

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

Decision notice

Date: 19 August 2013

Public Authority: Barnet Homes
Address: 9th floor Barnet House
1255 High Road
Whetstone
London
N20 0EJ

Decision (including any steps ordered)

1. The complainant requested a copy of the agreement between Barnet Homes and a particular leaseholders association about a set of 'major works'. He also sought a schedule containing details of the agreed amount payable for each property represented by the association. Barnet Homes withheld the requested information on the basis of section 40 of FOIA, the personal data exemption. The Commissioner has concluded that the requested information is 'environmental information' as defined by the EIR and thus the request should have been considered under that access regime. However, the Commissioner is satisfied that the information is exempt from disclosure under the personal data exception contained at regulation 13(1) of the EIR.

Request and response

2. On 20 February 2013 the complainant wrote to Barnet Homes and requested information in the following terms:

'Please supply a copy of the signed agreement, between Barnet Homes and the [name redacted] Leaseholders Association, regarding the [redacted] major works. If not contained within the agreement itself, in addition please supply a schedule containing details of the agreed amount payable for each property represented by [Leaseholders Association].

(It is understood the agreement was drawn up, in or around August 2012).'

3. Barnet Homes responded on 22 March 2013 and explained that it considered the requested information to be exempt from disclosure on the basis of section 41 of the FOIA.
4. The complainant contacted Barnet Homes on the same day and asked for an internal review of this decision to be undertaken.
5. Barnet Homes informed him of the outcome of the internal review on 19 April 2013. The review concluded that the requested information was exempt from disclosure on the basis of section 40(2) of FOIA, the personal data exemption. No mention was made in the review of the exemption contained at section 41 of FOIA.

Scope of the case

6. The complainant contacted the Commissioner 24 April 2013 in order to complain about Barnet Homes' decision to withhold the information he had requested on the basis of section 40(2) of FOIA.
7. Having reviewed the content of the requested information the Commissioner is of the opinion that the information constitutes environmental information as defined by the EIR. Therefore, this request should have been considered under that access regime rather than FOIA. However, regulation 13(1) of the EIR contains an exception that, for the purposes of this case, operates in the same way as the exemption contained at section 40(2) of FOIA. Consequently, the Commissioner has considered whether disclosure of the requested information is exempt from disclosure on the basis of regulation 13(1) of the EIR.

8. For clarity the requested information is in two parts, firstly, an overarching agreement between various members of the Leaseholders Association in question and Barnet Homes entitled 'Major Works Service Charge Agreement' and, secondly, letters to each leaseholder with the association specifying their individual charges under the terms of the agreement.

Reasons for decision

The application of the EIR

9. As stated above, in the Commissioner's opinion Barnet Homes should have considered this request under the EIR rather than under FOIA given that the requested information constitutes 'environmental information' as defined by the EIR.
10. Regulation 2(1) of the EIR sets out a number of different definitions of environmental information. The key definitions relevant to this case are those contained at regulations 2(1)(a) and (c):

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

 - (a) *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;*
 - (c) *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) and (b) as well as measures or activities designed to protect those elements;*
11. The information relates to the 'Major Works' that were undertaken in relation to the properties in question. In the Commissioner's opinion the requested information falls within the definition of regulation 2(1)(c) as information on activity, namely the major works in question, likely to affect the elements of the landscape set out in regulation 2(1)(a).

Regulation 13 – personal data

12. Regulation 13(1) states that to the extent that information requested includes personal data of which the applicant is not the data subject and the disclosure of the information to a member of the public would contravene any of the data protection principles set out in the Data Protection Act (DPA), a public authority shall not disclose the personal data.
13. Barnet Homes argued that disclosure of the requested information would be unfair and thus breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*

Is the withheld information 'personal data'?

14. Clearly then for regulation 13(1) to be applicable, the withheld information therefore has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

15. The complainant argued that the withheld information is not personal data. Rather, he argued that the information relates to the property rather than to the person. By way of example, he suggested that if he were to purchase any of the properties mentioned in the agreement he would be entitled to know if there were any outstanding liabilities in respect of the major works charge.
16. Barnet Homes simply argued that the withheld information was 'personal and private'.

17. The Commissioner is satisfied that all of the withheld information constitutes personal data of the various leaseholders for two reasons: Firstly, the individual leaseholders are clearly identifiable from the information in question as it contains their names and address. (The Commissioner understands that one of the properties is owned by a named company rather than an individual. However, the Commissioner understands that the company in question is owned by a sole trader. In such circumstances the Commissioner believes that information about the business of a sole trader can be considered as personal data of the business owner as information about the business will also be information about the sole trader.)
18. Secondly, in terms of whether the information 'relates to' the leaseholders the Commissioner has taken into account the approach set out in his guidance 'Determining what is personal data'. This guidance explains that if data is used to influence or inform actions or decisions about an identifiable individual then the information will be personal data. The guidance actually discusses data relating to particular property:

'Context is important here. Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual. However, data about a house will not, by itself, be personal data.'
19. Furthermore, the guidance explains that data used by an organisation to determine something about an individual's financial liabilities - the level of a resident's electricity bill is the example in the guidance - then that information will be that resident's personal data.¹
20. Consequently, in the circumstances of this case the Commissioner is satisfied that the withheld information 'relates to' each of the leaseholders who form part of the residents association because the information is used by Barnet Homes to determine their individual liability in respect of the major works undertaken. Therefore, whilst the Commissioner agrees with the complainant that the requested information relates to each of the leaseholders' *properties*, he is the view that it also clearly relates to each of the individual *leaseholders* and thus is their personal data.

1

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx - See pages 12 to 14.

Would disclosure of the withheld information breach the data protection principles?

21. Having found the withheld information constitutes personal data, the Commissioner must consider whether disclosure of this information would breach the first data protection principle.
22. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
23. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

24. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
25. Barnet Homes argued that the agreement between it and the various members of the leaseholders association had been signed on the understanding that the contents of the agreement would be kept confidential by all parties. Barnet Homes referred the Commissioner to a statement in the agreement that read 'I understand that the terms of this agreement must remain confidential between the parties'. It therefore argued that the leaseholders had a clear expectation that the withheld information would not be disclosed.
26. In light of the confidentiality clause contained in the agreement, and reiterated in the letters sent to each leaseholder, the Commissioner is satisfied that the leaseholders would have a reasonable expectation – and indeed weighty expectation - that the details of the agreement which they reached with Barnet Homes would not be disclosed.
27. In terms of the consequences of disclosure, the Commissioner recognises the complainant's point of view that if an individual were purchasing any of these properties they would be able to access details of any outstanding liabilities relating to the property in question. However, in the Commissioner's view disclosure of such information about individual properties to a potential purchaser is distinct from disclosure of the liabilities of each of the 17 leaseholders under the EIR which is taken to be disclosure to the world. In the Commissioner's opinion revealing to the world at large how much individual leaseholders were liable for in relation to their lease would result in an infringement into each individual's privacy given that such information would reveal something about their financial position. In terms of the legitimate interests in disclosure, the Commissioner accepts that other leaseholders who are not members of the association in question may find the withheld information useful with regard to their own discussions with Barnet Homes about their liabilities under the major works programme, but beyond that specific and particular interest, the Commissioner is not aware of any broader legitimate reasons why the withheld information should be disclosed.
28. In conclusion, the Commissioner is satisfied that disclosure of the withheld information would be unfair and thus breach the first data protection principle primarily because of the reasonable expectations of

the leaseholders that such information would not be disclosed, but also because of the fact that disclosure to the world at large would reveal something about the financial position of each of the individual leaseholders. Moreover, the Commissioner does not believe that there are significant or compelling legitimate interests in disclosure of this information under the EIR sufficient to ensure that disclosure would still be fair. The requested information is therefore exempt from disclosure on the basis of regulation 13(1) of the EIR.

Right of appeal

29. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.
31. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF