

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

Decision notice

Date: 26 April 2022

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested correspondence about works to a ditch at Toft Monks. Norfolk County Council ('the Council') originally relied on regulation 12(4)(b) of the EIR to refuse the request as manifestly unreasonable. However it subsequently withdrew its reliance on that exception and disclosed the relevant information it holds, with personal data redacted.
2. The Commissioner's decision is as follows:
 - The Council correctly applied regulation 13(1) of the EIR to the majority of the information it is withholding as it is the personal data of third parties and disclosing it would be unlawful.
 - The Council breached regulation 14(2) as it did not issue the complainant with a refusal notice within the required timescale. The Council also breached regulation 14(3)(a) as it incorrectly applied regulation 13(1) to information that is the complainant's own personal data. However, under regulation 5(3) of the EIR the Council is not obliged to disclose that particular information.

- Finally, the Council breached regulation 11(4) of the EIR as it did not provide an internal review within the required timescale.
3. The Commissioner does not require the Council to take any corrective steps.

Request and response

4. On 27 August 2020 the complainant wrote to the Council and requested information in the following terms:

"[1] ...Would you therefore, please supply appropriately redacted copies of all correspondence, both sent and received, between [redacted] and Councillor [redacted] relating to the unconsented works carried out by [redacted] and Munnings Construction Limited to a ditch at Toft Monks.

[2] Similarly, would you also supply appropriately redacted copies of any correspondence, both sent and received, between Councillor [redacted] and [redacted], Munnings Construction Limited, [redacted], [redacted] and [redacted] or any other individual or organisation relating to the unconsented works carried out to a ditch at Toft Monks.

[3] Finally, would you please supply appropriately redacted copies of all correspondence, both sent and received, between the Flood and Water Management Team, [redacted], [redacted], [redacted], [redacted], [redacted], and Munnings Construction Limited relating to unconsented works to a ditch at Toft Monks as from 1st February 2020 to date."

5. On 15 December 2020 the Council responded. It relied on regulation 12(4)(b) of the EIR to refuse the request which it considered to be manifestly unreasonable.
6. The complainant requested an internal review on 11 January 2021 and the Council provided a review on 16 March 2021. It upheld its response.

Scope of the case

7. The complainant contacted the Commissioner on 3 May 2021 to complain about the way their request for information had been handled.
8. The Council subsequently advised the Commissioner that it had reconsidered the complainant's request in light of the complaint and the passage of time. It withdrew its reliance on regulation 12(4)(b) and on 23 March 2022 issued the complainant with a fresh response to their

request. The Council disclosed the relevant information it holds, having redacted all personal data under regulation 13(1) of the EIR.

9. In the circumstances, Commissioner invited the complainant to withdraw their complaint. The complainant indicated that they remained dissatisfied with the timeliness of the Council's original response. They also said that it appeared to them that the Council's position is still that the request is manifestly unreasonable. Finally, they appeared to have concerns with some of the information the Council has redacted under regulation 13(1).
10. The Commissioner will not consider retrospectively whether or not the Council was entitled to categorise the request as manifestly unreasonable when it first refused the request. This is because the Council is no longer relying on that exception and has disclosed the information the complainant has requested (with personal data redacted).
11. The Commissioner's investigation has focussed on whether the Council is entitled to withhold information under regulation 13(1) of the EIR. He has also considered the Council's refusal including the timeliness of its original refusal and internal review response.

Reasons for decision

Regulation 13 – personal data

12. The Council has withheld some of the requested information under regulation 13(1) of the EIR.
13. Regulation 13(1) 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.
14. 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').

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

15. 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.
16. Second, 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?

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The Commissioner asked the Council to send him an unredacted copy of the information it is withholding. The majority of the information is third parties' names, but telephone numbers and the date and time have also been redacted from certain items of correspondence. Other correspondence has been withheld in its entirety.
22. A small amount of the redacted information is the complainant's own personal data. An applicant's own personal data is excepted from disclosure under regulation 5(3) of the EIR, not regulation 13(1). Requests for an applicant's own personal data should go on to be handled under the data protection legislation.
23. Having reviewed the information, the Commissioner is satisfied that the remaining information relates to individuals other than the complainant. He is satisfied that this information both relates to and identifies the people concerned. With regard to the information withheld in its entirety, the Commissioner considers that there is sufficient detail in this correspondence to enable its writer to be identified, even if their name

was redacted. And with regard to the date and time that particular correspondence was sent, the Commissioner considers that this information could help identify a specific individual. Regarding all the third person personal data, this information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

24. 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.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".

27. 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.
28. 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

29. 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.
30. 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.

31. 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.
32. 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

33. 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.
34. 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

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".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

35. The complainant has an interest in works that were carried out at a particular site, the Council's associated statutory flood management enforcement powers and the circumstances of a decision that Council officers made. This is an interest of the complainant, and perhaps a small number of others, but it is nonetheless a valid interest for them to have.

Is disclosure necessary?

36. '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.
37. The Council has advised the Commissioner what it advised the complainant in its fresh response of 23 March 2022. Namely, that there are established processes for challenging the position officers take on the Council's statutory flood management enforcement powers. The Council says that if the complainant considers that the decision officers took in this case had been inappropriately influenced by a Council Member, they should engage with the Council's complaints procedure, rather than pursue the matter through the EIR. That was why the Council originally categorised the request as manifestly unreasonable.
38. The Commissioner has noted the Council's point and the complaint procedure that the Council has in place, which is the appropriate route through which the complainant should pursue their concerns. The Commissioner also considers that information that the Council has released adequately addresses the complainant's interest in the matter of the works in question and the wider public interest in transparency. As such the Commissioner does not consider that disclosing the personal data in this case is necessary to meet the complainant's legitimate interest. And in the Commissioner's view, the information has minimal wider public interest
39. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

40. The Commissioner has therefore decided that the Council is entitled to withhold the majority of the information to which it has applied regulation 13(1), by way of regulation 13(2A)(a). The remaining withheld information is the complainant's own personal data which the Council is not obliged to disclose under regulation 5(3) of the EIR.
41. 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.

Regulation 14 – refusal to disclose information

42. Under regulation 14(1) of the EIR, if a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal must be made in writing and comply with certain provisions.
43. One of the provisions, under regulation 14(2), is that the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.
44. The Council originally relied on regulation 12(4)(b) to refuse the request. The complainant submitted their request on 27 August 2020 and the Council did not provide that refusal until 15 December 2020. The Council therefore did not comply with the requirement under regulation 14(2) of the EIR.
45. Under another regulation, regulation 14(3)(a), a public authority must cite the exception(s) under regulation 12 and/or 13 that it is relying on to refuse the request. In this case, the Council subsequently advised that it is withholding personal data under regulation 13(1). Regulation 13(1) concerns only the personal data of people other than the applicant. The information in this case includes information that is the complainant's own personal data, and the Council was incorrect to apply regulation 13(1) to that particular information. It therefore did not fully comply with regulation 14(3)(a).

Regulation 11 - representations and reconsideration

46. Under regulation 11(4) of the EIR, (4) a public authority must provide an internal review as soon as possible and no later than 40 working days after the date of receipt of the request for a review.
47. In this case, the complainant requested an internal review on 11 January 2021 and the Council provided one on 16 March 2021. This was outside the 40 working day requirement and therefore, the Council was in breach of regulation 11(4) of the EIR.

Right of appeal

48. 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

49. 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.
50. 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

Cressida Woodall
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