

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 1 August 2019

Public Authority: Bristol City Council
Address: City Hall
College Green
Bristol
Avon
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested copies of responses to a public consultation exercise about plans to develop an accessible pathway through Stoke Park, Bristol. The council provided the majority of the information in an anonymised form but refused to provide free text responses on the basis that Regulation 13(1) applies (personal data).
2. The Commissioner's decision is that the council was correct to apply Regulation 13(1) to withhold some of the information. She also observes that some of the information is personal data relating to the requestor, and this information is therefore exempt under Regulation 5(3). However, the Commissioner has also concluded that the majority of the information is not personal data and therefore the council was not correct to apply Regulation 13 in order to withhold it.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which is not personal data, as outlined in the confidential annex to this decision notice.
4. The public authority 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. Following earlier correspondence, on 5 November 2018 the complainant wrote to the council and requested information in the following terms:

"I would like the complete consultation responses published/supplied in relation to the all-weather path being proposed for Stoke Park Estate by the council's Transport team. I previously requested this under FOI (ref CRN00192215) but was told that because the consultation didn't end until 4th November that the data wasn't currently held and so couldn't be provided. To be clear about what is being requested, I don't just want a summary of the results, or indicative statistics, but want each full response published/supplied. There is a considerable public interest in this and we need to ensure that whatever comments people have written are being taken into account in any planning application that the council proceeds with"

6. The council responded on 19 November 2019. It refused the request on the basis that the information was exempt as Regulation 13(1) applied (personal data of third parties). The response also confirmed that anonymised consultation response data had been published at www.travelwest.info/stokeparkestatepath.
7. The council sent the outcome of its internal review on 13 December 2018. It upheld its position that the information is exempt as Regulation 13(1) applied (personal data of third parties).

Scope of the case

8. The complainant contacted the Commissioner on 8 November 2019 to complain about the way his request for information had been handled.
9. Specifically, his complaint relates to the withholding of free text responses that were provided to the council during the course of the public consultation. He said that:

"I remain convinced that they could easily publish the public's free text responses to their public consultation without compromising anyone's personal identity, especially as the comments could be published in a standalone document with all other data removed. There may be instances where the comment that someone has written contains biographical information, but these can easily be redacted to remove it. For example, someone could say "I've been walking in the park for 20 years and...." That's biographical information but it doesn't reveal

anything about that person's identity when separated from other identify [sic] information."

10. The Commissioner therefore considers that the complaint is whether the council was correct to withhold the free text responses on the basis that Regulation 13(1) of the Act applies.

Reasons for decision

Background to the complaint

11. The council has proposed that an ancient carriageway through Stoke Park in Bristol is upgraded to an all-weather path. The council's website states that its reasons for wanting to upgrade the pathway are:

"The all-weather path would:

- *be more accessible so that more people can easily use the park, such as cyclists and those with mobility scooters or pushchairs*
- *give better access to the park for people living in the new housing being built in the area."*¹

12. However local press reports have reported that the pathway is controversial, to the extent that some of the public have proposed alternative routes for the development of the park².
13. A public consultation took place as regards the council's plans, and the responses were anonymised and published by the council and TravelWest. However the complainant wishes a copy of unredacted free text responses which responders were able to complete on the response form.
14. The council's response was to withhold the entirety of the free text responses from disclosure on the basis that that information is personal data. It argues that where comments have been made by responders this would allow individuals to be identified either directly, or together with other information already known to people or already in the public domain. It therefore considered that the responses would be able to be

¹ <https://www.bristol.gov.uk/museums-parks-sports-culture/accessible-path-proposal>

² <https://www.bristolpost.co.uk/news/bristol-news/new-accessible-path-planned-stoke-2096808>

associated with individuals. It therefore applied Regulation 13 to withhold the information.

Regulation 5(3) Personal data of the applicant

15. Regulation 5(1) provides that, subject to exceptions applying, a public authority that holds environmental information shall make it available on request.
16. However Regulation 5(3) provides that "*To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data*".
17. The Commissioner notes that the complainant is named in the free text responses on a small number of occasions in relation to work he has carried out regarding the path. His work in relation to this is, however, public knowledge.
18. His identify falls within the definition of personal data (outlined below), and so the information is personal data relating to him. As the applicant for the information, his details are therefore exempt from disclosure under Regulation 5(3), but should be considered for disclosure under his rights under the Data Protection Act 2018.

Regulation 13 personal data

19. 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.
20. In this case the relevant condition is contained in regulation 13(2A)(a)³. 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').
21. 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.

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

22. 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?

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

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

24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. 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.
26. 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.
27. The Commissioner was provided with copies of the free text responses to the proposal. The Commissioner is satisfied that the free text responses provide opinions of those completing the consultation document, and, in parts, describe biographical information about the individuals.
28. She is not however satisfied that *all* of the information is personal data. The responses, when separated from the remainder of the information provided, generally focus upon the desirability of the potential development of the path and issues surrounding its development and do not generally provide any information which would allow an individual to be identified.
29. The Commissioner has identified some sections within the responses where the information does amount to personal data. This is because that information relates to an individual and the individual is identifiable from that information. There are also some sections where individuals may be identifiable from their response if either people have personal knowledge of the individual or carried out a degree of research.
30. For instance, a statement by an individual that they are a cyclist, or that they regularly visit Stoke Park does not of itself provide any information which would allow that individual to be identified from any of the other

cyclists or visitors to the park. It would require additional information identifying the individual in order to be personal data. If the response indicated that the individual visited the park every Thursday morning with three children, or that they visit every weekday at around midday and use a mobility vehicle this raises the possibility that the writer could be identified from the response, at least with prior knowledge of the individual's habits, or following a little research. The Commissioner however considers that sections such as this are relatively few in number within the withheld information.

31. With these sections redacted, the Commissioner is satisfied that the remaining information becomes anonymised in accordance with her guidance in '*Anonymisation: Managing data protection risk code of practice*'.⁴ Whilst this guidance relates to the Data Protection Act 1998, the guidance within this document remains relevant to the current Act, albeit that authorities should take into account that the Data Protection Act 1998 has been succeeded by the Data Protection Act 2018 and the associated General Data Protection Regulation (GDPR) and there may be areas where this needs to be taken into account.
32. The Commissioner therefore considers that the council has failed to properly identify the relatively few areas of personal data held within the free text responses but has sought to apply the exemption in a blanket fashion to withhold the entirety of the requested information. She considers that this approach is not correct, and is not in accordance with the requirements of the exception in Regulation 13(1).
33. The remainder of the information is not personal data. It does not identify individuals directly and provides only limited information which the Commissioner considers could not be used to specifically identify individuals, even where other information is already within the public domain.

Conclusions for data which does not identify living individuals

34. The Commissioner has therefore decided that the majority of the information which the council has sought to withhold under Regulation 13 is not personal data for the purposes of the Act. The council was not correct to withhold this information under Regulation 13 of the EIR.
35. As no other exception has been applied the Commissioner considers that this information should be disclosed.

⁴ <https://ico.org.uk/media/1061/anonymisation-code.pdf>

36. However the Commissioner is satisfied that some sections of the information do fall within the definition of 'personal data' in section 3(2) of the DPA.
37. 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.
38. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

39. 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".

40. 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.
41. 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

42. 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.
43. 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"⁵.

⁵ 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".

44. 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.
45. 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

46. 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.
47. 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.
48. The withheld personal relates to individuals who responded to the council's options for developing the path. The path is likely to have a marked effect on the environment surrounding the path and one suggested route is to place the all-weather pathway over an ancient carriageway which currently runs through the park.

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. On its website, TravelWest states: "*We've undertaken a public consultation where a majority were in favour of the scheme. There will be a further public consultation as part of the planning application.*"
50. The council therefore uses its findings over the consultation exercise to support its suggested approach the park. This creates a stronger need for transparency in order for the public to be able to fully understand what this support is based upon.
51. The public therefore has a legitimate interest in the withheld data being disclosed in order for the council and Travel West to be transparent and accountable for its decisions and about its subsequent actions.

Is disclosure necessary?

52. '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.
53. With the Commissioner finding that the majority of the information is not personal data, she has required the disclosure of the majority of the free text responses on the basis that it does not identify relevant individuals and is not therefore personal data. As mentioned above, there are a few sentences or sections where she considers that comments made within the responses would allow individuals to be identified, but where these sections are redacted each response is still intelligible and the focus of the response (i.e., whether the writer supports the plan or not) is understandable.
54. The question for the Commissioner is, in taking this into account, is it necessary for the council to disclose the sections of personal data in order to meet the legitimate interests of the public which have been identified above?
55. The Commissioner considers that a disclosure of the information she has identified, taking into account the redactions of personal data, would meet the legitimate interests of the public. She therefore considers that it is not necessary for the areas of information which she had identified as personal data need to be disclosed in order to meet the legitimate interests.

56. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she 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

57. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception at regulation 13(1) is engaged for all of the withheld information.
58. However for the sections of personal data, the Commissioner has decided that the council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).
59. For the purposes of identifying the relevant information to be disclosed the Commissioner has provided the council with a confidential annex to this decision notice, highlighting the information she has decided falls within the scope of Regulation 13(1) and 5(3) in this case.

Regulation 12(4)(b)

60. The Commissioner notes that the council sought to argue that it could not be expected to go through each response redacting information as doing so would be manifestly unreasonable. It did not specifically apply Regulation 12(4)(b) but sought to argue the burden as one point for allowing it to withhold the free text responses as a whole, rather than redacting sections of personal data.
61. Regulation 12(4)(b) applies to request which are manifestly unreasonable. The exception can apply where a request is either vexatious or where responding to the request would create a disproportionate burden upon the authority. In this case the council's argument is that it would be manifestly unreasonable to expect it to go through each free text response, ascertain whether it contains personal data and redact those sections from the response.
62. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the 'appropriate limit'. This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) as £600 for central government departments is £600 and £450 for all other public authorities.

63. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
- Determining whether the information is held;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information; and
 - Extracting the information from a document containing it.
64. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
65. As stated, the council did not go so far as to apply Regulation 12(4)(b) in its response to the Commissioner. It suggested that it would be unreasonable to expect it to read through each response identifying and redacting personal data. As noted above however, the time taken to redact relevant information cannot be taken into account in any calculation as to whether section 12 of FOIA would apply.
66. The withheld information is held in one document, and there are only approximately 160 free text responses in total. None of the responses are overly large, and some are only a sentence or two in length.
67. Additionally, having carried out a similar exercise herself, the Commissioner is satisfied that the work necessary for this information would not be manifestly unreasonable, nor would it fall close to that level of burden.
68. The Commissioner's decision is therefore that Regulation 12(4)(b) would not be applicable to refuse the information.

Right of appeal

69. 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

70. 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.

71. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF