

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

**Date:** 28 July 2021

**Public Authority:** The Planning Inspectorate  
**Address:** 3H Hawk Wing  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

**Decision (including any steps ordered)**

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1. The complainant requested from the Planning Inspectorate ("the PI") information about two inspectors and their engagement in a planning appeal process. The PI disclosed part of the information requested, withheld some under regulation 13(1) of the EIR (personal information) and stated that it did not hold any further information, beyond what was already disclosed.
2. The Commissioner has exercised her discretion to consider regulation 13(5) of the EIR. Her decision is that regulation 13(5) is engaged and that the PI should have refused to confirm or deny whether it held the requested information.
3. The Commissioner also found that on the balance of probabilities, the PI disclosed all the other information it held within the scope of the request, at the time it was submitted.
4. The Commissioner does not require the PI to take any step as a result of this decision notice.

## Request and response

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5. On 2 February 2020, the complainant wrote to the PI and requested information in the following terms, from which the Commissioner has redacted names:

*"I request the dates that each planning inspector was assigned this appeal (start and end date) together with the time (in hours) each inspector spent on this appeal.*

*Also the last date that [Inspector 1] was working prior to his illness.*

*Was [Inspector 2] given any knowledge, written or verbal, that this appeal had previously been investigated by [Inspector 1]? If so, what?*

*Further, if any of the material generated by [Inspector 1] was forwarded to [Inspector 2] I request a copy of this material.*

*As [Inspector 1] had conducted an on-site inspection, which I understand to be the last requirement of his investigation (after reading all the information supplied) had [Inspector 1] produced a report, or part of a report?*

*If so did he indicate whether he would refuse or allow the appeal?*

*If his report or part of his report is available, I request a copy."*

6. The PI responded on 5 March 2020, advising that:
- Inspector 1 did not commence work on an appeal decision letter, before falling ill;
  - No material generated by [Inspector 1] was forwarded to [Inspector 2];
  - The appeal "start" letter was sent to the main parties on 24 May 2018;
  - [Inspector 1] conducted a site-visit on 18 July 2018;
  - [Inspector 2] conducted a site-visit on 4 October 2018;
  - [Inspector 2] was aware that [Inspector 1] had originally been allocated to the case and of his subsequent illness; and
  - The hours each inspector spent on this appeal were withheld as this information was considered to be their personal data.
7. Remaining dissatisfied with the response received the complainant wrote to the PI on 5 May 2020 and asked for an internal review to be conducted. In this communication she presented her arguments why she believed that the PI did not properly respond to her information request.

8. The PI sent to the complainant the outcome of its internal review on 29 May 2020. It provided the complainant with an explanation in relation to her concerns regarding the delays that occurred. In addition, the PI provided the complainant with a break-down of the time spent by [Inspector 1] working on the appeal concerned and his last day of his recorded work in relation to this case. The PI also provided the complainant with the recorded time [Inspector 2] spent working on the same case. However, the PI refused to disclose the dates that [Inspector 1] was absent through illness, because it was considered to be their personal data and the PI considered that this information is "exempt by virtue of s40 of the FOIA/Regulation 13 of the EIR".

### Scope of the case

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9. The complainant contacted the Commissioner on 29 July 2020 to complain about the way her requests for information had been handled. The complainant was not content with the reasoning of the PI for withholding the last date that [Inspector 1] worked before illness, relying on section 40(2) – (personal data). The complainant also disagreed with the PI when it stated that no further information was held in relation to the request for any material produced by [Inspector 1] in relation to this appeal that was passed to [Inspector 2]; and for any reports (in whole or in part) that [Inspector 1] may have produced following the on-site visit.
10. The complainant also attached two previous information requests (from 2018 and 2019) that she submitted to the PI and asked the Commissioner to consider them as well. However, the complainant was advised that due to the length of time that had passed since the last communication with the PI in relation to those two requests (in relation to the first request in 2018 and the second one in 2019), the Commissioner would not investigate the handling of those requests.
11. In the course of the Commissioner's investigation, the PI uncovered some additional information which was considered to fall within the scope of the request for any material produced by [Inspector 1] in relation to the appeal that was passed to [Inspector 2], and this additional information was disclosed to the complainant accordingly.
12. The Commissioner notes that in the outcome of its internal review the PI quotes provisions of both information access regimes: FOIA and the EIR. For the reasons set out below in the analysis part of this decision notice, the Commissioner has decided to consider the matters raised in this case under the EIR.
13. Therefore, the analysis that follows will focus on the following:

- whether all the information requested was environmental and whether the request should have been dealt with under the EIR;
- whether the PI should have relied on regulation 13(5) of the EIR by refusing to confirm or deny holding information in relation to the last day that [Inspector 1] worked prior to falling ill; and
- whether the PI identified all the information it held within the scope of the complainant's request, as per the requirements of regulation 5(1) of the EIR.

## Reasons for decision

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### Is the requested information environmental?

14. Regulation 2(1) of the EIR defines environmental information as being 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)...as well as measures or activities designed to protect those elements;*
- reports on the implementation of environmental legislation;*
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred*

*to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

15. The Commissioner considers that, as the information requested in this case is related to planning matters, it is highly likely to affect the elements and factors of the environment as defined in regulations 2(1)(a) and 2(1)(b). She is therefore satisfied that the information falls within the definition of environmental information in regulation 2(1)(c) of the EIR.

### **Regulation 13 - personal information**

16. The Commissioner has discretion to consider exceptions not cited by the public authority. Given her role as the data protection regulator, the Commissioner will in particular consider whether to exercise that discretion to consider any aspect of regulation 13 of the EIR where necessary to avoid any breach of data protection law.
17. As explained above, in its internal review, the PI cited regulation 13 of the EIR as its basis for withholding information requested by the complainant. Even though the PI did not specify which part of regulation 13 of the EIR it was relying on, by confirming that it held that information it indicated that it was relying on regulation 13(1) of the EIR.
18. However, the Commissioner's view is that, for the reasons given below, the wording of the request meant that confirming or denying whether the requested information was held would itself involve a disclosure of sensitive personal data. Consequently, her view is that regulation 13(5) of the EIR should have been cited. Regulation 13(5) removes the duty to confirm whether or not a public authority holds third party personal data if:
  - doing so would breach the data protection principles; or
  - it would contravene an objection to processing; or
  - the data subject would not be entitled to know if their own personal data was being processed.
19. The Commissioner is mindful that the complainant may argue that it is absurd to consider an exception from the duty to confirm or deny after the PI had confirmed that the information was held. Nonetheless, the approach of the Commissioner is that a public authority can cite further exceptions during her investigation, including exceptions from the duty to confirm or deny where it had previously stated whether the information was held. The Commissioner takes the same approach when exercising her discretion to consider exceptions not cited by the public authority, particularly where to do otherwise would perpetuate a data

protection breach, which may mean belatedly applying an exception from the duty to confirm or deny.

***Would giving the confirmation or denial involve a disclosure of personal data?***

20. On the issue of whether confirmation or denial in response to the complainant's request would involve a disclosure of personal data, the definition of personal data is given in section 3(2) of the Data Protection Act 2018 ('DPA'), which states that:

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. The requested information in this case is the last date of work of [Inspector 1] prior to falling ill. The Commissioner considers that confirming or denying that this information was held would effectively disclose information about the health of a specific individual. Clearly, the individual in this case is identifiable in relation to this information as a result of being named in the request and that this information in this context would relate to them. Therefore, she finds that the information disclosed through giving a confirmation or denial of whether information was held in response to this request would fall within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that confirming or denying whether the requested information is held would reveal personal data of an identifiable living individual does not automatically exclude the duty to confirm or deny holding the information requested under the EIR.
26. The second element of the test is to determine whether such a confirmation or denial would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

***Would confirmation or denial contravene principle (a)?***

27. Article 5(1)(a) of the UK General Data Protection Regulation ('UK GDPR') states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

28. 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 (or in this case) a public authority can only confirm whether or not it held the information requested, if to do so would be lawful, fair and transparent.
29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
30. In addition, if the requested personal data is special category data, in order for disclosure to be lawful and compliant with principle (a) an Article 9 condition for processing must also be fulfilled.

*Is the information requested special category data?*

31. Information relating to special category data is given special status in the UK GDPR.
32. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
33. Having considered the wording of the request and the circumstances of the case, the Commissioner finds that the information requested does constitute special category data. She has reached this conclusion on the basis that the information about the last date of work before falling ill can be considered as data concerning the health of a specific individual.
34. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure, by confirming or denying that the information is held, in response to an information request, if one of the stringent conditions of Article 9 can be met.
35. The Commissioner considers that the only conditions that could be relevant to a confirmation or denial under the EIR are conditions (a)

(explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

36. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the EIR request or that they have deliberately made this data public.
37. The Commissioner, therefore, concludes that as none of the conditions required for processing special category data are satisfied, there was no legal basis for confirming or denying that the requested information was held. Processing this special category data would therefore breach principle (a) and so this information is exempt under regulation 13(5).

### **Regulation 5(1) – Duty to make environmental information available on request**

38. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
39. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
40. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
41. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the*



*existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

42. As part of her investigation, the Commissioner wrote to the PI requesting submissions in respect of a number of questions relating to the complainant's concerns. The Commissioner's questions were focused on the PI's endeavours in providing the requested information to the complainant, its searches conducted in relation to the complainant's request, and whether any of the information falling within the scope of the requests was deleted or destroyed.
43. In its response to the Commissioner, the PI explained that when it contacted the inspectors involved and reviewed the complainant's appeal case file, [Inspector 1] was best placed to confirm whether they drafted any decision for the case and confirmed that they had not done so. [Inspector 2] confirmed that "*there was some information in the "internal correspondence" folder created by [Inspector 1] (which has now been disclosed to the requester)*" but no other information was exchanged between them.
44. The PI confirmed that the entire appeal case file was reviewed manually for any information created by [Inspector 1]. It added, that it has "disclosed the procedural decision made by [Inspector 1] that was recorded on the appeal file made available to [Inspector 2]".
45. The PI explained that if further information would have been held, it would have been recorded electronically or in hard copy. It stated that inspectors have personal choice how they draft decisions. However, the PI asserted that as it has reviewed the entire file and contacted both inspectors involved, it considers that all the information held in relation to this specific planning appeal, that was not subject to any exemption/exception has been now disclosed to the complainant.
46. The PI stated that it has no reason to believe that any information created for the purpose of this planning appeal, was deleted or destroyed, following the complainant's request for information.
47. The PI asserted that "*Theoretically, if [Inspector 1] had begun drafting his decision then any information created would have become redundant at the point the case was reassigned from them and any record would serve no business purpose.*" The PI based this statement on its retention policy which does not require its inspectors to retain information created

about a case which subsequently is reassigned to someone else. In this respect, the PI quoted the relevant part of its *Retention and Disposal Policy*, that states:

*"Information that is not needed to be kept as a record, or working copies of records, should also be reviewed and deleted once no longer required for that purpose."*

48. The PI confirmed that there is no business purpose to retain information that the complainant had assumed was held. *"There is no business reason for [Inspector 1] and [Inspector 2] to have communicated over any draft findings or decision. [Inspector 2] was independently provided with time to prepare, attend the site visit, and write the decision."*
49. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the PI, the information it disclosed, the PI's explanations as to why there is no further information held and the complainant's concerns.
50. Having considered the scope of the request, the Commissioner is satisfied that, although not in a timely fashion, the PI carried out necessary searches to identify the requested information that was held at the time of the request.
51. The Commissioner appreciates the complainant's concerns, however, in the absence of evidence to the contrary, the Commissioner is satisfied that the PI has provided the complainant with all of the relevant information which it held falling within the scope of the request.
52. Therefore, the Commissioner is of the view that, on the balance of probabilities, the PI does not hold further information within the scope of the request.

## Right of appeal

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53. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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 .....**

**Ben Tomes**  
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