

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 October 2019

Public Authority: Historic England

Address: 4th Floor
Cannon Bridge House
25 Dowgate Hill
London
EC4R 2YA

Decision (including any steps ordered)

1. The complainant has requested to know the person or persons who submitted a listing application for a specific property. Historic England has refused to supply the requested information in reliance on Regulation 12(3) and 13(1) (third party personal data) of the EIR.
2. The Commissioner's decision is that Historic England is entitled to withhold the information requested by the complainant in reliance on Regulation 12(3) and 13(1) of the EIR.
3. The Commissioner does not require Historic England to take any further steps.

Request and response

4. On 18 July 2019, the complainant wrote to Historic England and requested information in the following terms:

"Under the freedom of information act I would like to know who sent in the initial notification to make [address redacted] listed?"
5. Historic England responded on 18 July 2019. It stated that the information the complainant is seeking is third party personal data and is exempt from disclosure under Regulation 12(3) of the Environmental Information Regulations (EIR).
6. Following an internal review Historic England wrote to the complainant on 1 August 2019. It stated that information relating to the identity of a private individual is third party personal data. It upheld its reliance on Regulation 12(3) and Regulation 13(1) in refusing the request.

Scope of the case

7. The complainant contacted the Commissioner on 29 August 2019 to complain about the way her request for information had been handled. The complainant stated that, as the owner of the property in the listing application, they should be able to know the identity of the person or persons who submitted the listing application.
8. The Commissioner considers the scope of her investigation to be to determine whether the Council has handled the complainant's request in accordance with the EIR, and specifically, to determine whether the Council is entitled to refuse the request in reliance on Regulation 12(3) and, by extension, Regulation 13 of the EIR.
9. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case without seeking detailed arguments from Historic England.

Reasons for decision

Is the requested information environmental?

10. Historic England dealt with the complainant's request under the provisions of the EIR on the grounds that the requested information

satisfies the definition of environmental information provided by Regulation 2(1)¹ of the EIR.

11. Specifically, regulation 2(1)(c) defines environmental information as being information on:

"(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"

12. The requested information in this case relates to an application for a historic structure to be considered for certain forms of protection under the listing system (such as protection against demolition or major alteration). The application is therefore part of a process which can be considered to be an administrative measure likely to affect the elements and factors of the environment referred to in regulation 2(1)(a) and (b) of the EIR. For this reason the Commissioner considers the requested information to fall within the definition of environmental information at regulation 2(1)(c) of the EIR.
13. The Commissioner is therefore satisfied that Historic England considered the request under the correct access regime, and has gone on to examine whether Historic England was correct to rely on regulations 12(3) and 13(1).

Regulation 12(3) / regulation 13(1) – third party personal data

14. The complainant in this case states that, whilst she is the owner of the building in question, she did not submit the listing application. The complainant is thus seeking to know the name of the applicant who submitted the listing application specific to her property.
15. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
16. In this case the relevant condition is contained in regulation 13(2A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

²

<http://www.legislation.gov.uk/ukpga/2018/12/schedule/19/part/2/crossheading/environmental-information-regulations-2004-si-20043391/2018-07-23>

processing of personal data (“the DP principles”), as set out in Article 5 of the General Data Protection Regulation (“GDPR”).

17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“DPA”). If it is not personal data then regulation 13 of the EIR cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

19. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

20. The two main elements of personal data are that that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.
23. In the circumstances of this case, the Commissioner is satisfied that the information (the name of the person or persons who filled out a listing application for a specific property) clearly relates to a third party. She is satisfied that this information both relates to and identifies the third party concerned. This information therefore falls within the definition of “personal data” in section 3(2) of the DPA.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that:

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

27. 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 if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³

30. In considering the application of Article 6(1)(f) in the context of a request for information under EIR it is necessary to consider the following three-part test:
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied

Legitimate interests

32. In considering any legitimate interest(s) in disclosing the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

³ <http://www.privacy-regulation.eu/en/article-6-lawfulness-of-processing-GDPR.htm>

33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The complainant argued that, as the owner of the property in question, they had a right to access information relating to the identity of the applicant/applicants who submitted the listing application. For this reason the complainant considers there to be a legitimate interest in disclosing this information under the EIR.

Is disclosure necessary?

35. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
36. In this case, the data subject/subjects is the person(s) who submitted a listing application for a specific address. The complainant is therefore requesting the personal information of another identifiable living individual.
37. The Commissioner considers the data subject/subjects submitted this listing application in a private capacity with a legitimate expectation that their identity/identities would not be released to the wider general public. The Commissioner considers that the data subjects in this case are unlikely to expect that this information would be disclosed into the public domain.
38. The Commissioner accepts Historic England's argument that they have an established policy not to release the names of individuals who make listing applications. She also agrees with Historic England's arguments that disclosure in this case is not necessary in the interests of the wider public and that releasing this information would likely inhibit the rights, freedoms and legitimate interests of the person or persons concerned.
39. That being said, the Commissioner acknowledges that the complainant is the owner of the property in question and thus has a legitimate interest in knowing who made the listing application specific to her property.
40. However, the Commissioner notes that any legitimate interest the complainant may have in the requested information is largely specific to them as the property owner. This is not to say that the legitimate interests of the complainant are trivial, but the Commissioner struggles to see any compelling legitimate interest that would necessitate

publishing the name of the person or persons who made the listing application. She is not persuaded that the legitimate interests of the complainant override the interests or fundamental rights and freedoms of the data subject/subjects.

41. As the Commissioner has decided that disclosure in this case is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test. Because disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
42. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1) of the EIR.

Right of appeal

43. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.

45. 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.....

Terna Waya
Senior Case Officer
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Wycliffe House
Water Lane
Wilmslow
Cheshire
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