

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 April 2023

Public Authority: Pembrokeshire Coast National Park Authority

Address: Llanion Park
Pembroke Dock
Dyfed
Pembrokeshire
SA72 6DY

Decision (including any steps ordered)

1. The complainant requested, from Pembrokeshire Coast National Park Authority ('the PCNPA'), information relating to the monitoring of a completed development approved under the One Planet Development Scheme. The PCNPA refused the request under Regulation 13(1) of the EIR (personal data of third parties).
2. The Commissioner's decision is that the PCNPA was correct to apply Regulation 13(1) of the EIR to withhold the information from disclosure.
3. The Commissioner does not require further steps.

Request and response

4. In relation to a specific approved Open Planet Development (an 'OPD'), on 7 June 2022, the complainant wrote to the PCNPA and requested information in the following terms:

"Please provide:

- 1) Un-redacted annual monitoring reports for years 3 and 4;
- 2) An un-redacted copy of [name of individual redacted by ICO]'s report dealing with the annual monitoring report for year 3 and any documents relating to steps being taken to address the issues raised in that report;
- 3) Documents relating to and recording visits to the premises by officers of the National Park (or by contractors on behalf of the National Park) together with documents relating to any decisions arising from those site visits;
- 4) Confirmation of any inspections and assessment visits to the premises and any further external reports by any outside advisers or assessors acting on behalf of the Applicant or National Park to assess progress of this OPD scheme including any notes and inspection sheets as well as recommendations or reports made by them;
- 5) Documents relating to the changes in the original management plan passed by the National Park requested by the Applicants or suggested by the National Park;
- 6) Documents relating to any other meetings the National Park has had with the Applicant which relate to this OPD scheme;
- 7) Documents relating to the discharge of the original planning conditions passed by the National Park in November 2019, including any applications by the Applicant to discharge those conditions."

5. The PCNPA responded on 6 July 2022. It responded with the following:

- 1) It applied Regulation 13 to withhold unredacted copies to the complainant. It said that it understood that the complainant already had the redacted copy.
- 2) It confirmed that no contractors had visited the site on the PCNPA's behalf.
- 3) It said that there are no further external reports held, but that several site visits had been undertaken.
- 4) It confirmed that it didn't hold any documents relating to changes in the original management plan passed by the PCNS following the approval.

- 5) It confirmed that the requested information is publicly available by inspection. However, it clarified that information it holds in relation to any enforcement case would be withheld under Regulation 12(5)(f).
 - 6) It confirmed that a discharge of condition application is a public file, able to be viewed.
6. Following an internal review, the PCNPA wrote to the complainant on 14 October 2022. It found that:
- 1) It upheld its position that Regulation 13 applied.
 - 2) It upheld the application of Regulation 13, and Regulation 12(5)(f) of the EIR.
 - 3) It upheld its reliance upon Regulation 13.
 - 4) It provided further information in relation to the site visits which had occurred.
 - 5) It maintained its reliance upon Regulation 13 to withhold the information.
 - 6) It disclosed information it considered to be public, however it said that it was withholding information relating to enforcement under Regulation 12(5)(f).
 - 7) It attached a document relating to the discharge of conditions in respect of the planning application. It clarified that had been unable to read an illegible note, and that its writer was not able to be read it as it had been some years since he had written it.

Scope of the case

7. The complainant contacted the Commissioner on 11 November 2022 to complain about the way their request for information had been handled. They considered that the council was not correct to withhold information under Regulation 12(5)(f) and Regulation 13.
8. During the course of the Commissioner's investigation, the PCNPA withdrew its reliance upon Regulation 12(5)(f) and sought to rely fully on its application of Regulation 13(1) of the EIR.
9. The following therefore analyses whether the PCNPA was able to withhold the requested information under Regulation 13(1) of the EIR.

Reasons for decision

Regulation 13 - personal information of third parties

10. The following analysis explains why the Commissioner is satisfied that the public authority was entitled to apply Regulation 13(1) of the EIR to withhold the information from disclosure.
11. 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.
12. 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 UK General Data Protection Regulation ('UK GDPR').
13. 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.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, the Commissioner must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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.

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

18. The Commissioner is satisfied that the withheld information is personal data. It relates to monitoring reports relating to the activities of identifiable individuals relating to their property on an approved development. The information relates to their property and their business on that property. As such, the withheld information provides insight into the private lives of the individuals, including details about the financial aspects of their business. A section of the withheld information also relates specifically to other, identifiable, third parties.
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.

²However, Regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

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.

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. The Commissioner is satisfied that the public has a legitimate interest in understanding more about how activities on an approved OPD in a national park is affecting the environment around it.

30. The Commissioner notes that the redacted monitoring reports were disclosed, and this disclosure meets many of the legitimate interests which the public would have over the development. The complainant, however, believes that the redacted sections should be disclosed, including financial information about the activities on the development.

"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".

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 is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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 complainant, and the wider public, have a legitimate interest in a disclosure of the requested information, and disclosure would be necessary in order to satisfy that interest. OPD developments are

generally developments which would not, otherwise be allowed other than in the areas specified. Planning Policy Wales defines One Planet Developments as a “development that through its low impact either enhances or does not significantly diminish environmental quality.” In this case, the relevant development has been approved within a national park.

38. Redacted copies of the monitoring reports have been disclosed, which meet some of the legitimate interests identified above. The complainant, however, argues that the redacted information, including the financial data, should be disclosed as the individuals have chosen to put this into the public domain by pursuing the OPD process. They argue that if the applicants had sought a permission other than via the OPD policy, they would not have been granted planning permission.
39. The complainant argues that some members of the wider community expressed concerns regarding the development. They argue that the individuals applied for an OPD planning permission, which entails oversight and monitoring by the PCNPA over a period of 5 years to ensure that the development meets, and continues to meet, the parameters set by this type of application. They argue that the planning process should be open and transparent as it is only in this way that the public can be fully aware of the impact of the development and the extent to which it is meeting OPD policy criteria. They consider that proper public participation in the planning process is significantly hindered without a full disclosure, and that it is only via full disclosure that they can have the information to decide whether they should be making further representations to the PCNPA in relation to the development.
40. The PCNPA explained, however, that there is no requirement that all details of its ongoing monitoring of the OPD development would be disclosed to the entire world in response to an FOI request. The individuals concerned would have a reasonable expectation that their information would not be disclosed to the public where it isn't necessary in order for the PCNPA to monitor that the requirements of the OPD are being met, and in order for it to be transparent about the impact the development is having on the environment.
41. The complainant argues that financial data relating to the development should be disclosed. They argue that a key tenet of the OPD policy requires financial criteria to be met, and consequently, that that information should be in the public domain. The PCNPA noted this argument but clarified that the financial data required to be published for OPD's relates to expected yields, prior the approval of the application, rather than actual yields once the development is in place.

42. Once the monitoring process is in place, the financial data becomes personal and confidential information as it relates to actual income and yields, rather than estimated/forecasted incomes. It argues that a disclosure of actual financial data is far more intrusive than estimates, and it is therefore unwarranted in terms of the individual's rights under the GDPR.
43. As a disclosure of actual financial yields is not required under the OPD, a disclosure of that information in response to an FOI request would not be expected by the individuals concerned. The individuals would be likely to consider it highly intrusive, and its disclosure would therefore cause distress and concern, particularly as there appears to be continued objections towards the development by some members of the community.
44. The Commissioner acknowledges that the public has a legitimate interest in knowing whether OPD developments in areas such as this are working, and whether they are causing any detrimental effects on the surrounding environment. However, the disclosure of the redacted monitoring reports addresses the public's legitimate interest in understanding what their activities on the land are, and how the surrounding area is being affected by these activities. A disclosure of the withheld information is not necessary in order to understand the effects the development is having on the surrounding environment.
45. The role of the PCNPA is to monitor the specifics of the development and ensure that the terms of the OPD are being met. A disclosure of the withheld information to the wider public would be unwarranted and unexpected by the individuals given that it is the PCNPA's role to monitor the development, not the public. The PCNPA highlighted that if a member of the public has concerns that the terms of the OPD are not being met, they are able to make a complaint to the PCNPA, and their concerns will be investigated.
46. Withholding the redacted information does not, therefore, prevent individuals from understanding the impact of the development upon the environment, nor does it prevent them making a complaint and pursuing the enforcement route if they believe that the development is breaching OPD requirements.
47. 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 information would not be lawful.

48. 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.

The Commissioner's view

49. The Commissioner has therefore decided that the PCNPA was entitled to withhold the information under Regulation 13(1), by way of Regulation 13(2A)(a).

Right of appeal

50. 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

51. 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.

52. 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

Ian Walley
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