

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

Decision notice

Date: 15 March 2019

Public Authority: London Borough of Lambeth
Address: Southwyck House
Moorland Road
Brixton
London
SW9 8UR

Decision (including any steps ordered)

1. The complainant requested information in relation to possible renovation works on a property. Relying on regulation 13(5A)(5)(B) EIR the public authority neither confirmed nor denied whether it held the requested information.
2. The Commissioner's decision is that the public authority was entitled to rely on regulation 13(5A)(5)(B) EIR as the basis for neither confirming nor denying whether it held the requested information.
3. No steps required.

Request and response

4. It is unclear from the complainant's submissions further to his complaint to the Commissioner when he actually submitted his request for information to the public authority. The request itself was however reproduced by the public authority further to its response which was issued to the complainant on 24 July 2018. The request as reproduced in that correspondence is set out below¹:
1. "I have a number of Questions about the Council in its role as Freeholder of [Property Address] which is a dual dwelling leasehold.
 2. This property is being Scaffolded by subcontractors with a view to exterior work being done but there appears to be no Section 20 process going on. Yet there are 2 leaseholds and the cost of the work to each must be ~£250
 3. Is the leaseholder of 47B effectively having private work done with the permission of the Council?
 4. Why did the Council not consult the resident of 47A [Named Individual] or contact her in writing before sending scaffolders round?
 5. Does [Named Individual] have to pay for the scaffolding?
 6. Similar scaffolding and work was done in 2015 and the roof surveyed. What happened to that survey? Can I have a copy?
 7. Is scaffolding a free Council service? If not how much does it cost the leaseholders and the Council?
 8. Was the 2015 scaffolding paid for by the Council or someone else?
 9. Why is the Council scaffolding the same property twice in 3 years?
 10. There is no RTM company for 47 A and 47 B so in the situation of a Section 20 process running its course and the two leaseholders being unable to agree on the final quotes who is the final arbiter of whether the work can go ahead? Can either of the two leaseholder

¹ The requests are numbered for ease of reference. Neither party has disputed the wording of the requests set out in paragraph 4 of this notice.

veto each other indefinitely or can one leaseholder have work done without the cost of the other? In this second case who pays for the work?

11. As there is no RTM company does the Council as the Freeholder take on this role?
 12. Does the Council have any sanctions for continual lease violations?
 13. Why when I rang up the Council to ask about the work was there no job number or record of the work?
 14. How does the scaffolding fit into the Section 20 process? Is it part of it? Or is it just an inspection by the Council?
 15. Why does the Council not inform leaseholders before putting up scaffolding?
 16. Why do Council subcontractors not give written notice of visits as they are supposed to under schedule 4 section 2 (with 3 days notice)?
 17. Who at the Council is specifically responsible for [Named Individual]'s property?
 18. Does [Property Address] have a file? And if it does can we see it (note: I don't need you to dig it out now)?
 19. Since there is no RTM company for [Property Address] is there someone at the Council who simulates this role?
 20. Is it the Council's policy to sell the Freehold of a dual dwelling property without the consent of both parties?
 21. Is it true that the Council is exempt from right to buy laws with regards to the freehold?
 22. Is it the Council's policy to sell the freehold of such properties"
5. As mentioned, the public authority provided its response on 24 July 2018. Relying on section 40(5) FOIA, it neither confirmed nor denied holding the requested information on the basis that to confirm or deny whether the requested information is held would breach the Data Protection Act 2018.
 6. The Commissioner understands that the complainant requested an internal review of this decision on 1 August 2018.

7. The public authority upheld the original decision following the review. A copy of the outcome of the review provided to the Commissioner by the complainant is undated.

Scope of the case

8. The complainant contacted the Commissioner on 24 August 2018 to complain about the public authority's handling of his request specifically the refusal by the public authority to either confirm or deny whether it holds any information within the scope of his request above.
9. However, during the course of the investigation, the Commissioner ordered the public authority to respond to parts of the requests which she considered should have been dealt with as normal course of business enquiries and, in her view, do not in any event constitute requests for the personal data of the leaseholders. The relevant parts of the request are; items 7, 12, 15, 16, 20, 21 and 22.
10. Consequently, the public authority provided its response to items 7, 12, 15, 16, 20, 21 and 22 directly to the complainant on 26 February 2019.
11. In view of that response, those parts of the request no longer formed part of the Commissioner's investigation.
12. The scope of the Commissioner's investigation was therefore to determine whether the public authority was entitled to neither confirm nor deny whether it held information within the scope of the complainant's request save for items 7, 12, 15, 16, 20, 21 and 22 (the requested information).
13. Nothing in this notice should be construed as confirming or denying that the requested information is held by the public authority.

Reasons for decision

Applicable access legislation

14. In view of the nature of the request the Commissioner initially considered whether it should have been handled under the EIR rather than the FOIA.
15. The Commissioner considers that the requested information if held would constitute information on activities affecting or likely to affect the

elements and factors. She therefore finds that the requested information if held would be caught by the definition of environmental information in regulation 2(1)(c) EIR.

Regulation 13(5A)(5B) EIR

16. As the public authority's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and the General Data Protection Regulation EU2016/679 (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies.
17. Regulation 13(1) 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. Regulation 13(5A)(5B) EIR provides that 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, where one of the conditions listed in that regulation is satisfied.
18. Therefore, in the circumstances of this case, for the public authority to be entitled to rely on regulation 13(5A)(5B) as the basis for refusing to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

19. Section 3(2) DPA 2018 defines personal data as:-

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.

22. The public authority considers that to confirm or deny whether it holds the requested information would disclose personal data about a third party (ie a party other than the complainant).
23. The Commissioner shares the public authority's assessment. The requested information is clearly linked to two addresses at a property, at least one named individual and another unnamed individual. The property addresses clearly relate to the occupants of the property.
24. The Commissioner therefore finds that confirming or denying whether the requested information is held would reveal the personal data of the occupants of the property and the named individual. The first criterion above is therefore met.
25. The fact that confirming or denying whether the requested information is held would reveal personal data about the occupants of the relevant property and the named individual does not automatically prevent the public authority from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
26. The Commissioner considers that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene principle (a)?

27. Article 5(1)(a) GDPR states that:

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

Public authority's submissions

28. The public authority considers that confirming or denying whether it holds the requested information would be unfair as it does not consider that any individual would hold a reasonable expectation that it would confirm or deny whether it holds the requested information.
29. Furthermore, confirming or denying whether the information is held may cause some distress/damage to the third party.

Complainant's submissions

30. The complainant does not consider that confirming or denying whether the requested information would reveal personal information about the owner/occupants. He has argued that the ownership of the property is a

matter of public record which can be accessed for a small fee from HM Land Registry.

The Commissioner's considerations

31. The Commissioner has found that confirming or denying whether the requested information is held would result in the disclosure of the personal data of third parties. She does not share the complainant's view that it would not. Providing confirmation or denial that the requested information is held clearly constitutes personal data within the meaning of section 3(2) DPA 2018.
32. 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 – or as in this case the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.

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

33. Article 6(1) of the 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*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before issuing a confirmation or denial that the requested information is held would be considered lawful.
34. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

'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.

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) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:- I think that the formatting makes it look separate and am not sure how to fix it.

35. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under the 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.
36. 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

37. In considering any legitimate interest(s) in confirming or denying whether a request for information under the FOIA is held, 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.
38. 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.
39. The Commissioner considers that there is a legitimate interest in knowing whether renovation work on the property would be carried out following the correct procedures in place. Some of the questions posed by the complainant are clearly in pursuit of that legitimate interest.

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

Is confirming whether or not the requested information is held necessary?

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under the EIR whether the requested information is held must therefore be the least restrictive means of achieving the legitimate aim in question.
41. In the circumstances of this case, the Commissioner is not persuaded that confirming or denying whether the requested information is held is the least restrictive means of knowing whether correct procedures would be followed further to renovation work on the property. She is not persuaded that it is necessary in the circumstances to reveal the personal data of the occupants of the property to the whole world in order to achieve that legitimate interest. The legitimate interest could be achieved through enquiries by concerned or affected individuals to the public authority outside of the EIR/FOIA. The responses to those enquiries would take care not to reveal personal data and/or would be subject to confidentiality restrictions in order not to place third party personal data into the public domain. It would be disproportionately intrusive on the occupants of the property to reveal their personal data in the context of the complainant's request for information under the EIR.
42. The Commissioner considers that confirming or denying whether the requested information is held does not meet the three part legitimate interests test outlined above. The Commissioner does not consider that disclosure is necessary to meet the legitimate interest in knowing whether renovation works on the property would be carried out further to the correct procedures.
43. The Commissioner has therefore concluded that the requirements of Article 6(1)(f) of the GDPR have not been met and so confirming or denying whether the requested information is held would not be lawful and thus breach principle (a). The public authority was therefore entitled to rely on regulation 13(5A)(5)(B) EIR.

Right of appeal

44. 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

45. 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.
46. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF