

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 August 2019

Public Authority: Royston Town Council
Address: 5 Lower King Street
Royston
Herts
SG8 7DA

Decision (including any steps ordered)

1. The complainant has requested a report which was referred to in the minutes of a meeting at Royston Town Council ("the Council") on 25 June 2018. The Council redacted some of the information in the report as being third party personal data.
2. The Commissioner's decision is that the Council has correctly redacted some information in the report under regulation 13(1) of the EIR.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 4 October 2018, the complainant wrote to the Council and requested information in the following terms:

"Under the terms of the above Act, I write to request a copy of the report referred to in the minutes of Royston Town Council's Finance Committee meeting held on 25 June 2018.

Minute '105/19 Royston Cave' states that "Members received a report on the current management and operation of the cave". It is this report that I am requesting."

5. The Council responded on 26 October 2018. It stated that it was withholding the requested report under section 40(2) of the FOIA - personal information.
6. Following an internal review the Council wrote to the complainant on 21 December 2018. It provided a redacted version of the requested report but stated that some information was still being withheld under section 40(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 13 March 2019 to complain about the way his request for information had been handled.
8. During the course of the investigation, the Council has agreed that the request should be handled under the EIR for the reasons set out in this notice.
9. The Commissioner considers that the scope of the case is to determine whether the Council correctly redacted the report under regulation 13(1) of the EIR.

Reasons for decision

Regulation 2 – is the information environmental?

10. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements..."

11. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
12. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
13. The Commissioner has considered the report that was requested in this case. As it relates to the management of a cave, the Commissioner considers that it is information "on" a measure which, as set out in regulation 2(1)(c), is likely to affect or protect the elements and factors of the environment. Therefore, the Commissioner considers that the request was for environmental information as defined by regulation 2(1) of the EIR.

Regulation 13 personal data

14. 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.
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.

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

16. 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?

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 redacted information contains information about three named individuals. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that it both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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".

25. 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.

26. 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

27. 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.

28. 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.

29. 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".

30. 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

31. 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.
32. 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.
33. The Council has provided the requested report. However, it has redacted personal data that is contained within the report. It has argued that disclosure of the personal information could cause unjustified harm to the interest rights of those named.
34. The complainant argues that the redacted information should be disclosed, as it refers to matters that are, in his view, potentially seriously prejudicial to Royston and District Local History Society's (RDLHS) reputation.
35. They add that they believe the Council went about the issues in a discourteous and disrespectful way, which they feel is still evident.
36. Having considered the above, the Commissioner is satisfied that there is some legitimate interest in the disclosure of the information relating to the individuals involved in the management of the cave as well as a general interest in transparency.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
38. In this case, the Commissioner understands that, while the Council made some information concerning the cave public, it has not otherwise published the redacted information. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and she accepts that disclosure

under the legislation would be necessary to meet the legitimate interest in disclosure.

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

39. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under 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.
40. 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 individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
41. 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.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. Whilst the Commissioner notes that the complainant is concerned that the report could be detrimental to the RDLHS, against these interests are the reasonable expectations and specific wishes of the persons whose names have been redacted for confidentiality to be maintained.
44. The Council has advised that it has contacted two of the three named individuals to ask if they would consent to the disclosure of their personal data to the public under the EIR. These individuals confirmed that they do not want their personal information to be disclosed. They added that, should the information be disclosed, it could cause distress to them.

45. The Council's view is that none of the named individuals has any reasonable expectation that their personal data would be disclosed.
46. The Council informed the Commissioner that RDLHS, of which the complainant is a member, has the information which is necessary for the public to understand the future operations of the cave, following the resignation of the cave manager.
47. The Council has not provided any arguments in favour of disclosure of the withheld information, which is due to the information being personal data.
48. The Commissioner considers that it is clear that there has been a breakdown of trust between the Council and the RDLHS, due to the circumstances described. However, she notes that the report has already been disclosed in redacted form.
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, and that the disclosure of the specific withheld information in this case would not therefore be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to consider separately whether disclosure would be fair or transparent.
51. 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.

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: 0300 1234504

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

Andrew White
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