

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

**Date:** 9 August 2017

**Public Authority:** London Borough of Lambeth  
**Address:** Olive Morris House  
18 Brixton Hill  
London  
SW2 1RL

**Decision (including any steps ordered)**

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1. The complainant requested notes of a meeting between his neighbour and the London Borough of Lambeth in relation an extension being built at the neighbour's house. The London Borough of Lambeth initially refused the request under section 40(5)(b)(i) of the Freedom of Information Act 2000 (the Act). It stated that any held information would be personal data, but neither confirmed nor denied whether it held such information.
2. The London Borough of Lambeth amended its position at internal review to refuse the request under the EIR rather than the Act, as the information – if held – would be environmental as per the EIR. The basis of the refusal remained the same, so the London Borough of Lambeth cited the equivalent exception in the EIR for section 40(5)(b)(i), which is regulation 13(5)(a).
3. The Commissioner's decision is that the London Borough of Lambeth incorrectly refused the request on the basis of regulation 13(5)(a) of the EIR.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a new response to the complainant which does not refuse to comply with the request on the basis of regulation 13(5)(a).

5. 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

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6. On 9 November 2016, the complainant wrote to the London Borough of Lambeth and requested information in the following terms:

*"I am therefore citing the Freedom of Information act to request that you share the notes of and the actions agreed at your meeting with [complainant's neighbour] where the details of how his extension joins to mine were discussed."*

7. The London Borough of Lambeth responded on 7 December 2016. It refused the request under section 40(5)(b)(i) of the Act, on the basis that confirming or denying whether it holds the requested information would reveal personal data in contravention of the first data protection principle.
8. Following an internal review the London Borough of Lambeth wrote to the complainant on 2 February 2017. It stated that the request was for environmental information and so should have been handled under the provisions of the EIR rather than the Act. The internal review upheld the refusal of the request, but amended the refusal so that it was on the basis of regulation 13(5)(a) of the EIR rather than section 40(5)(b)(i) of the Act.

## Background to case

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9. The complainant has a dispute with his neighbour over an extension. The Council provided the Commissioner with a chronology of events that show matters have been ongoing since the neighbour was granted planning permission in April 2011.
10. It is evident from reading through the Council's version of events that at points the complainant has identified instances where his neighbour has not fully complied with the planning permission or with building controls at every stage of the construction of the extension.

## Scope of the case

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11. The complainant contacted the Commissioner on 7 January 2017 to complain about the way his request for information had been handled. At this stage, the London Borough of Lambeth had not issued its internal review of the complainant's request.
12. Following the outcome of the internal review the complainant confirmed he wished to appeal against the refusal of his request under regulation 13(5)(a) of the EIR.
13. The Commissioner considers the scope of the case to be whether the London Borough of Lambeth is correct to refuse the request under regulation 13(5)(a) of the EIR.

## Is the information environmental?

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14. Environmental information is defined at regulation 2 of the EIR. The relevant section for this decision is as follows:

*"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;*
  - (b) 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);*
  - (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;*
15. The complainant's request asks for notes relating to an extension being built on his neighbour's property. The extension constructed by the complainant's neighbour would have an impact on the living environment, and building control measures are in place to determine

what impact is permitted. The Commissioner sees such matters as an activity that would affect the state of the elements. As such, she considers the information to be environmental as per regulation 2(c) of the EIR.

## Reasons for decision

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16. Regulation 13(5)(a) of the EIR states that:

*(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;*

17. Regulation 13(5)(a) allows public authorities to refuse requests where either confirming or denying whether the requested information is held would disclose personal data, and that disclosure would contravene one of the data protection principles.

18. The London Borough of Lambeth's position is that issuing a confirmation or denial in response to the request would contravene the first data protection principle. This states:

*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.*

19. In order to decide whether the London Borough of Lambeth has correctly applied regulation 13(5)(a) the Commissioner will:

- determine whether the information requested would – if held – constitute the personal data of third parties.
- determine whether confirming or denying whether the information requested is held would contravene the first data protection principle.

Does the request encompass third party personal data?

20. Personal data is defined in the Data Protection Act 1998 (DPA) as follows:

*“personal data” means 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 intentions of the data controller or any other person in respect of the individual;*

21. The complainant named his neighbour in the request, so if information was held it would refer to the neighbour. Further, as the request is for information relating to the neighbour's extension it would likely – if held – contain the neighbour's address. The Commissioner considers that from this information the neighbour could be identified and so can be seen as personal data.

22. Were the Council to deny relevant information is held then this would still constitute the release of personal data. It would confirm something about the neighbour – ie that information as to any such meeting involving him is not held.

Would confirmation or denial of whether the information requested is held contravene the first data protection principle?

23. The first data protection principle states that personal data shall be processed fairly and lawfully, and shall not be processed unless at least one of the conditions in Schedule 2 is met.

24. In order to determine whether confirmation or denial of whether the information requested is held would contravene the first data protection principle the Commissioner shall consider:

- nature of the requested information
- reasonable expectations of data subjects
- consequences of confirming or denying whether information is held
- legitimate interests in confirming or denying whether information is held

*Nature of the requested information*

25. Information that would meet the scope of the request would be notes or other relevant documents discussing action points from meetings between the London Borough of Lambeth and the complainant's neighbour held to discuss the extension.
26. Confirmation or denial as to whether information that would fall within the scope of the request is held does not appear to the Commissioner to disclose information which in itself would be particularly confidential or deeply private in nature. In order for order regulation 13(5)(a) to be applied it would need to be shown that the context in which the request was made meant that strict measures were required to prevent any details being released into the public domain.

*Reasonable expectation of data subjects*

27. The London Borough of Lambeth stated to the Commissioner that it did not consider any individual would reasonably expect to have it confirmed or denied whether their personal data was held in instances where there is a dispute between two neighbours over the construction of an extension.
28. The Commissioner disagrees; as noted above, confirmation or denial in the circumstances of this case is not seen as being confidential or deeply private. Whilst it is noted there is a dispute between the parties the nature of the dispute is a fairly common one. Relations between the neighbours might be strained, but from the information provided there is no indication they are in any sort of state where the Council would be required to take drastic action to prevent potential harm or need the involvement of the police.
29. In the Commissioner's view any reasonable individual would expect that a public authority should confirm or deny whether personal data was held in relation to a meeting about an extension unless there were suitable grounds not to. Meetings between a planning authority and an individual carrying out building work are commonplace and do not carry an inherent confirmation that anything improper has occurred.
30. Furthermore, it is also evident that Councils routinely publish information about buildings beyond what is required for planning applications.<sup>1</sup> There is a well-established precedent for transparency

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<sup>1</sup> As an example please see – <https://www.newcastle.gov.uk/planning-and-buildings/building-control/building-control-public-access-portal>

over the Council's involvement in building matters such as the extension. The Commissioner considers that this supports the argument that there is a reasonable expectation that information of the sort requested does not require a neither confirm nor deny response unless there are specific circumstances to justify it being used.

31. In order for the Commissioner to accept that an individual would have a reasonable expectation that their personal data in relation to a building matter would not be disclosed there would need to be a detailed and compelling argument explaining why. The Council has given detail of the disagreement but in the Commissioner's view the complainant has a valid concern over the construction of the extension and has pointed out to the Council that his neighbour has not always complied with the planning permission that was obtained, or complied with building controls. The Commissioner does not consider that the context in which the request was made would give complainant's neighbour a reasonable expectation that the Council should neither confirm nor deny whether it holds his personal data in relation to the extension.

*Consequences of confirming or denying whether information is held*

32. The Commissioner has considered whether – assuming relevant information is held - the London Borough of Lambeth would disclose that the complainant's neighbour had breached building controls by confirming information was held. In her view, the Commissioner does not consider that this would occur. The wording of the request asks for information about a meeting between the complainant's neighbour and the Council in relation to an extension. The Council's submissions show that meetings can be arranged to discuss building projects and are no guarantee that building controls have been breached. Were the Council to confirm it held information of this nature to a requester it could not be seen as confirmation that building controls had not been complied with.
33. In its submissions to the Commissioner the London Borough of Lambeth cited the following paragraph from a previous decision notice (its emphasis):

*The Commissioner is of the view that there is also going to be some public interest in knowing what information is held by a public authority when it comes to planning matters. Knowing this may better inform the public and also encourage further engagement in the processes involved. However, the Commissioner recognises that, when it comes to personal data of individuals, there is an expectation that a public*

authority will be mindful to the consequences that could result in the release or even, as in this case, confirmation as to whether such information is held or not.<sup>2</sup>

34. The Commissioner is aware of this decision notice, and provided a copy to the London Borough of Lambeth as an example of where a neither confirm nor deny response is appropriate, along with the following explanation:

*"The Commissioner notes that she upheld Bristol City Council's refusal of the request due to very specific circumstances regarding one of the data subjects that came within the scope of the request. The details for this were contained in the Commissioner's confidential annex.*

*It is not standard practice for the Commissioner to support a neither confirm nor deny response in relation to planning meetings. The Commissioner would expect to see strong arguments to support why the Council issued a NCND response, such as the meeting being the result of legal proceedings for any offence committed or alleged to have been committed by a data subject that comes within the scope of the request."*

35. The London Borough of Lambeth failed to provide any such argument as to why the consequences of disclosing whether any relevant information was held would be unfair. It referred to a "dispute" between the complainant and his neighbour, but did not provide any detail on why this supported neither confirm nor deny whether information was held.
36. The Commissioner asked for details about the dispute between the two parties. The Council provided an explanation of the context and a chronology of events. Having looked through these the Commissioner does not consider that they give sufficient justification for a neither confirm nor deny response. Whilst the Commissioner cannot go into detail why, the Bristol City Council decision contained circumstances which compelled Bristol City Council to take steps to prevent the possibility of an individual's personal data being disclosed. There are not any such circumstances in this current case. The Council stated that the complainant is of the view that his neighbour has not always complied with building controls or the agreed planning application, but this is confirmed by the Council so seems justified. Whilst it is clear there is a protracted disagreement about the extension between the complainant

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1432852/fs\\_50574808.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1432852/fs_50574808.pdf) see paragraph 43



and his neighbour there is nothing to suggest that it would be unfair to confirm or deny whether the neighbour's personal data is held because of the consequences in doing so.

37. It is assumed that the neighbour would rather not have information relating to his extension disclosed. However, confirmation or denial whether the information is held only reveals whether the Council has notes of a meeting between it and the neighbour in relation to the extension. Should information be held and it is exempt from disclosure then it can be withheld under the relevant exception.
38. The Commissioner cannot conceive of any unjustified adverse consequences resulting from disclosing whether any relevant information was held. No sensitive or confidential information would be revealed – unlike in the case in the Bristol City Council decision – and the Commissioner's view is that the potential consequences are negligible. The London Borough of Lambeth alluded to a disagreement between the complainant and his neighbour but this is not sufficient to support a neither confirm nor deny response.

*Legitimate interests in confirming or denying whether information is held*

39. Regulation 13(5)(a) is designed to ensure that a standard confirmation or denial response does not unfairly reveal personal data. It should be reserved for those situations only and improper usage undermines transparency in a public authority's records.
40. There is a legitimate interest in requesters knowing whether information is held; and if a request is being refused it is important that a requester knows why, so that they may make an informed decision on whether they wish to challenge the refusal. A neither confirm nor deny response prevents a requester from knowing these facts and inhibits their ability to know whether to appeal against the handling of their request. There is a legitimate interest in such a refusal being used only where it would be unfair to confirm or deny whether information is held.
41. The Commissioner acknowledges that the dispute is largely between the complainant and his neighbour, but it is clear reading through the Council's submissions that this does impact upon other residents in the surrounding area. The houses concerned are terraces which have been split into blocks of flats; beyond the complainant and the neighbour building the extension, there are two further dwellings in the same house. The Council's submissions also explain that the complainant's neighbour was recommended to serve a party wall notice as he was building on the party wall line. Therefore whilst this is a private dispute for the complainant, it does have implications that reach beyond his own interests, such as those of his other neighbours who have been impacted by the construction of the extension. It is also entirely feasible

these other individuals have concerns over whether the extension has been made with strict adherence to the planning permission and building control, even if the Council has not made this point to the Commissioner.

42. Further, there is a legitimate interest in there being more information available about the Council's involvement with the neighbour's extension as it would provide transparency over what actions have occurred. This would offer a better understanding to the affected residents about what involvement the Council has had in the extension.

#### Commissioner's decision

43. As it has been established, the neither confirm nor deny response must be used in situations where a standard response is inappropriate. The Commissioner has not been provided with any argument that would justify such a refusal.
44. The Commissioner considers that the circumstances of this matter are such that there are no unjustified adverse consequences in confirming whether personal data is held. Further, she would expect any reasonable individual to know that a public authority might confirm whether information of this nature is held unless the context gave cause to adopt a neither confirm nor deny response, one which is not evident in this situation. These factors, combined with the evident legitimate interests in a confirm or deny response being used where appropriate, mean that the Commissioner's decision is that it would not be unfair to the complainant's neighbour for the London Borough of Lambeth to confirm or deny whether it holds relevant information.
45. The Commissioner's decision is that the London Borough of Lambeth has incorrectly applied regulation 13(5)(a) of the EIR. The Commissioner requires the London Borough of Lambeth to issue a new response to the complainant which does not refuse the request under regulation 13(5)(a).

## Right of appeal

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46. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

47. 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.
48. 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  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**