is also the regulator of data protection legislation, the Commissioner will apply the personal data exceptions herself if she feels a public authority is at risk of disclosing personal data without a lawful basis for doing so. In this case she has proactively applied regulation 13 to some of the withheld information. The reasons for this are explained below
9. The scope of the Commissioner's investigation is to determine whether the Council correctly applied regulations 12(5)(b) and 13 to the request.

Reasons for decision

Is the information environmental?

10. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in

regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

11. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
12. In this case the withheld information relates to the collapse of a dormice bridge on a particular road due to high winds and litigation that is being considered in respect of the collapse. The Commissioner considers that the collapse of such a structure is likely to have had an effect on the elements of the environment, namely land and landscape, and possibly biological diversity and its components, given that the bridge was built to aid a protected species. The Commissioner considers that the information requested qualifies as information on (concerning, relating to or about) this activity and therefore falls within the definition of environmental information as provided by regulation 2(1)(c). As such, the Commissioner has determined that the EIR is the correct legislation to apply.

Regulation 12(5)(b) – course of justice

13. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."

14. There is no definitive list which covers circumstances when a public authority may consider applying the exception. In *Rudd v The Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Information Tribunal commented that "*the course of justice*" does not refer to a specific course of action but is "*a more generic concept somewhat akin to the 'smooth running of the wheels of justice'*".
15. The Commissioner considers that the course of justice element of the exception is wide in coverage, and accepts that it can include information about civil investigations and proceedings. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,
 - disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
16. The Council's position is that the withheld information is subject to legal professional privilege and that disclosure would adversely affect the course of justice. The Council explained that it has, for some time, been contemplating litigation against the contractors responsible for the construction of the dormice bridge that collapsed in 2016. As well as legal exchanges with its solicitors, the withheld information includes officer and expert opinions and estimated costs relating to the collapse of the bridge. The Council is waiting on further legal advice, through its insurers in respect of the litigation case. Disclosure would mean that the Council would no longer have any control over the information and there is a risk that the information that the other party would gain access to the information and thereby an insight into the information that the Council might use in any litigation against them. The Council contends that disclosure of any of the withheld information at this time would therefore jeopardise its ability to receive a fair trial.
17. The Council provided the Commissioner with clear evidence that litigation has been in contemplation for some time, and was still being considered at the time of the request.
18. Based on her examination of the withheld information and the Council's representations, the Commissioner accepts that disclosing details about the Council's legal position and case could undermine its position in any proceedings and thus it is more probable than not that disclosure would

adversely affect the course of justice. She is therefore satisfied that regulation 12(5)(b) is engaged.

The public interest test

19. Having concluded that the exception is engaged, the Commissioner must carry out a public interest test into the application of the exception as required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
20. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure identified in regulation 12(2) of the EIR.

Public interest arguments in favour of disclosure

21. The Council accepts that there is a public interest in transparency and accountability in relation to its decision making and how it determines what action should be taken in connection with litigation cases.
22. The complainant has a personal interest in the subject matter as his wife was involved in the incident involving the collapse of the dormice bridge. He also pointed out that the incident occurred 3½ years before his request and he does not consider it acceptable that the Council "*appears to have made little or no progress on this litigation*" since that time. The complainant highlighted the fact that the bridge failure itself is public knowledge, as is the identity of the organisations involved in the design, construction, installation and maintenance of it. He pointed out that such structures should not fail as they did, and as such there was a clear "*failing in design, construction or maintenance, or possibly all three*". He also stated that it is public knowledge that the Council is considering litigation against the parties involved.
23. The complainant has indicated that his interest is not in ensuring that the Council (or the Welsh Government) is compensated for any costs/losses associated with the collapse of the bridge or any replacements arrangements for dormice. His concern is that the organisation(s) responsible should admit any failings and be made aware of their responsibility to ensure safe structures are built in the future, and that they should pay penalties via court proceedings if necessary.

Public interest arguments in favour of maintaining the exception

24. The Council argues that disclosure of the withheld information will negatively impact on its legal case as it would put information into the public domain which may be used in the litigation. The risk that the information would be brought to the attention of the contractors would

lead to an adverse impact on the litigation being contemplated. This would have a significant impact on the extent that the Council will be able to properly put forward its legal case against the contractors. This would be unfair and it would undermine the justice system.

25. The Council also contends that it needs a safe space in which to make balanced, well thought out decisions relating to the litigation case, without interference. The Council pointed out that the litigation case was pending at the time of the request and still is. It confirmed that no information has been released into the public domain that would jeopardise the litigation case.
26. The Council advised the Commissioner that it also considered the effects of disclosure of the information in relation to further queries about the matter being raised by the complainant, councillors or Members of the Senedd. This would distract offices from their normal duties when they *"need a protected space in which to discuss and reach important decisions without interference from the public/other parties"*.

Balance of the public interest test

27. In determining the public interest balance, the Commissioner always attaches some weight to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. In this case, there is also a public interest in public authorities being accountable in relation to their responsibilities, particularly when these relate to matters of public safety.
28. The Commissioner considers that the public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice, and in this, the importance of not prejudicing proceedings. This is a well established principle which has been recognised by the First-Tier Tribunal (Information Rights) (the Tribunal).
29. The Commissioner recognises that the complainant has a personal interest in accessing the information, however, she considers that the public interest in the context of the EIR refers to the broader public good. Specifically, in this case, the public interest in not jeopardising the litigation in contemplation and the Council's position in any such proceedings.
30. The Commissioner does not accept the complainant's argument that because the bridge collapse, the identity of the contractors and the fact that litigation is being contemplated may be in the public domain, parties to any proceedings have already seen the withheld information and therefore there is no harm in its release. This view is based on

surmise and it does not take account of the fact that release under the FOIA is release to the world at large which could impinge on those proceedings. In addition, the Commissioner has seen no evidence to suggest that the withheld information has either been made public previously or the other parties involved in any proceedings have had sight of it.

31. The Commissioner notes that the public interest in maintaining the exception is particularly strong. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council. The Commissioner has seen no evidence of this in this case.
32. In view of the time of the request, the Commissioner considers that it is highly likely that disclosing the information would compromise the Council's legal position in the litigation being considered. This, in turn, would represent an unwarranted interruption of the legal process and would result in specific damage to the course of justice. In the Commissioner's view there is a clear public interest in maintaining a level playing field in any legal proceedings and it would be unfair, and moreover undermine the administration of justice, if the Council's legal case was disclosed prior to any proceedings taking place unless the Council had the corresponding benefit.
33. In light of the above, the Commissioner has concluded that the public interest in maintaining the exception contained at regulation 12(5)(b) outweighs the public interest in disclosure of the withheld information.

Regulation 13 – third party personal data

34. 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.
35. 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 UK General Data Protection Regulation ('UK GDPR').

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

36. 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.
37. 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?

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

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

39. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
40. 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.
41. 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.
42. As mentioned earlier in this notice, the Commissioner has proactively applied regulation 13 of the EIR in this case because during her examination of the withheld information, she identified that some of the information constituted the personal data of a third party. This information identifies the individual by name and refers to their claim against the Council in respect of the collapse of the bridge in question.
43. In the circumstances of this case the Commissioner is satisfied that the information clearly relates to the third party concerned. She is satisfied that this information both relates to and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
44. 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.

45. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

46. 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".

47. 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.

48. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

49. Article 6(1) of the UK 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.

50. 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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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".

51. In considering the application of Article 6(1)(f) of the UK 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.
52. 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

53. 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.
54. 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.
55. The Commissioner notes that the complainant has a personal interest in this matter as his wife was involved in the incident involving the collapse of the dormice bridge. The Commissioner also considers there is a legitimate interest in respect of understanding how the Council handled matters relating to the bridge collapse, and specifically claims received from the public following the bridge collapse.

Is disclosure necessary?

56. '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
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the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

57. The Commissioner is aware that the information requested (the personal data of the individual concerned) is not in the public domain and is not readily accessible by other means. She, therefore, accepts that disclosure under the EIR would be necessary to meet the legitimate interest in disclosure explained above.

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

58. 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 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.

59. 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.

60. 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.

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

62. In the Commissioner's view any individual who has submitted a claim against the Council would have a reasonable expectation that their personal data would not be disclosed into the public domain. The Commissioner also considers that disclosure of the information is highly likely to cause damage or distress to them, which would be unwarranted. Whilst the Commissioner accepts that the complainant may have a legitimate interest in disclosure of the information in question, she has been unable to identify any wider legitimate interest that would outweigh the fundamental rights and freedoms of the

individual in this case. 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.

Right of appeal

64. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

65. 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.
66. 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

Joanne Edwards
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