

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 August 2023

Public Authority: Basingstoke & Deane Borough Council

Address: foi@basingstoke.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information from Basingstoke & Deane Borough Council (the 'council') in respect of the felling of trees in the Spring of 2021 adjacent to a named property. The council provided some information but refused to provide other information on the basis of regulation 12(5)(b) (the course of justice) of the EIR. The council also withheld some limited personal information under regulation 13.
2. The Commissioner's decision is that the council has complied with its obligations under regulation 5(1) of the EIR, and that it was entitled to rely on regulation 12(5)(b) to refuse information in respect of item 3 of the request and that regulation 13 applies to the limited redactions of personal information.
3. The Commissioner does not require any steps.

Request and response

4. On 7 January 2022, the complainant wrote to the council and requested the following information in respect of the felling of trees adjacent to a named property in Spring 2021:

"1. What was the reason for the felling of these trees in line with BDBC Tree Policy June 2012?

2. If the reason was subsidence please provide '*strong evidence that a tree is causing damage to a building*' (Policy 03, Section 3.2) to include

- the engineers report including an accurate survey, a history of damage and precise level monitoring information provided to demonstrate that the trees were responsible for the damage in line with Policy 05, Section 5.2. If the council required further information including crack monitoring, soil analysis, foundation details, root analysis or drain surveys please also provide these (Also Policy 05, Section 5.2).
3. If the reason was subsidence, please also provide the Council's own expert specialist advice sought to verify submitted evidence in line with Policy 05, Section 5.4.
 4. If the reason was subsidence, had the 2007 version of the BSBC Tree Policy still been extant, and given that the trees felled were both LTOA Amenity Value Medium/ BS5837 Category B (as a minimum), what additional evidence detailed in BDBC Tree Policy 2007 Appendix C would have been required?
 5. If the reason was shading, please provide the justification using the council's adopted Shading Assessment Methodology in line with Policy 03, Section 3.3. Please include evidence of how this was weighed against the value of the trees as a landscape feature of significant amenity value. (Please also provide access to the Shading Assessment Methodology or highlight where it is available on the council's website). Also, how was the environmental (including biodiversity) value of two relatively mature oak trees taken into consideration? (Policy 04, Section 4.6) and how was the shading weighed against the value of the trees as a landscape feature (Policy 03, Section 3.3)?
 6. What is the plan for replacement of the trees (either oak or another species), either in the same position or elsewhere on the same site? (Policy 04, Section 4.16 and Policy 07 Section 7.2)
 7. Please provide details of any further trees covered by TPO LAW87UCR0A200 that are currently the subject of a felling request (either by a householder or an insurer). In each case provide the information submitted to date and the Council's own expert advice where this has been procured."
5. The council responded on 4 February 2022. It refused to provide information in respect of items 1-4 of the request on the basis of regulation 12(3) (third party personal information) of the EIR. It informed the complainant that it does not hold information in respect of item 5, and in respect of item 6, it confirmed that there were no plans to replace the trees. In relation to item 7, the council informed the complainant the Tree Preservation Order (the TPO) reference quoted was invalid.

6. Following an internal review, the council contacted the complainant on 1 April 2022 with an amended response to some items of the request.
7. In relation to item 1, the council confirmed that the reason for the removal of the trees was a subsidence claim.
8. The council continued to withhold information in relation to items 2 and 3 of the request on the basis of regulation 12(3) of the EIR, however it now included regulation 12(5)(b) on the basis that disclosure would adversely affect the course of justice. The council also amended its response to item 7 and cited regulations 12(3) and 12(5)(b).
9. There was various correspondence between both parties in relation to this matter in the period between April and November 2022, culminating in the council issuing an amended response to items 5 and 7 of the request on 11 November 2022.
10. Regarding item 5, the council confirmed:

“The Shading Assessment Methodology and the shade assessment criteria these are the same, just with slightly different wording.”
11. In relation to item 7, the council informed the complainant that:
12. “we have had one application in relation to this question.”

Background

13. The council provided some background information to the request. It stated it had been served with a notice of claim in relation to a number of trees on a council owned verge which adjoined the insureds property. All of the trees were subject to a Tree Preservation Order (TPO).
14. Advice was sought from the council’s tree service who did not consider that all of the trees were contributing towards the problem. It was subsequently agreed to remove three of the trees without any admission of liability.

Scope of the case

15. The complainant contacted the Commissioner on 29 January 2023 to complain about the way their request for information had been handled. They were not satisfied with the council’s reliance on the exceptions specified and with the exception of item 4, does not consider that a full response to all items of their request has been provided.

16. During the course of the Commissioner's investigation the council revisited its response in relation to a number of items of the request on the basis that the nature of the subsidence claim had evolved. It provided redacted information in respect of item 2 of the request it had previously withheld under regulation 12(5)(b), but maintained its reliance on regulation 12(5)(b) in respect of item 3. It also amended its response in relation to item 7, confirming that the only application was from the council in respect of the trees subject to this request.
17. In respect of item 5, the council provided the Shading Assessment Methodology, but stated that it should not have responded to this item of the request as the reason for the felling of the trees was not due to shading, so there was no requirement to respond.
18. As item 4 has not been complained about, and the Commissioner is satisfied that the council did not need to respond to item 5 as a response was dependent on the reason being shading, the scope of the Commissioner's investigation is to consider:
 - whether the council holds any additional information relevant to items 1, 2, 3, 6 and 7 of the request,
 - whether it was entitled to withhold information in respect of item 3 on the basis of regulation 12(5)(b), and
 - whether it was entitled to withhold the personal information it has redacted from the information it has disclosed in response to the request under regulation 13

Reasons for decision

Regulation 5(1) – duty to make available environmental information on request

19. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.
20. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of the request, the Commissioner is not expected to provide categorically whether or not further relevant information is held. He is only required to make a judgement based on the civil standard of the balance of probabilities as to the likelihood of whether additional information is held.

21. In this case, the complainant does not consider that the council has provided all relevant information it holds, particularly in respect of item 2, as it has not provided a copy of the engineers report referred to in the Arboreal report.
22. The Commissioner contacted the council in respect of the complainant's concerns and asked for details of its searches.
23. The council confirmed that all information relating to trees would be sent through to its Parks and Streetscene Service and anything to do with insurance would be sent to the Insurance Team within the Internal Audit function.
24. The council therefore confirmed that its initial search was with the Parks and Streetscene Service, and from there, it was directed to its Insurance Team as this was known to be an insurance matter. It added, that there would be no conceivable reason for any other business unit to hold information in relation to decisions based on whether to fell a tree and dealing with an insurance matter.
25. The council further informed the Commissioner that it searched for information and correspondence held on its electronic filing system regarding the relevant subsidence claim, the relevant tree inspection records and case files. It used the claim and case reference numbers and the claimant's address as search terms.
26. In respect of the Engineers Report, the council stated that it does not hold a copy of the report and that the decision to fell the trees was based on the documents already provided to the complainant. The council also checked with its insurance team, which confirmed that it has never had sight of the report and it is not therefore held by either the council or its insurers.
27. The Commissioner has also considered the council's final position regarding item 7 of the request (previously withheld under regulation 12(5)(b)), which stated it should have informed the complainant it has no further information in respect of this part of their request. The council informed the Commissioner that there has never been a previous felling request on its system from any resident and confirmed that the only felling request it has submitted was in relation to this matter - for the trees that were felled in Spring 2021.
28. The Commissioner has considered the complainant's arguments and the details of the council's searches. He considers that the searches conducted by the council appear both reasonable and proportionate. He has also considered the council's responses to items 1, 2, 3, and 6 of their request. Whilst he is sympathetic to the complainant's reasoning

as to why additional relevant information may be held, he can only base his decision on the balance of probabilities and has no reason to believe that the council holds any additional information relevant to the request.

Regulation 12(5)(b) – the course of justice

29. Regulation 12(5)(b) of the EIR states that information is exempt if disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
30. "Would adversely affect" means that it is more probable than not, i.e., a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
31. The council has confirmed that there was a notice of claim against it being dealt with by its insurers in relation to the protected trees subject to this request. At the time of the request and to date, all of the withheld information is advice provided to the council in the context of the notice of claim. The council considers that to release this information into the public domain while the matter remains ongoing would adversely affect its ability to take advice on this matter and to properly deal with the claim against it.
32. The council has confirmed that it is still in a pre-claim status in as much as it is likely the third party's insurer is undertaking further monitoring following the removal of the three trees, and that it could still be subject to an insurance claim on this matter. It therefore considers that releasing the withheld information could prejudice any claim going forward.
33. The council has further explained that the withheld information would be part of any litigation file and its disclosure at this stage could compromise any proceedings which may occur in the future. It also considers that disclosure of the withheld information would undermine the proper administration of justice and the jurisdiction of the Court to deal with, and consider the claim submitted in accordance with the rules and procedures of the Court.
34. The Commissioner accepts that the information was obtained by the council as part of a live and ongoing insurance claim relating to the felling of trees.

35. It is the Commissioner's view that the public disclosure of such information at the time of the request, and whilst the matter remains ongoing, would not only inhibit the council's ability to effectively take expert advice on the claim, but would damage public confidence in such expert advice being undertaken and provided appropriately.
36. In view of the above, the Commissioner is satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice, and that the exception provided by regulation 12(5)(b) is therefore engaged.
37. As regulation 12(5)(b) is subject to the public interest test, the Commissioner has gone on to consider the balance of the public interests in this case.

Public interest test

Factors in favour of disclosure

38. The council accepts that disclosure of the information would promote transparency and accountability in decision making.
39. The council has also acknowledged that disclosure of the information may provide public confidence and increased knowledge regarding its inspection and decision making procedures in relation to protected trees and allow the public to evaluate the effectiveness of the council's decision.

Factors in favour of maintaining the exception

40. The council has argued that it has disclosed as much information relevant to the request as possible, and that relevant information about the general protection of trees is publicly available in the form of the Tree Preservation Orders (TPOs).
41. The council has confirmed that although there are currently no legal proceedings against it in relation to this issue, the possibility remains real, and considers that there is a need to protect the ability of public authorities to conduct legal proceedings brought against it. The council has argued that it would need a safe space to do this.
42. The council also considers that given the possibility of litigation in relation to this matter, that there is a public interest in maintaining the independence of the litigation process and ensuring that all parties, including the council are able to have a fair hearing.
43. The council has argued that, at the time of the request, the notice of claim against it was being dealt with by its insurers and that the matter

is still being monitored by the third party insurers at the date of this notice. It considers that there is a strong public interest in maintaining the exception while the matter is still ongoing, as disclosure would adversely affect its ability to take advice on this matter and to properly deal with the claim against it.

The Commissioner's conclusion

44. The Commissioner would highlight that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
45. The Commissioner acknowledges the public interest in transparency and accountability in decisions made by public authorities.
46. The Commissioner is also mindful that the felling of protected trees is a controversial matter and that there is a strong public interest in the disclosure of information relating to the decision to do so.
47. However, although the Commissioner acknowledges that there is currently no litigation against the council on this matter, he is mindful that the possibility remains real, and considers that there is a compelling public interest in protecting the ability of public authorities to defend legal proceedings brought against it. He accepts that the council needs a safe space to do this. Similarly, the Commissioner recognises the strong public interest in maintaining the independence of the litigation process and ensuring that all parties, including the council, are able to have a fair hearing.
48. The Commissioner also considers that the public interest will be strongest where the matter is live at the time of the request and has therefore placed considerable weight on the fact that at the time of this request, the notice of claim against the council was being dealt with by its insurers and that even at the date of this notice, the matter remains ongoing.
49. On balance, the Commissioner has therefore concluded that in all the circumstances of the case, the balance of the public interest is weighted in favour of maintaining the exception.

Regulation 13 – personal data

50. Under regulation 13(1) of the EIR, information is excepted from disclosure if it's the personal data of someone 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 (2A)(a)¹. This applies where disclosing 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 General Data Protection Regulation (GDPR).
52. First, the Commissioner must determine whether the withheld information is personal information as defined by the Data Protection Act 2018 (DPA). If it's not personal information, then regulation 13(1) 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. The Commissioner has not had sight of the withheld information, but understands that the council has redacted personal information from a number of reports provided to the complainant. The council has

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

confirmed that the type of information withheld from the various reports is the following:

- Names and addresses of the claimants
 - Photos showing the claimant's front door
 - Claim number
 - Policy holder
 - Client reference
 - The insured
 - The contact number and the details of the author of the report.
59. The council further informed the Commissioner that nothing had been redacted from the body of the reports unless it referred to the number of the property.
60. The Commissioner considers that the information clearly relates to various individuals connected to the claim and is therefore satisfied that it constitutes their personal information.
61. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The public authority is required to determine whether disclosure would contravene any of the DP principles.
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. The Commissioner's view is that public authorities should consider lawfulness first. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

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

64. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
65. The Commissioner considers that the lawful basis most applicable is Article 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"².

66. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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.

iv) The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

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. These may be the requester's own interests or the interests of third parties, and may include 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.

² 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, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

68. The council does not consider there to be any legitimate interest in disclosure of the withheld personal information as the substance of the reports has been disclosed.
69. However, as specified in paragraph 67 of this notice, the Commissioner recognises that a wide range of interests may be legitimate interests, including the requester's own interests whether compelling or trivial and does not dispute that the complainant has their own legitimate interest in this information.

Is disclosure necessary?

70. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest 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.
71. The Commissioner recognises that the council disclosed the substance of the reports. In the Commissioner's opinion the substance of the reports is more important than the claim number, client reference or the name of the author of the report and he considers that it is sufficient to meet the legitimate interest of the complainant.
72. The Commissioner is not persuaded that it is necessary for the council to disclose the photos showing the claimant's front door, the claim number, client reference, the details of the policy holder or the name of the author of the reports. He does not consider that the disclosure of this information would assist the public's understanding of the matter.
73. In light of the above the Commissioner finds that the necessity test is not met, therefore the council would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the council was entitled to rely on the exemption at regulation 13 of the EIR in respect of the withheld personal data.

Right of appeal

74. 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

75. 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.
76. 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

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