

KIRKLEES METROPOLITAN COUNCIL**REFUSAL NOTICE****REGULATION 14 ENVIRONMENTAL INFORMATION REGULATIONS 2004****REQUEST FOR INFORMATION RELATING TO COLNE VALLEY FOOTPATH 144****1. Request**

The request was received on 23 October 2018 and is for:

Please provide information you may hold regarding the dumping of fly tipping on this public footpath which was reported in June 2018 and the council's subsequent decision to permit the burying of this waste beneath Footpath 144. This should include records of site visits, emails & telephone calls internally and with the owner of the waste. Also documentation which demonstrates the owner of the waste has transported and dealt with the waste in line with the statutory duty of care required under current legislation. In addition any documentation which demonstrates the councils decision making process in this case.

The Council does hold information falling within the scope requested and considers that it falls within the Environmental Information Regulations 2004 (EIR), but for the reasons set out below considers that one of the exceptions to disclosure within the EIR applies to a small amount of information held and that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The Council has had regard to the Information Commissioner's Guidance:

- The Guide to the Environmental Information Regulations
- Personal data of both the requester and others (section 40 FOIA and regulations (3) and 13 EIR) Freedom of Information Act, Environmental Information Regulations (July 2016)
- ICO guidance relating to the General Data Protection Regulation (GDPR)

2. Reasons

For information, applications made under the EIR are totally independent from any other process operated by a public authority and any disclosure of recorded information under these Regulations is deemed as a disclosure to the world and cannot be a disclosure of information to any single individual. This means that once information has been released under the Regulations it becomes a matter of public record and we have to make that information available to any member of the public who may wish to view it. This means that the Council must consider the consequences of disclosure to the world at large, and not just the impact of providing the material to the applicant and

as such must consider whether the information requested is suitable for disclosure to anyone and everyone.

Regulation 12(1) of the EIR provides that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies. This is subject to the requirement that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. There is a presumption in favour of the disclosure of environmental information.

The exception at Regulation 12(3) applies to information which is the personal data of a person other than the requester and provides that third party data can only be disclosed in accordance with Regulation 13.

Regulation 12(3) states:

Exceptions to the duty to disclose environmental information

12.—(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*

- (a) an exception to disclosure applies under paragraphs (4) or (5); and*
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 13 states:

Personal data

13.—(1) *To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998⁽¹⁾ (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that—

(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or

(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.

The Information Commissioner's Guidance "Personal information (section 40 and regulation 13)" states in relation to Regulation 13:

Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exceptions.

The exception for disclosure that would breach the data protection principles is set out in regulation 13(1) together with the condition in 13(2)(a)(i) or 13(2)(b). There is no additional public interest test.

Regulation 13(1) together with the condition in 13(2)(a)(ii) provides an exception if disclosure would breach section 10 of the DPA.

Regulation 13(1) together with regulation 13(3) provides an exception if the information would be exempt from the subject access right.

The exceptions for a breach of section 10 and information exempt from subject access require a public interest test. The information must be disclosed unless the public interest in not disclosing the information outweighs the public interest in disclosing it.

Under regulation 13(5), the public authority is not required to confirm or deny whether it holds information if to do so would breach data protection principles or a DPA section 10 notice, or if the information is exempt from the subject access right. There is no public interest test for the exceptions under regulation 13(5).

The Council notes that from 25 May 2018 the data protection legislation in the UK has changed and the current legislation is the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA2018), and as such the references to the Data Protection Act 1998 do not apply.

However, substantially similar provisions are made for the protection of personal data in the GDPR and the DPA2018.

Personal data of a third party is exempt from disclosure under Section 40(2) of the Freedom of Information Act 2000 if its disclosure to a member of the public would contravene any of the Data Protection Principles.

In this case, the personal data which the Council considers exempt are names and contact details of officers of the Council and names and contact details of members of the public.

The Council considers that disclosure would breach the first Data Protection Principle which requires personal data to be “*processed lawfully, fairly and in a transparent manner*”.

Article 5(1) of the GDPR says:

“1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness, transparency’)”

The Data Protection Act 2018 states, in relation to the first data protection principles:

86 The first data protection principle

(1) The first data protection principle is that the processing of personal data must be—

(a) lawful, and

(b) fair and transparent.

(2) The processing of personal data is lawful only if and to the extent that—

(a) at least one of the conditions in Schedule 9 is met, and

(b) in the case of sensitive processing, at least one of the conditions in Schedule 10 is also met.

(3) The Secretary of State may by regulations amend Schedule 10—

(a) by adding conditions;

(b) by omitting conditions added by regulations under paragraph (a).

(4) Regulations under subsection (3) are subject to the affirmative resolution procedure.

(5) In determining whether the processing of personal data is fair and transparent, regard is to be had to the method by which it is obtained.

(6) For the purposes of subsection (5), data is to be treated as obtained fairly and transparently if it consists of information obtained from a person who—

(a) is authorised by an enactment to supply it, or

(b) is required to supply it by an enactment or by an international obligation of the United Kingdom.

(7) In this section, “sensitive processing” means—

(a) the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership;

(b) the processing of genetic data for the purpose of uniquely identifying an individual;

(c) the processing of biometric data for the purpose of uniquely identifying an individual;

(d) the processing of data concerning health;

(e) the processing of data concerning an individual’s sex life or sexual orientation;

(f) the processing of personal data as to—

(i) the commission or alleged commission of an offence by an individual, or

(ii) proceedings for an offence committed or alleged to have been committed by an individual, the disposal of such proceedings or the sentence of a court in such proceedings.

The Schedule 9 conditions relevant to the first data protection principle are set out in Appendix 3 of this refusal notice.

The ICO's guidance on Article 5(1) of the GDPR states:

Processing of personal data must always be fair as well as lawful. If any aspect of your processing is unfair you will be in breach of this principle – even if you can show that you have a lawful basis for the processing.

In general, fairness means that you should only handle personal data in ways that people would reasonably expect and not use it in ways that have unjustified adverse effects on them. You need to stop and think not just about how you can use personal data, but also about whether you should.

Assessing whether you are processing information fairly depends partly on how you obtain it. In particular, if anyone is deceived or misled when the personal data is obtained, then this is unlikely to be fair.

In order to assess whether or not you are processing personal data fairly, you must consider more generally how it affects the interests of the people concerned – as a group and individually. If you have obtained and used the information fairly in relation to most of the people it relates to but unfairly in relation to one individual, there will still be a breach of this principle.

The requested information includes the names and contact details of individuals which is personal data for the purposes of the EIR.

Personal data is information which relates to living individuals who can be identified from the requested information or from a combination of that information and other information known to the data controller.

In terms of more junior members of staff at Kirklees Council, the Council considers that whilst senior managers and decision makers can reasonably expect that their identities are disclosed into the public domain, more junior members of staff would not.

In terms of members of the public, the Council considers that they would have no expectation that their personal information would be released into the public domain.

Personal data of a third party is exempt from disclosure under Reg 3(2)(a)(i) of the EIR if its disclosure to a member of the public would contravene any of the Data Protection Principles.

The conditions for processing personal data are based on either consent or the "necessity" to process personal information and the Council does not have consent of the individuals nor does it consider the disclosure of requested information to be necessary in this case.

The Council believes that disclosure of the personal information described above would be unfair to the individuals to whom it relates and is confidential, and that disclosure would give rise to breach of the first data protection principle, which states that personal data shall be processed lawfully, fairly and in a transparent manner.

The disclosure of the personal information is therefore refused.

3. Review

Under Regulation 11 of the EIR you have the right to make representations to the Council in respect of this Refusal Notice. If you wish to do so you should write, within 40 working days of receipt of this Refusal Notice, to The Monitoring Officer, 1st Floor, Civic Centre 3, Huddersfield HD1 2EY. Alternatively, you can send an email to: monitoring.officer@kirklees.gov.uk.

It would assist if any such request for a review were clearly marked as such and specifically referred to this refusal notice.

If you are not content with the outcome of any review you have the right under section 50 of the 2000 Act to apply to the Information Commissioner for a decision as to whether your request for information has been dealt with in accordance with the requirements of the Act. The Information Commissioner's website is at www.ico.org.uk and gives more information about the role and duties of the Commissioner. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Signed

Information Governance Team

21 November 2018