

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

Date: 20 November 2018

Public Authority: London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested the contents of a Planning Enforcement File, relating to his property, which was created as a result of a complaint submitted by his neighbour (“the Neighbour”).
2. The Commissioner’s decision is that, as the file relates to the complainant’s property, it is his personal data. Given her role as regulator of Data Protection legislation, she has therefore decided to apply Regulation 5(3) proactively to all the requested information and thus the London Borough of Croydon (“the London Borough”) is not required to disclose any of it under the EIR. However the London Borough failed to respond to the request within 20 working days, failed to issue an adequate refusal notice and failed to carry out a proper internal review. It therefore breached Regulations 5(2), 11 and 14 of the EIR.
3. The Commissioner does not require the London Borough to take any further steps under the EIR.

Request and response

4. On 16 November 2017, the complainant wrote to the London Borough via the whatdotheyknow.com website (“WDTK”) and, referring to the

complaint that had been submitted about his property, requested information in the following terms:

"Please provide copies of information showing:

[1] what OTHER 'decision' was the case officer referring to by the inclusion of the word 'also',

[2] the details of the 'senior planning officer' with whom the case officer consulted on THIS case,

[3] the PLANNING GROUNDS on which the Council has decided not to pursue the matter, WITHOUT investigation, and

[4] the details of the DECISION-MAKER."

5. The London Borough initially treated this request as a complaint and responded on 7 December 2017, providing some information.
6. The complainant contacted the London Borough again on 10 December 2017 to complain that he did not feel that he had had an appropriate response to his information request.
7. There was then an exchange of correspondence between the complainant and the London Borough as to whether the correspondence of 16 November was a valid information request. Unable to get the London Borough to treat the correspondence as an information request, the complainant made a complaint to the Commissioner on 25 March 2018.
8. The Commissioner intervened on 11 April 2018. She pointed out to the London Borough that the complainant's correspondence of 16 November 2017 would constitute a valid request for recorded information and therefore needed to be addressed under either FOIA or, to the extent that the requested information was environmental, the EIR. She also noted that there was a possibility that some of the information might be the complainant's own personal data and that the London Borough should also take account of his Subject Access Rights.
9. On 27 April 2018, the London Borough issued a response under the EIR and provided some further information.
10. The complainant requested an internal review on 30 April 2018. He complained that his request had been for specific documents which had not been provided and that the response had not been sent via WDTK.
11. The London Borough issued what it described as a "second response" to the request on 2 May 2018. It withheld information citing Regulation 13

(personal data) of the EIR. The response stated that the complainant could seek an internal review if he wished. The complainant again complained that the correspondence had been sent to his private email address and not via WDTK.

Scope of the case

12. The complainant contacted the Commissioner on 3 May 2018 to complain about the way his request for information had been handled. Whilst the London Borough had not carried out an official internal review at that point, the Commissioner considered that it had had an adequate opportunity to consider the request.
13. The Commissioner considers that element [1] of the request is not a valid request under the EIR and that elements [2] and [4], inasmuch as they constitute requests for environmental information, have been responded to. The remaining point of contention is element [3], the scope of which the Commissioner has agreed with the London Borough encompasses the contents of Planning Enforcement File 17/00668.
14. During the course of the Commissioner's investigation, the London Borough issued a further response on 23 October 2018. It disclosed a redacted version of a document that was not within the scope of the request and provided arguments as to why sections of that document had been redacted.¹
15. When the Commissioner pointed out to the London Borough that this further response was irrelevant to the original request, the London Borough issued a fourth response on 6 November 2018 – this time relevant to File 17/00668. The London Borough argued that the exception at Regulation 13 (Third Party Personal Data) applied to parts of the withheld information and that the exceptions at Regulations 12(5)(b) (Course of Justice) and 12(5)(d) (Confidentiality of a Process) applied to the information in its entirety.
16. Having reviewed the withheld information the Commissioner considers that this information is the personal data of the complainant. She has therefore taken the decision to apply Regulation 5(3) proactively to the withheld information in its entirety, preventing its disclosure.

¹ The complainant had requested a full copy of this document – but in an entirely separate request.

17. The analysis that follows explains why the Commissioner has exercised her discretion in this manner.

Reasons for decision

Is the withheld information environmental?

18. 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);*
19. The withheld information relates to a complaint about an alleged breach of planning consent. The Commissioner considers that planning rules (and the enforcement of those rules) are “measures” affecting the elements of the environment and therefore the EIR is the correct legislation to apply.

Personal data of the requestor

20. Regulation 5(1) states that: *"a public authority that holds environmental information shall make it available on request."*
21. Regulation 5(3) states that: *"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data."*
22. The withheld information was all generated as a result of an allegation, made by the Neighbour, that the complainant had breached planning rules in respect of work carried out on his - the complainant's - home. The correspondence and documentation within it are therefore inextricably linked to the complainant's home.
23. The Commissioner takes the view that the address of and details about an individual's home would be the personal data of that individual. As the address and details are central to the withheld information, it follows that the entirety of the information would be personal data as it could identify the complainant, either on its own or in conjunction with other publicly available information, such as from the Land Registry. The information in question is, therefore, the personal data of the complainant.
24. The London Borough has not attempted to cite Regulation 5(3) or treat the complainant's request under the Subject Access provisions of the Data Protection Act at any point during this process – despite the Commissioner raising the possibility in her first letter of 11 April 2018.
25. The Commissioner is also responsible for regulating Data Protection legislation and, as such, takes her responsibility to protect personal data seriously when considering information which can be disclosed under either the FOIA or the EIR. She will therefore step in and apply exceptions (or exemptions) herself to prevent disclosure of personal data where she considers this necessary in order to avoid a breach of data protection legislation.
26. Disclosure under the EIR is considered to be disclosure to the world at large and not to the complainant specifically. It is the equivalent of the London Borough publishing the information on its website.
27. In this case, the Commissioner considers that the London Borough should not be publishing such information and she has thus applied Regulation 5(3) to prevent the information being disclosed. Regulation 5(3) is an absolute exception and the Commissioner is not required to consider either the balance of public interest or the complainant's wishes – although she comments further on this request in "Other Matters" below.

28. The Commissioner therefore concludes that, as the information in question is the personal data of the complainant, Regulation 5(3) is engaged and the London Borough was not obliged by the EIR to disclose the withheld information.

Procedural Matters

Timeliness

29. Regulation 5(2) states that such information shall be made available “*as soon as possible and no later than 20 working days after the date of receipt of the request.*”
30. The Commissioner considers that the request in question constituted a valid request for information under the EIR.
31. Whilst the London Borough did respond to the complainant’s correspondence of 16 November 2017, the Commissioner does not consider the initial response to have been one that was valid under the EIR. Indeed the London Borough subsequently confirmed in correspondence to the complainant on 2 January 2018 that it had not considered the request under either the FOIA or the EIR. As the London Borough failed to issue a valid response to the request within 20 working days, it has breached Regulation 5(2) of the EIR.

Refusal Notice

32. Regulation 14 of the EIR states that:
- (1) *If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
 - (2) *The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
 - (3) *The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) *any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) *the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*

- (4) *If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
 - (5) *The refusal shall inform the applicant—*

 - (a) *that he may make representations to the public authority under regulation 11; and*
 - (b) *of the enforcement and appeal provisions of the Act applied by regulation 18.*
33. As the Commissioner has already pointed out at paragraph 31, the London Borough failed to issue a proper response under the EIR within 20 working days. However, she also notes that the London Borough, having received the request on 17 November 2017, failed to issue a refusal notice setting out every exception on which it wished to rely to withhold information, until 6 November 2018. This was a breach of Regulation 14 of the EIR.

Reconsideration (Internal Review)

34. Regulation 11 of the EIR states that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge—*

 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*
- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*

- (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
- (a) *the failure to comply;*
 - (b) *the action the authority has decided to take to comply with the requirement; and*
 - (c) *the period within which that action is to be taken.*
35. The complainant made representations to the London Borough on 30 April 2018 which demonstrated that he was unhappy with the response he had received to his request.
36. The London Borough did write to the complainant on 2 May 2018. It is not clear whether this correspondence was supposed to be the outcome of the internal review or whether the London Borough had wrongly interpreted the complainant's request for an internal review as a fresh request for information. The document titles and the reference numbers on the correspondence of both 27 April and 2 May 2018 are identical but both letters offered the complainant the opportunity of an internal review if he was dissatisfied with the content of that letter.
37. The Commissioner is left to conclude that the London Borough did not carry out a proper Reconsideration (or internal review) of its response and therefore breached Regulation 11 of the EIR.

Other matters

Disclosure of Personal Data

38. The Commissioner wishes to emphasise that she is not determining that the complainant in this case is not entitled to any of the withheld information. Her position is that the requested information should not be disclosed *under the EIR* – for the reasons outlined at paragraph 26.
39. Regulation 5(3) exists because individuals already have a right of access to their own personal data via the Subject Access Provisions of the 1998 and 2018 Data Protection Acts. Disclosure under Subject Access is disclosure solely to the individual.
40. The fact that the complainant is asking for his own personal data and may have no issue with the information being published to the world at large is not a relevant factor for the Commissioner to consider. If, having received his personal information, the complainant wishes to

publish that information himself, that is a matter for him. The London Borough and the Commissioner still have to consider their responsibilities under Data Protection legislation when deciding what information to disclose.

41. Whilst she has no power to compel the Council to do so as part of this decision notice, the Commissioner would strongly advise the London Borough to reconsider this request again as a Subject Access Request.

Disclosure via whatdotheyknow.com

42. During the course of her investigation, both the complainant and the London Borough have raised queries about the extent to which information should be provided via WDTK. The Commissioner therefore considers it useful to comment on this issue here.
43. Where a request for recorded environmental information is made using WDTK, the Commissioner would normally consider that to be the complainant expressing a preference for receiving the information in a particular form and format; by the public authority responding via WDTK so that the response to the request can be published.
44. Regulation 6 of the EIR states that:
- (1) *Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—*
 - (a) *it is reasonable for it to make the information available in another form or format; or*
 - (b) *the information is already publicly available and easily accessible to the applicant in another form or format.*
 - (2) *If the information is not made available in the form or format requested, the public authority shall—*
 - (a) *explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;*
 - (b) *provide the explanation in writing if the applicant so requests; and*
 - (c) *inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.*

45. The Commissioner wishes to encourage public authorities to publish as much information as they can and she recognises that there are occasions when they can give a much more helpful response to a requestor when that response is provided individually rather than to the world at large. This may particularly be the case where the public authority's response will necessarily include personal data.
46. The Commissioner considers each complaint on its own merits and whether it is reasonable for a public authority to issue its response directly to the requestor will depend on the circumstances of each particular case. However the public authority should be mindful of its Data Protection obligations when it chooses to allow its responses to be published on WDTK.

The London Borough's engagement

47. The Commissioner has already set out above the London Borough's multiple failings in the way it handled the request. Whilst the Commissioner is aware that the complainant in this case has made a number of other requests on similar matters which will have imposed a considerable degree of work on a specific section of the London Borough, the failings described are significant and avoidable.
48. Of equal concern to the Commissioner has been the poor engagement of the London Borough during the course of her investigation. It took the London Borough two months and the potential of an Information Notice to provide a substantive response to her initial investigation. When the London Borough did respond, it disclosed the wrong information and provided arguments in relation to that incorrect information.
49. Whilst the quality of engagement did improve significantly in the latter stages of considering this particular complaint. The Commissioner expects to see this same improved level of engagement in relation to future cases.

Right of appeal

50. 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@hmcts.gsi.gov.uk

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

51. 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.
52. 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

Ben Tomes
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