

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 September 2021

Public Authority: Leeds City Council

Address: Civic Hall
Calverley Street
Leeds
LS1 1UR

Decision (including any steps ordered)

1. The complainant has requested information from Leeds City Council ("the Council") which concerns an application for a Certificate of Lawful Existing Use or Development on private, protected green belt land.
2. The Commissioner's decision is that the Council has not correctly applied Regulation 13 of the EIR to all of the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the last two paragraphs of the email dated 23 September 2020, ensuring that any personal data is redacted under the terms of the Data Protection Act 2018.
4. 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

5. On 4 December 2020, the complainant wrote to the Council and requested information in the following terms:

"This application is on protected green belt land which up to now we believed was for agricultural purposes only."

The application has been granted on the balance of probability due to submitted evidence, we would like to see all the evidence submitted including that for and against this application to provide us with the opportunity to scrutinise it."

6. The Council responded on 11 December 2020. It stated that the requested information contains personal data and applied regulation 13 of the EIR – personal data.
7. Following an internal review the Council wrote to the complainant on 21 January 2021. It stated that it upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of her investigation is to establish whether the public authority is entitled to withhold the requested information under regulation 13 of the EIR.

Reasons for decision

Regulation 13: third party personal data

10. 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.
11. 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 UK General Data Protection Regulation ('UK GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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

Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.

13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
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. In the circumstances of this case the Commissioner is satisfied that the information (the opinions of third parties regarding the specific application) clearly relates to third parties. She is satisfied that this information both relates to and can identify the third parties concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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".

22. 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.
23. 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

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

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.

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".

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 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.
28. 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.
29. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason: to determine how a decision was made regarding the development of land near to their property.
30. The Commissioner considers that there is a legitimate interest in the disclosure of this information., i.e transparency about how the Council considers planning applications. There is also a general legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

31. '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.
32. The Commissioner accepts that the complainant would have no other means of getting the requested information and that, therefore, disclosure by the Council would be necessary to satisfy the complainant's legitimate interests in this case.

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

33. 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.

34. 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.
35. 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.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. The Commissioner is mindful that disclosure under the EIR is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
38. The Council has explained that as the application that was submitted was a "Certificate of Lawful Existing Use or Development", it does not constitute what might be referred to as a 'standard' planning application and as such, the information that is required to be placed in the public domain, differs somewhat.
39. The Council advised that there is no legal basis in planning law for the evidence that was submitted in the determination of the application, to be placed in the public domain.
40. The Council has provided the Commissioner with copies of the withheld information, along with a link to the documents which are required to be placed in the public domain for these types of planning permission.
41. Within the documents, available on the Council's website, the Commissioner can see that it states "Lawful development certificates for existing or proposed development in pursuant of Sections 191 and 192 of the Town and Country Planning Act 1990 are determined based on a legal test and a matter of fact. For that reason these types of application are not subject to consultation. If the local planning authority is satisfied that the legal tests have been met it will grant a lawful development certificate.". It goes on to state, "...If granted by the Local Planning

Authority, the certificate means that enforcement action cannot be taken against the development referred to in the certificate”.

42. The Council explained that it appreciates why the complainant would wish to scrutinise the evidence provided to the Council and that disclosure would increase the transparency. However, disclosure of the information would not allow members of the public to effect the decision making process, as this is a decision for the Council to make, based upon matters of fact.
43. The Council has also explained to the Commissioner that these applications are not 'subject to consultation'. However, opinions could have been submitted before a decision was made by the Council.
44. The Council went on to explain that as a decision has been made to grant the Lawful Development certificate, there could not be an appeal regarding the outcome, due to the nature of the planning permission sought.
45. Upon review of the withheld information, the Commissioner considers that even if the personal information was redacted, individuals would still be able to be identified, especially by those local to the area and by those who know other residents. Additionally, the Commissioner considers that even if the personal data were to be redacted, the content of the correspondence would not be easy to understand, as the redactions would render the remaining information meaningless..
46. The Commissioner finds, however, that two paragraphs of the email dated 23 September 2020, could be released under the EIR, providing any personal data is redacted. The two relevant paragraphs are general in nature and the third party can not be identified.
47. Whilst the Commissioner understands the complainant's reasoning for wanting to receive this information, she must consider the impact of disclosure to the world at large, rather than to an interested party. As this process is unlike normal planning applications in terms of the information that is placed into the public domain, the Commissioner finds that the individuals would not have a reasonable expectation that their personal data would be made public.
48. She therefore considers that disclosure of the remainder of the information would be disproportionately intrusive to the data subjects as it would reveal information about these third parties which is not otherwise in the public domain, and as such, disclosure could cause unwarranted damage or distress to the individuals involved.
49. 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 vast majority of the information would not be lawful.

50. 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.
51. She therefore finds that the council was correct to rely on regulation 13 to withhold the requested information, with the exception of the two paragraphs referred to in point 46 of this decision notice

Right of appeal

52. 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

53. 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.
54. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF