

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

Date: 13 February 2018

Public Authority: Essex County Council

Address: PO Box 11
County Hall
Chelmsford
Essex
CM1 1QH

Decision (including any steps ordered)

1. The complainant on two occasions requested from Essex County Council (the Council) information relating to correspondence between a group of individuals and the Council regarding a planning application. The Council provided some redacted information, withholding some content under the exemption provided by section 40(2) (personal information) of the FOIA, and stated that it did not hold the remainder of the information requested.
2. The Commissioner's view is that the requested information was environmental and hence it was appropriate to consider the request under the EIR. The Commissioner's decision is that the Council was correct to redact personal data in the documents that it shared with the complainant, hence regulation 13(1) (personal information) was correctly applied to those redactions. It is also the Commissioner's view that, on the balance of probabilities, the Council does not hold any further information falling within the scope of the request.
3. However, the Commissioner finds that the Council applied regulation 13(1) incorrectly when it decided to withhold an entire document that

was within the scope of the request. The Council is now required to disclose a copy of that document, with personal data redacted.

4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Disclose a redacted copy, with the personal details withheld, of the letter of 10 January 2016 sent to the Council by the owners of the affected land.
5. 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.

Background information

6. On 19 November 2015, the Council submitted an application for planning permission to the County Planning Team. The Council's project was called Great Burstead Flood Scheme and intended to build a new attenuation basin on arable farm land. The pond would be introduced to intercept surface flows and slowly release the water into the existing piped system.
7. On 10 January 2016, a group of individuals who considered that the Council's plan would affect their private land, submitted a letter of objection to this planning application. Prior to this objection letter being submitted, there was some correspondence involving the delivery and enforcement manager of the Council, a flood investigation engineer and the representatives of the individuals who objected to the planning application. This letter of objection was followed by further correspondence between the above parties.
8. Subsequently, on 26 January 2016 the delivery and enforcement manager on behalf of the Council wrote to the planning authority expressing the wish of the Council to withdraw the application.

Request and response

9. On 8 March 2018, the complainant wrote to the Council and requested information in the following terms:

"I would like to make a Freedom of Information Act request for disclosure of all letters and emails which have passed between yourselves [ECC] and landowners between March 2014 and today's

date concerning this matter. I also request disclosure of notes/reports prepared after meetings and telephone conversations with relevant landowners between March 2014 and today's date...Please confirm when you last discussed this matter with the landowners."

10. The Council responded on 6 April 2018. It provided some information and stated that it was withholding the remainder citing the exemption provided under section 40(2) of the FOIA – personal data of third persons.
11. Remaining dissatisfied with the response, the complainant submitted a request for internal review on 10 April 2018. Together with the request for an internal review on the handling of the first request, the complainant asked for additional information, formulated as follows:

"A – Please forward a copy of [name redacted]'s original plan dated 3rd August 2015 showing the bund behind no's 114/118 Kennel Lane and the original position of the northern attenuation basin.

B – Please forward a copy of the objection letter referred to in the email of 12th January 2016 which you have disclosed.

C – My request covered the period from March 2014 until March 2018. You have only sent copy emails\letters for the period 18th September 2015 to 26th May 2016. If you are prepared to release emails\letters for the first period it is illogical that you are not prepared to do so after 26th May 2016 especially as there was a second flood on 23rd June 2016.

D) Please confirm when ECC last discussed this matter with the landowners.

You have not disclosed the identity of the landowners. How can disclosure of the material requested fall foul of the data protection act?"

12. The Council responded on 10 May 2018, providing information requested under point A, withholding information requested under point B – citing section 40(2) (Personal Information) - of the FOIA and stating that it did not hold information requested under point C and point D.
13. On 12 May 2018, the complainant expressed her dissatisfaction with the response and effectively requested a further internal review.
14. The Council provided the outcome of the second internal review on 14 May 2018. It upheld its position and stated that it had disclosed all the information that could be disclosed.

Scope of the case

15. The complainant contacted the Commissioner on 30 May 2018 to complain about the way his request for information had been handled.
16. In the course of the Commissioner's investigation, it became apparent that the complainant had submitted further questions and requested further information, which go beyond the original requests of 8 March and 10 April 2018. Those further questions and information requests are not within the scope of this notice.
17. The Commissioner considers that as the requested information relates to planning matters, it is likely to fall within the EIR. Therefore, she considers it appropriate to consider the request under that access regime.
18. The withheld information consists of:
 - The personal data of the sender and recipients of the email sent by the flood investigation engineer dated 26 May 2016, with the following subject: Great Burstead Alleviation Scheme;
 - The personal data of the sender and recipients of the email sent by delivery and enforcement officer dated 18 January 2016, with the following subject: Great Burstead – Interim Drawings;
 - The personal data of the sender and flood investigation engineer, who were copied into the email sent to the delivery and enforcement manager, dated 12 January 2016, with the following subject: Great Burstead – Interim Drawings;
 - The personal data of the recipient and the flood investigation engineer, who were copied into the email sent by the delivery and enforcement manager, dated 5 January 2016, with the following subject: Great Burstead – Interim Drawings.
 - The personal data of the recipient and the flood investigation engineer, who were copied into the email sent by the delivery and enforcement officer, dated 24 December 2015, with the following subject: Great Burstead – Interim Drawings.
 - The personal data of the recipient and the sender sent by the flood investigation engineer, dated 18 September 2015, with the following subject: FLOOD ALLEVIATION SCHEME – GREAT BURSTEAD; and

- The objection letter sent to the Council on 10 January 2016 by the owners of the land surrounding Acors Farm (“Affected Land”)
19. In light of the above, the scope of this case and the following analysis concern whether the Council was correct:
- to redact information from the materials disclosed in response to the information requests of 8 March 2018 and 10 April 2018, under regulation 13(1) of the EIR;
 - to withhold the information requested under bullet point B in the request of 10 April 2018 under regulation 13 (1) of the EIR; and
 - to state that it did not hold any further information within the scope of the complainant’s requests.
20. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 (“the DPA 1998”). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA as applicable at that time.

Reasons for decision

Regulation 2(1) - Is the requested information environmental?

21. Information is “environmental” if it meets the definition set out in regulation 2 of the EIR. Environmental information must be considered for disclosure under the terms of the EIR.
22. Regulation 2 of the EIR states that environmental information is information on:
- *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;*
 - *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);*
 - *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;

23. In the present case, the information requested by the complainant constitutes environmental information as it relates to a planning application which would tackle flooding in a specific location. This is a measure that is likely to affect several of the elements of the environment referred to in 2(1)(a).
24. The Commissioner is therefore satisfied that the request asks for environmental information as per Regulation 2(1)(c) and so the EIR is the correct statutory instrument applicable to this request.

Regulation 13(1) – Third party personal data

25. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA 1998.

Is the information personal data?

26. The first step for the Commissioner to determine is whether the withheld information constitutes personal data.
27. Personal Data is defined by section 1 of the DPA 1998. If the information is not personal data then the Council will not be able to rely on regulation 13(1) of the EIR.
28. Section 1 of the DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

Redacted correspondence included in the response to the first request

29. The definition of personal data set out in section 1 of the DPA 1998 provides that, for information to be personal data, it must relate to a living individual and that individual must be identifiable from the information. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decision affecting them, has them as its main focus or impacts them in

any way. The second part of the test is whether the withheld information identifies any living individual.

30. Having inspected the withheld information, the Commissioner notes that it consists of the identity and contact details of several individuals, including landowners of a specific piece of land, and the identity and contact details of a Council employee. It is the Commissioner's view that the above information clearly amounts to personal data of the individuals in question.

Withheld information in response to the second request

31. The withheld information requested under point B in the request of 10 April 2018 consists of an objection letter against a Council's planning application. This letter is dated 10 January 2016 and was sent to the Council by the owners of the land which was considered to be affected by this planning application.
32. The letter contains the identity of the landowners and also relates to them, hence this piece of information is clearly personal data.

Would disclosure breach the Data Protection Principles?

33. The Council asserted that by providing this information it would breach Principle 1 of Schedule 1 of the DPA 1998, which provides that "*Personal data shall be processed fairly and lawfully.*"
34. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness, or whether a Schedule 2 condition can be satisfied.
35. "Fairness" is a difficult concept to define. It involves consideration of a number of factors, which are often interrelated:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.
36. The Council explained that the withheld information consists of personal data of landowners concerned about the planning application which the complainant's information request is related to. Taking into account the nature of the information requested, the Council considers that this

piece of *"information is in relation to the landowners' private lives, as it is in their home/land."*

37. The Council considers that the individuals in question would expect to have confidential conversations with public authorities surrounding their land and its potential use and they would not expect this type of communication to be made public. In addition the Council confirmed that the concerned individuals *"have explicitly stated that they wish for their information to stay confidential."* The landowners' representative confirmed to the Council that it does not have their consent to share their personal information.
38. The Council maintains that releasing the requested information in its entirety would cause an unnecessary distress to affected data subjects. With that in mind, the Council considers the need to protect the privacy of individuals in question outweighs the need for transparency.
39. The complainant claimed that the addresses and names of the landowners are in the public domain and already known to her. Consequently, according to the complainant, the exception does not apply in this case.

The Commissioner's considerations

40. The Commissioner is mindful that the EIR are applicant blind. Despite the fact that the complainant has prior knowledge about the identity of the individuals mentioned in the exchange of correspondence, disclosure under the EIR is to the public at large and not just to the applicant.
41. The Commissioner agrees with the Council that members of the public would have a reasonable expectation of privacy and confidence when corresponding with a public authority. The Commissioner considers that if the correspondence with a public authority were to be disclosed to the world at large, it would be likely to cause damage and/or distress to those individuals. In addition it may cause a chilling effect and would make members of the public more hesitant to raise issues in their communication with public authorities. In relation to this personal data, the Commissioner accepts that disclosure would be in breach of the first data protection principle, and so the exception provided by regulation 13(1) was cited correctly.
42. In the course of the review of the redacted information already disclosed by the Council, the Commissioner noted that the Council had also redacted the identity and contact details of one of its members of staff. In its submission to the Commissioner, the Council did not elaborate on the reasons as to why it decided to redact the name and the contact details of the Flood Investigation Engineer. However, taking into account

that in the same piece of information, the identity of the Project Delivery Manager was disclosed, the Commissioner understands that the redaction of the personal data of the Flood Investigation Engineer was done because this position was considered to be a more junior position in the Council's hierarchy.

43. In this respect, the Commissioner refers to her guidance on requests for personal data about public authority employees¹, where it is stated that *"It is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones."* In the same guidance, she cited a previous decision notice² which *"concerned a request to the Financial Services Authority (FSA) for a list of staff in the Enforcement/ Investigation team. The FSA disclosed the names of managers but withheld the names of investigators below that level under section 40(2). The Commissioner found that the junior investigators had a reasonable expectation of non-disclosure."*
44. In light of the above, the Commissioner considers that the Council was correct to redact the names and contact details of the landowners concerned and the Council's Flood Investigation Engineer. Therefore, the Commissioner finds that the Council acted in compliance with regulation 13(1) when redacting the name of that individual.
45. Regarding the withheld information in response to the second request, upon examining it, the Commissioner noted that it consisted of a letter submitted to the Council by individuals/landowners who were considered to be affected by a Council's planning application. The letter outlines the reasons why they object this planning application.
46. The Commissioner considers that apart from the names of the landowners, there does not seem to be any information that would add significantly more value beyond what was already disclosed. It does not appear to the Commissioner that a redacted copy of this letter could lead to identification of specific living individuals.
47. Furthermore, the Commissioner notes that in the course of her investigation, the Council actually did not object disclosing this information with the names of the landowners redacted.

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

² Decision Notice on case FS50276863, which can be accessed at: https://ico.org.uk/media/action-weve-taken/decision-notices/2010/564116/fs_50276863.pdf

48. Therefore, the Commissioner concludes that the Council did not cite regulation 13(1) correctly when it refused to provide the letter of 10 January 2016 in its entirety and orders the Council to disclose this piece of information in compliance with paragraph 4 of this decision notice. The version disclosed to the complainant should have the individuals' names redacted. In relation to the names, the Commissioner's view is that regulation 13(1) was cited correctly.

Regulation 12(4)(a) of the EIR – Information not held

49. Subject to certain conditions, Regulation 5(1) of the EIR requires a public authority, who holds environmental information, to make it available on request.
50. By virtue of regulation 12(4)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
51. When a public authority claims that the information is not held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, will decide whether this is the case based on the adequacy of the public authority's searches for the information and any other reasons explaining why the information is not held.
52. For clarity, the Commissioner reiterates that she is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held (or was held at the time of the request) on the civil standard of the balance of probabilities.³

The complainant's position

53. The complainant considers that the Council did not address his information request appropriately. She maintains that the questions included in her request were not answered properly.
54. Consequently, the complainant maintains that the Council must be in possession of information beyond what was already provided and states that she is entitled to have access to this information.

The Council's position

55. In response to the Commissioner's enquiries, the Council has advised that its project officers conducted searches through the case files on the

³ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

Council's network drives and also performed searches using "...key terms in their outlook folders for any communication on this matter." The Council considered that relevant information potentially held, would be stored in above-mentioned locations. The key terms using in the course of this process "included contact names, scheme names, locations, planning terms, planning reference "CC/BAS/72/15" and the complainant's name."

56. The Council explained that information on personal computers would not be included in these searches as it is the Council's policy that "*Electronic records must not be stored in personal drives, but held in shared areas with appropriate folder permissions to manage access if restrictions should apply.*"
57. The Council stated that "*Upon further review, we have identified one document (attached) which could be released with the name of landowners redacted.*" As elaborated above in paragraphs 4, 45, 46, 47 and 48, the Commissioner has ordered the Council to disclose this information with personal information of third parties redacted.
58. The Council confirmed its view was that that all relevant and necessary searches have been conducted. The Council also confirmed that it was not aware of any information falling within the scope of the complainant's request being deleted or destroyed.
59. Responding to the Commissioner's question in relation to the business purpose of holding this type of information, the Council asserted that "*The information is held to keep in contact with the landowners about any potential future scheme options that could be delivered.*"

The Commissioner's considerations

60. The Commissioner has reviewed the copies of the responses that the Council has provided to the complainant and the correspondence it had in the course of handling the complainant's requests.
61. Whilst the Commissioner recognises that the complainant does not consider that her request has been completely complied with, the Council has provided a clear explanation of the searches that underlay its responses. No evidence is available to the Commissioner that indicates that the Council's searches and efforts to comply with the request have been insufficient, or that further recorded information is held.
62. In conclusion, the Commissioner has considered the searches performed by the Council, the amount of information provided, the Council's explanations as to why there is no further information held and the complainant's concerns. On the balance of probabilities, the

Commissioner concludes that the Council does not hold any further information in relation to the complainant's information request, hence the exception at regulation 12(4)(a) applied here.

Right of appeal

63. 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@hmcts.gsi.gov.uk

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

64. 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.
65. 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

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