

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

Date: 25 April 2022

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested correspondence regarding the planning history at a specified address. Rotherham Metropolitan Borough Council ("the Council") relied on Regulation 13 (third party personal data), Regulation 5(3) (personal data of the requestor) and Regulation 12(4)(e) of the EIR (internal communications).
2. The Commissioner's decision is that some of the requested information is the requestor's own personal data and is thus exempt under Regulation 5(3) of the EIR. The remaining information is the personal data of a third party and is mostly exempt under Regulation 13. However some of the information appears to be information that should be published on the Council's planning portal, but isn't.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, any of the emails within the withheld information that should be visible on the Council's planning portal, with appropriate redactions for 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 28 September 2020 the complainant requested information of the following description:

"Under the Freedom of Information Act, please provide me with a copy of the following set out below:

- "[1] All correspondence, emails, notes including hand written for Planning application [redacted], [redacted], [redacted] Plus any other planning applications/correspondence for the same address.
- "[2] All correspondence , emails, notes including hand written from RMBC and the planning inspectorate including appeal decision [redacted]
- "[3] A list of all Planning officers times, dates and visits to the site in question.
- "[4] A copy of the agreement between [redacted], the Vice and Chair of the planning board. All emails, notes including hand written that apply to this action. Also reference on the same agreement that all the planning board were fully aware that this is what they were voting on.
- "[5] A copy of all correspondence, emails, notes to include hand written from planning officer [redacted] that confirms his statement ' we have made mistakes'. i.e what were they and how have these been recorded. Plus who within RMBC are aware of such mistakes, so again correspondence in all formats please.
- "[6] All internal emails, notes, including hand written regarding any of the planning applications noted and to include the latest structure that RMBC granted that needed no planning permission.
- "[7] All correspondence emails, notes including hand written relating to these applications and where my name, address or my complaints with RMBC are mentioned from Cllr Simon Tweed to Cllr Chris Read. Also the same is asked of any communications from any officers to whom their content relates to this matter. i.e [redacted], [redacted], [redacted], [redacted] plus any other officers of any position held within RMBC.

“[8] All correspondence emails notes, including hand written relating to the members enquiry [redacted].”

6. In subsequent correspondence the complainant agreed to restrict the scope of the request to exclude any correspondence that he had either sent to or received from the Council.
7. On 12 November 2020, the Council responded. It denied holding some of the requested information but confirmed it held the remainder. However, it refused to provide the remainder, citing the following exceptions as its basis for doing so: Regulation 13 – third party personal data; Regulation 12(4)(e) – internal communications and; Regulation 5(3) – personal data of the requestor
8. The complainant requested an internal review. The Council sent the outcome of its internal review on 13 May 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 25 May 2021 to complain about the way his request for information had been handled.
10. As Regulations 5(3) and 13 are both absolute exceptions, with no requirement to consider the public interest, the Commissioner will consider the extent to which these exceptions are engaged. If some of the withheld information does not engage either exception, the Commissioner will consider whether the Council is entitled to rely on Regulation 12(4)(e) of the EIR to withhold it.

Background

11. The withheld information relates to an acrimonious dispute between neighbours concerning the precise location of the boundary between two properties, the construction of a structure on land belonging to the complainant's neighbour (“the Neighbour”) and the neighbour's use of that structure.

Reasons for decision

Is the requested information environmental?

12. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
13. As it is information relating to planning and the enforcement of planning law, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment (namely land, landscape and soil). For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 5(3) – personal data of the requestor

14. Regulation 5(3) of the EIR provides an exception from disclosure for information that is the personal data of the person requesting it.

15. Information will be an individual's personal data if it relates to them or has biographical significance for them.
16. The Commissioner notes that the complainant is mentioned either by name or by implication in a number of the emails and he would be identifiable from those emails, even if his name were redacted. The Commissioner therefore considers that this information is the complainant's own personal data and thus exempt from disclosure under the EIR.
17. Regulation 5(3) is an absolute exception and so there is no requirement for the Council to consider either the public interest or the complainant's wishes.

Regulation 13 personal data

18. 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.
19. 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').
20. 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.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. The Commissioner notes that the original wording of the request specified three planning application reference numbers. Those reference numbers can be searched on the Council's Planning Portal and the documents attached to each application specify the address which forms the subject of the request. Local people would already be aware of the occupant of that address and, even if they did not, the address could be cross-referenced with the publicly-available electoral register to identify the occupants.
27. Any information which did not relate to that property would not fall within the scope of the request therefore the information must, by definition, relate, to some extent, to the Neighbour who is the occupant of that address.
28. The withheld information concerns various planning applications that have been submitted in respect of the address in question. They concern the erection and subsequent modification of a particular structure which the Neighbour maintained was being used for domestic purposes. They also discuss the Council's approach to that structure and its attempts to require the Neighbour to modify it so that it was either consistent with the planning consent that had been granted or with a structure that would be covered by permitted development rights.² Finally the emails refer to a boundary dispute between the complainant and the Neighbour.
29. The Commissioner considers that the withheld information concerns the Neighbour, the property he occupies and a series of decisions taken by the Council as to what he was, or was not, required to do to his

² Not all structures require formal planning consent to erect. Homeowners are permitted to erect some structures under what is known as "permitted development rights." These are usually smaller, less intrusive structures not close to a property boundary.

property. Whilst the focus is predominantly on the property rather than the Neighbour, the Commissioner recognises that this property is the Neighbour's home. The information also concerns the actions the Neighbour was (or was not) taking to modify his home.

30. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the Neighbour – who is identifiable from the request and other material in the public domain. He is satisfied that this information both relates to and identifies the Neighbour. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
31. 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.
32. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

33. 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".

34. 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.
35. 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. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is the information criminal offence data?

36. Information relating to criminal convictions and offences is given special status in the GDPR.
37. Article 10 of the GDPR defines criminal offence data as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

"The alleged commission of offences by the data subject; or

"Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing."

38. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that some of the information involved discussion as to whether or not the Neighbour had complied with an enforcement notice that the Council served upon him. Whilst failing to comply with planning law is a civil, not a criminal offence, where an enforcement notice has been issued, a failure to comply with that notice can be dealt with as a criminal offence.
39. Therefore, to the extent that the withheld information concerns any discussion about and alleged failure to comply with an enforcement notice, the information is criminal offence personal data relating to the Neighbour.
40. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
41. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the EIR are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
42. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the EIR request or that they have deliberately made this data public.
43. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under regulation 13(1) of the EIR.

The remaining information

44. Once the information that is either the personal data of the complainant or the criminal offence personal data of the neighbour has been removed, the remaining information remains the personal data of the neighbour. The Commissioner has next considered whether there is a lawful basis for processing this information.

45. 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.
46. 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"³.
47. 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.
48. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

³ 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".

49. 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.
50. 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 the narrower the interest, the less likely it is that disclosure to the world at large will be a proportionate means of achieving the interest.
51. It is clear that the complainant has his own strong personal interest in the matter. There is also some wider interest in the Council being transparent and accountable in the way that it administers planning law.

Necessity test

52. In *Kol v Information Commissioner and Reigate & Banstead Borough Council* [2022] UKUT 74 (AAC), the Upper Tribunal reinforced the necessity test as one of proportionality. Disclosure under the EIR means disclosure to the world at large, not just the person making the request. Therefore if the legitimate interest can be met by some less intrusive means than publication to the world at large, disclosure will not be necessary to achieve that interest.
53. In dealing with necessity, the Commissioner notes that the information in question falls into two categories. Firstly there are emails, mainly internal emails, which have not been published.
54. However, the Council's planning portal shows a wide variety of information relating to the three planning applications which should be available. However, the Commissioner has checked these documents (which mostly appear to be email correspondence as the submitted drawings and plans are visible) and they are not accessible via the portal – only an error message is generated.
55. As the Commissioner is not aware of the information that ought to be visible on the portal, he has not been able to make a comprehensive assessment of which parts of the withheld information ought to be visible. However, he notes that, following good records management practice, the Council has titled each piece of email correspondence noting the author and the date on which the email was sent. Whilst the withheld information comprises a large volume of emails (many of which are duplicated), the Commissioner can see numerous titles of emails on

the planning portal that appear to match emails within the withheld information.

56. The Commissioner notes that there is a longstanding presumption that information relating to planning applications should be placed in the public domain. Whilst the Council argued that this information was already in the public domain (and directed the Commissioner to its portal), if the emails themselves do not display, the Commissioner cannot consider that the information is in fact in the public domain.
57. To the extent that the withheld information contains correspondence that the Council would normally have published (and does appear to have attempted to publish – albeit that some technical issues seem to have prevented this) the Commissioner considers that it is necessary to publish this information to achieve transparency.
58. To the extent that the withheld information goes further than the correspondence that would normally be published, the Commissioner is of the view that disclosure of this information is not necessary to satisfy any legitimate interest in transparency – as that will already have been achieved.
59. To the extent that the complainant has concerns about the way that the Council has handled the planning matters in question, he is entitled to make a formal complaint to the Council (if he has not already done so) and, if necessary, escalate that complaint to the Local Government and Social Care Ombudsman. That is clearly a less intrusive means of achieving the legitimate interest and it follows that disclosure under EIR is not necessary to allow the complainant to pursue a grievance against the Council.

Balancing test

60. The final test, where the Commissioner has judged that disclosure is necessary to achieve a legitimate interest, is to balance the legitimate interest against the rights and freedoms of the data subject.
61. The Commissioner notes once again, that there is a general presumption that correspondence between the Council and applicant (or their agent) on a particular planning application will be published – unless there are specific reasons not to. Would-be applicants are usually informed of this at the start of the process.
62. In the Commissioner's view, whilst the Council may not have the Neighbour's explicit consent for the correspondence to be made available to the world at large, he (the Neighbour) should have a reasonable expectation that it will be. As a consequence, disclosure in this case would not cause the Neighbour unjustified harm.

63. Having balanced the competing interests, the Commissioner is satisfied that the legitimate interests in this case outweigh the rights of the data subject. Consequently, it follows that there would be a lawful basis for processing this personal data in this manner.

Fairness and transparency

64. Even though it has been demonstrated that disclosure of the requested information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
65. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
66. The requirement for transparency is met because as a public authority, Council is subject to the EIR.
67. In this instance, the Commissioner has decided that Council has failed to demonstrate that the exception at regulation 13(1) is engaged in respect of the information that should be published.
68. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of regulation 13(1) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.
69. As the Council does not appear to have cited Regulation 12(4)(e) in respect of any of this information, it must disclose it.

Right of appeal

70. 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

71. 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.
72. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF