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Report of Chief Planning Officer

Report to Joint Plans Panel

Date: 26 July 2018

Subject: Publishing public representations on Public Access

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	☐ Yes	☒ No
Are there implications for equality and diversity and cohesion and integration?	☐ Yes	☒ No
Is the decision eligible for Call-In?	☐ Yes	☒ No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	☐ Yes	☒ No

Summary of main issues

1. The Data Protection Act 1998 has been replaced by the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 and came into force on 25 May 2018.

2. The new legislation significantly strengthens provisions on the protection of individuals' personal data; it has a wider definition of what is considered personal data and there are stricter rules for handling sensitive personal data. This has implications for any organisation or service which collects and stores personal data.

3. Under the Act, there is a lawful basis for Leeds planning services to collect personal data, however, a key principle of GDPR is that organisations process personal data securely by means of 'appropriate technical and organisational measures' and requires organisations to ensure the confidentiality and integrity of systems and services and the personal data processed within them. Work has been undertaken ensuring privacy statements informing the public how the service will securely store and use their personal data in relation to services they apply for, but in relation to public comments made on Public Access, the Planning Register, such assurances cannot be given for the current process.

4. A recent case investigated by the Information Commissioner's Office in 2017 into Basildon Council's planning department handling of personal information resulted in a £150,000 fine. This combined with the new legislation has led to planning services reviewing its processes in relation to publishing online comments made by the public on planning applications.

5. The service wishes to cease publishing comments online and instead make them available on request; the service is under no legal obligation to publish the comments online.

6. Whilst the service recognises that customers will not be immediately able to look at other people's comments, this does not in any way prejudice them from making their own personal comments. A process will be advertised and promoted so the public will be aware of the new changes and how to request comments on applications through the Council's Public Access website.

7. There will need to be significant changes to the process and current customer communications, so it is likely that this will take effect from autumn 2018.

8. **Recommendations**

8.1. Members are recommended to note the report and provide comments as appropriate.

1. Purpose of this report

1.1. This report is to inform members of the new process the service intends to implement in relation to online publishing of public comments made on planning applications as part of the notification process.

2. Background information

2.1. General Data Protection Regulation (GDPR) came in to force on 25th May 2018. The aim of GDPR is to ensure that personal data is stored with consent, for a specified purpose and for a duration that is in keeping with the reason for obtaining the data in the first place.

2.2. GDPR **r**equires a raft of control measures around processing of personal data**;** personal data is defined in the GDPR as any information relating to an person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.

2.3. Under GDPR there are six lawful basis in order to process personal data, these replace and mirror the previous requirement to satisfy one of the 'conditions for processing' under the Data Protection Act 1998. However, the GDPR places more emphasis on being accountable for and transparent about the lawful basis for processing. Planning services lawfully can rely on the new 'public task' basis for most processing and the service has been writing privacy notices which will be included on communications with individuals, which describe the lawful basis for processing their personal data.

2.4. The GDPR requires that there are suitable processes defined and in place in case of a data breach. Depending on the severity of the breach, the legal obligation to report a data breach (of identifiable or un-pseudonimised data) within 72 hours.

2.5. The GDPR also requires that services undertake an analysis of the risks presented by processing and use this to assess the appropriate level of security needed to put in place to ensure data security.

2.6. The maximum sanction for non-compliance with the GDPR is 20,000,000 Euros or up to 4% of annual worldwide turnover (based on figures from the preceding financial year), whichever is the greater.

3. Main issues

3.1. The implementation of GDPR has significant implications for planning services as the service collects and uses personal data as part of its day to day operations in a variety of processes. The public task test provides the legal basis which allows the use of data enabling the service to perform its statutory function and the processing is necessary for the service to perform a task in the public interest.

3.2. A key principle of GDPR is that organisations process personal data securely by means of 'appropriate technical and organisational measures' – this is the 'security principle'. Doing this requires considerations of risk analysis, organisational policies, and physical and technical measures and taking into account additional requirements about the security of processing information.

3.3. The strengthened GDPR provisions and a recent case in Basildon County Council has highlighted the importance of information governance and data security.

3.4. The case was in Basildon Borough Council who were ordered on 31st May 2017 by the Information Commissioner's Office (ICO) to pay a monetary penalty of £150,000 as it determined that the council had breached the Data Protection Act by publishing sensitive personal data contained within a planning comment in the public domain.

3.5. The ICO's investigation found that the council received a written statement in support of a householder's planning application for proposed works in a green belt. The statement contained sensitive personal data relating to a static traveller family who had been living on the site for many years. In particular, it referred to the family's disability requirements, including mental health issues, the names of all the family members, their ages and the location of their home.

3.6. The council published the statement in full on its online planning portal later that day without redacting the personal data. The ICO investigation found that this was due to failings in data protection procedures and training. The information was only removed on 4 September 2015 when the concerns came to light.

3.7. The Council argued that whilst it did redact personal data from planning documents – names address etc, (the same process as Leeds currently does) it was required, under planning law, to publish all planning comments in the public domain. This argument was rejected by the ICO which said planning regulations could not override people's fundamental privacy and data protection rights. The ICO also noted that publication of planning documents online was a choice and not a legal requirement.

3.8. In light of this case and the GDPR, planning services having reviewed current processes and polices considers that, as planning comments can currently be placed on the Council's online planning register, Public Access, without being vetted by the authority, the Council is at risk of a similar data breach.

3.9. Published Public Access comments do not include information such as email address and signatures etc, but have the potential to include such information in the main body of the representation. Comments are automatically available online as soon as a customer submits them and even if there was a way to place comments in a temporary off line position, it would not be possible due to current resource pressures for staff to vet every comment received. Comments received in hard copy have personal information, email and telephone numbers and signatures redacted, but the main body of the comment is not scrutinised and could include personal information. Again, there isn't the resource to vet each representation prior to publishing.

3.10. Therefore in order to mitigate the risk of disclosure of personal information, the service wishes to cease publishing any comments on Public Access and instead make comments available for public inspection on request (as required by planning law).

3.11. A process will be developed whereby customers are able to request to view comments on particular applications and these comments will then be made available, appropriately vetted and redacted on Public Access. This proposed solution is already operating successfully in other Local Planning Authorities. The change will be widely advertised and promoted as this represents a significant change to the current process and whilst it is accepted that this will prevent members of the public from immediately inspecting comments, the service believes this decision will not ultimately impact on the transparency of the planning process or adversely impact on the ability of an individual to make their own comment. The important issue is that the change in process will safeguard that only valid planning comments are made publicly available, and that these comments do not contain personal information or perhaps libelous comments.

3.12. The new process will be monitored to ensure they are no unintended consequences of making this change, however it is inarguable that the risk of a breach and the consequential fine and reputational damage will mean that these measures are the best solution to mitigate the risk of occurrence.

3.13. Once planning applications have been determined, there is no legal obligation to make comments available for public inspection and this is currently the practice in Leeds. In addition, once the time period for appeal to the Planning Inspectorate or judicial review has expired, both the Data Protection Act and GDPR necessitate that any personal information is destroyed. Nevertheless, if the authority does receive a request to review documents after determination, and if these are still held by the authority, this request will be considered under the Environmental Information Regulations and a response provided to the customer within 20 working days (with redactions to personal data being made as required).

4. Corporate Considerations

4.1. Consultation and Engagement

4.1.1. The Executive Member for Regeneration, Transport and Planning, Plans Panel Chairs Development Plan Panel Chair and the Joint Member Officer Working Group have all been consulted on this proposal. Whilst there is some concern about the change, it is accepted that the risk of a breach could be significant. Members have asked that a robust and clearly advertised process is put in place so that members of the public can easily request comments, in the interests of transparency.

4.2 Equality and Diversity / Cohesion and Integration

4.2.1 An equality impact assess men will be carried out for this change.

4.3 Council policies and City Priorities

4.3.1 The effective and expedient determination of planning applications contributes to the overall prosperity of the City and plays a key part in the regeneration and growth agenda.

4.4 Resources and value for money

4.4.1 Current resourcing levels and functionality of the Public Access software prevent the redaction and vetting of comments prior to placing online, putting the Council at risk of a breach and disclosure of personal information by publishing unvetted comments on Public Access. The proposed solution is one which can be met from existing resources.

4.5 Legal Implications, Access to Information and Call In

4.5.1 The measures identified ensure we are complying with legislation and good information governance.

4.6 Risk Management

4.6.1 There are risks of a breach of personal information under the current process. The measures outlined in the report seek to mitigate the potential risks.

5. Conclusions

5.1. The GDPR forms part of the data protection regime in the UK, together with the new Data Protection Act 2018. The strengthened rules around the storage and security of personal data has led the service to look at the risk of a breach in regards to comments made on Public Access, in light of the recent ICO ruling on Basildon Council. As a consequence the way to mitigate this risk is by no longer publishing comments online, but instead making them available on request. The council legally does not have to publish comments online

5.2. The new process does not prevent anyone from making comments about applications and therefore it does not reduce the important input of local people having their say about applications. Importantly, the change to the process will safeguard that only valid comments are made publically available and that these comments do not contact personal information or libelous information.

5.3. Work will be carried out to ensure that customers and members of the public are aware of the changes and a clear process is put in place to enable requests for information to be made easily.

6. Recommendation

6.1. Members are recommended to note the report and provide comments as appropriate.

7. Background documents