

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

Date: 20 July 2022

Public Authority: London Borough of Redbridge
Address: Lynton House
255-259 High Road
Ilford
IG1 1NY

Decision (including any steps ordered)

1. The complainant requested documentation evidencing an application to amend planning permission in respect of a particular property, including any documentation relating to any planning enforcement process. The London Borough of Redbridge ("the Council") initially cited Sections 40 and 41 of FOIA before finally settling on Regulations 12(5)(d) (confidentiality of proceedings), 12(5)(f) (voluntary supply) and 13 (personal data) of the EIR to withhold the requested information.
2. The Commissioner's decision is that the Council has not demonstrated that either Regulation 12(5)(d) or 12(5)(f) of the EIR is engaged and is therefore not entitled to rely on those exceptions.
3. In relation to Regulation 13 of the EIR, the Commissioner only finds that this is engaged in respect of some of the withheld information.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, identified in paragraph 21 as being in scope. The Council may redact names, email addresses and job titles.
5. The Council 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

6. On 27 April 2021, the complainant made the following request for information to the Council:

"Any documentation evidencing an application to amend the planning permission the council granted for building works at [address], as per the plans shown on the planning section of the Redbridge council website (reference [redacted]).

Any documentation evidencing the decision process of the council relating to amendments of the planning permission granted for building works at [address], as per the plans shown on the planning section of the Redbridge council website (reference [redacted]).

Any communication between the owners of [address] and any representatives of the council who are or have been involved with planning, building control, or planning enforcement since 5 February 2020 (the date the original application for this project was made).

Any communication between people employed by the council who are or have been involved with planning, building control, or planning enforcement, related to the property at [address], since 5 February 2020.

Any communication between people employed by the council who are or have been involved with planning, building control, or planning enforcement, related to enforcement enquiry reference number E0467/20, since 18 August 2020.

Any correspondence between [Officer 1], [Officer 2], and [Officer 3], all working for Redbridge council, relating to enforcement enquiry reference number [redacted], since 18 August 2020."

7. The Council responded on 27 May 2021 confirming that the relevant information existed but explained that, due to its nature, the query raised by the applicant had not been dealt with as a formal amendment to planning permission. The Council provided the complainant with a summary of the query raised by the applicant and explained that the Council had concluded the changes were not significantly harmful to warrant enforcement action and therefore the case had been closed as "not expedient".

8. The complainant queried this response as not being an appropriate response to a Freedom of Information request and asked for a formal response.
9. On 18 June 2021, the Council provided a formal response citing section 40(2) of FOIA (personal data of third parties) and section 41 (confidentiality) as its bases for withholding the information.
10. The Council provided an internal review on 26 July 2021 in which it maintained its position under FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 31 August 2021 to complain about the way their request for information had been handled.
12. The Commissioner commenced his investigation on 21 March 2022 with a letter to the Council explaining that the Council was relying on the incorrect access regime. He invited the Council to reconsider the request under the EIR and provide submissions setting out which exceptions in the EIR it wished to rely on to withhold information.
13. On 19 May 2022, the Council issued a fresh response to the complainant. The Council explained that its initial response had been erroneously dealt with under FOIA and that that it was now relying on Regulations 12(5)(d) (confidentiality of proceedings), 12(5)(f) (voluntary supply) and 13 (personal data) of the EIR to withhold the requested information.
14. At this stage, the Council did release some of the withheld information to the complainant as, following the initial letter from the Commissioner, the Council asked the owner of the property in question for consent to release personal data, which was granted.
15. The Commissioner requested copies of the remaining withheld information which was subsequently provided to him by the Council.
16. The Commissioner considers that the scope of his investigation is to determine whether the Council is entitled to rely on Regulations 12(5)(d), 12(5)(f) and 13 of the EIR to withhold information.

Reasons for decision

Is the requested information environmental?

17. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
18. As it is information relating to planning, the Commissioner believes that the requested information is likely to be information on a measure, affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Information within scope

19. In responding to the Commissioner's investigation, the Council provided copies of the information that it wished to withhold. Some of the withheld information was emails which post-dated the request for information dated 27 April 2021. The Commissioner does not consider that such information falls within the scope of the request as it did not exist at the time the request for information was made.

20. Particularly given the findings set out below, the Commissioner considers that it is imperative that only information falling within the scope of the request be considered.
21. The only information that the Commissioner has identified as falling within the scope of the request are emails sent between 5 February 2020 and 27 April 2021. The later emails provided to the Commissioner by the Council do not fall within scope.

Regulation 12(5)(d) – confidentiality of proceedings

22. Regulation 12(5) of the EIR states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;”

23. The term ‘proceedings’ is not defined in the EIR. However, the Commissioner in his guidance on this exception has said that he considers that:

“...the word implies some formality, i.e., it does not cover an authority’s every action, decision, or meeting. It will include, but is not limited to:

- formal meetings to consider matters that are within the authority’s jurisdiction;
- situations where an authority is exercising its statutory decision making powers; and
- legal proceedings.

“In each of these cases the proceedings are a means to formally consider an issue and reach a decision. ‘Proceedings’ could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality.”¹

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

24. In the Commissioner's view the term 'proceedings' should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.
25. In this case, the Council has stated that the consideration of planning enforcement matters is a process where a public authority exercises its legal decision-making powers under the Town and Country Planning Act 1990. The Commissioner accepts that this process would amount to "proceedings" for the purposes of this exception.
26. Next the Commissioner must consider whether those proceedings are subject to a duty of confidence provided for in law.
27. The proceedings do not have to have to be subject to a statutory duty of confidence to engage Regulation 12(5)(d) – it is sufficient that they are subject to a common law duty of confidence.
28. The Commissioner recognises that the withheld information is neither trivial nor in the public domain – it therefore has the necessary quality of confidence. On the planning enforcement section of the Council's website, it states that all details submitted to the Council in relation to an enforcement report will be treated in the strictest confidence. The Commissioner accepts that there is a general expectation (informed by that statement) that details of an enforcement complaint will be kept confidential – at least until a decision has been taken on whether to take enforcement action: at such time the enforcement action would become a matter of public record. The Commissioner therefore accepts that such information is subject to the common law duty of confidence.
29. Finally, having determined that the information relates to a set of formal proceedings whose confidentiality is protected by law, the Commissioner must next consider whether that confidentiality would be adversely affected by disclosure of the withheld information.
30. Turning first to the specific proceedings, the Commissioner notes that in August 2020 the complainant reported to the Council that building works at the property in question were not in line with the plans submitted.
31. The Council refused to disclose enforcement case file documents based on the general argument that because reports of planning breaches are not anonymous, release of enforcement case files could lead to the identification of complainants and could cause aggressive behaviour between neighbours.
32. The Council's response also indicated that it had concerns that disclosure would adversely affect the process of reporting planning breaches more generally. Disclosure would set a precedent that could lead to a loss of confidence that planning enforcement submissions

would be dealt with confidentially. That in turn would lead to an increase in unreported planning breaches.

33. The Commissioner recognises that planning matters, by their very nature can often be contentious. Rules exist to prevent the wrong development in the wrong place. It is important that those rules are adhered to and that they are applied consistently. Where allegations of a breach are made, the local planning authority has a duty to investigate those concerns and, where appropriate and proportionate, order remedial steps to be taken to bring a development back within similar terms to those on which planning consent was granted.
34. Not every planning breach requires the Council to take remedial action. The Council has a published Planning Enforcement Prioritisation Strategy on its website as a guide to when formal enforcement will take place and, as importantly, when it won't. The Council noted that early, informal, engagement with the individual (particularly if works are still ongoing) can be a much more effective method of bringing a building back into compliance than if the Council were to deploy enforcement notices. In this case, the Council decided that formal enforcement proceedings were not appropriate.
35. The Commissioner notes that the Council has not made any specific arguments relating to this case on how those involved would be adversely affected but has instead made general arguments about setting unhelpful precedents if the withheld information is released.
36. The Commissioner notes that any person dealing with a public authority should be aware of the possibility (however unlikely) that their correspondence might be vulnerable to an information request.
37. The Commissioner also notes that the property owner has given consent for their personal data to be disclosed and, as a result, some information has already been disclosed to the complainant.
38. Each request must be dealt with on its own individual merits. The Commissioner recognises that there will be many cases in which the person who has been subject to a breach complaint will not want the details placed in the public domain. In those cases, the expectation of confidence would clearly still apply and disclosure would adversely affect both the particular proceedings to dispose of that complaint and enforcement proceedings more generally.
39. However, in circumstances such as this, where the proceedings in question have come to an end and the subject of the information has freely given consent for that information to be disclosed, no significant harm is likely to result to those proceedings. Furthermore, there is no

reason why disclosure in this case would set a precedent for each and every future request for enforcement correspondence. Each request should be dealt with on its own merits and with reference to the particular facts of the case.

40. Having seen the withheld information, the Commissioner considers that the effects of disclosure in this case would be limited.
41. The Commissioner is therefore satisfied that the Council has not demonstrated that Regulation 12(5)(d) of the EIR is engaged. The Council is thus not entitled to rely on that exception.

Regulation 12(5)(f) – voluntary supply of information

42. Regulation 12(5) of the EIR states that:

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

- (f) the interests of the person who provided the information where that person—
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure

The Council's position

43. When asked to justify its reliance on Regulation 12(5)(f), the Council explained that:

- "Whilst the requestor and the complainant are one and the same, within the communications, release under the EIR/FOI regime should be "requestor blind" and is also into the public domain. The three criteria above are clearly met in regard to individuals who submit objections or complaints to ongoing planning applications and would be likely to suffer detriment if their identity were disclosed."
- "The documents contain details of complaints made by a close neighbour who has disputed works already undertaken by the property owner and could have jeopardised the outcome of the

approval and potentially led to enforcement action from the Council against the property owner. We would therefore anticipate that disclosure of these communications into the public domain/to the property owner, would be likely to lead to a dispute between the owner and the complainant.”

The Commissioner’s view

44. The Commissioner does not consider that the Council has adequately explained why disclosure of the information in scope would adversely affect the persons who originally supplied it because, looking at the withheld information, it has not been supplied by the requestor, but by an architect and Council employees.
45. The exception sets out a four-stage test: first the public authority must consider the interests of the supplier of that information; next it must consider whether the person could have been compelled to provide the information; thirdly it must consider whether there was an expectation of disclosure and; finally, it must establish whether the person has consented to disclosure.
46. The Commissioner’s guidance on this particular exception states that the starting point to determining whether this exception applies should be to consider the interests of the third party who supplied the information to the public authority in the first place.² A public authority cannot and should not assume that if the other three steps of the test are met, that an adverse effect would automatically result. Furthermore, whilst a public authority is entitled to consider arguments about the voluntary supply of information more generally as part of its public interest test, such arguments are not relevant to whether the exception is engaged in the first place.
47. The Council does not appear to have asked the suppliers of the information whether they considered that they would be adversely affected by disclosure. A public authority should not automatically assume that any disclosure will have an adverse effect and, where such a claim is made, the Commissioner expects the third party to have been consulted. In any case, having viewed the withheld information, the Commissioner is sceptical that the suppliers of the information could

² https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

plausibly have claimed an adverse effect in the circumstances of the case.

48. The Commissioner does not consider that the Council has put forward any arguments that demonstrate why disclosure would have an adverse effect on the suppliers of the particular information it is relying on this exception to withhold.
49. The Commissioner therefore considers that the Council has not demonstrated that Regulation 12(5)(f) is engaged, and it is therefore not entitled to rely on this exception.

Regulation 13 personal information

50. 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.
51. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation ("UK GDPR").
52. 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.
53. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual."

55. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
56. 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.

57. 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.
58. As the withheld information contains the names and contact details of individuals, the Commissioner is satisfied that such information both relates to and identifies the individual in question. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
59. However, once these names and contact details have been removed, the information does not identify the senders or recipients and is therefore no longer their personal data. Whilst it remains the personal data of the property owner, that individual has already given their consent to disclosure.
60. 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.
61. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
62. 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.
63. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

64. 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.

65. In considering the application of Article 6(1)(f) of the UKGDPR in the context of a request for information under FOIA, 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.

66. 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

67. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.

68. In this case the Commissioner notes that the complainant has reasons for requesting sight of the planning enforcement correspondence, as

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks."

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

they are attempting to determine whether the Council has complied with planning procedures.

69. The Commissioner considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are carried out and that it is adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions.
70. The Commissioner recognises that the complainant has a strong personal interest in the way this decision was reached. He also recognises more broadly that there is an interest in transparency. In this case, the withheld information comprises of the contents of the emails (which is the personal data of the property owner) and the names and contact details of the senders and recipients of those emails.
71. The property owner has already consented to disclosure of their personal data. Therefore, by disclosing the contents of the emails, the Council will have met the legitimate interest in transparency. Disclosing the names of senders and recipients does not serve this legitimate interest and no other legitimate interest in this personal data has been identified. Therefore, there is no lawful basis upon which this personal data could be disclosed. The Commissioner thus accepts that this information can be redacted.

Other matters

72. The Commissioner regards it to be necessary to formally record his concerns about the Council's poor handling of this request.
73. The Council initially failed to recognise the request as an information request and, when it did formally respond, it relied on the incorrect access regime.
74. The internal review process provides an opportunity for a public authority to correct any failings that may have occurred at the time of the initial response to the request. However, in this instance, the internal review response was brief and failed to engage with the arguments the complainant had put forward.
75. It was only at the stage of the Commissioner's intervention that the Council considered the EIR but, even when it did, the response to the complainant was in general terms and did not address the specific circumstances of the case. The Council also repeatedly missed deadlines set by the Commissioner for responses.

76. Upon viewing the withheld information, it was clear that much of the information was not in scope as it post-dated the request. This is a fundamental error on the part of the Council.
77. In this notice, the Commissioner has laid out a number of examples of poor request-handling practice which the Council may wish to consider in the event that it receives further, similar requests.

Right of appeal

78. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

79. 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.

80. 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF