

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 March 2022

Public Authority: London Borough of Hackney

Address: Town Hall
Mare Street
London
E8 1EA

Decision (including any steps ordered)

1. The complainant requested from London Borough of Hackney (“the Council”) information relating to building control files. The Council maintained that it does not hold one of the three files requested and relied on the exception under regulation 12(4)(a) (information not held). With regard to the remaining two files, the Council stated that the information was exempt from disclosure and relied on regulation 13(1) (personal data), regulation 12(5)(c) (intellectual property rights) and regulations 8(1) and (3) of the EIR.
2. The Commissioner’s decision is that, on the balance of probabilities, the Council is correct to state that it does not hold recorded information falling within the scope of the request to file FP2016/24498.
3. With regard to the two files FP2005/0992 and FP2007/0724 the Commissioner’s decision is that the Council is not entitled to rely on regulation 13(1) to withhold the information requested. Also, the Council failed to demonstrate that regulations 12(5)(c), 8(1) and 8(3) of the EIR are engaged.
4. Furthermore, the Commissioner has found there to be a breach of regulation 5(2) and regulation 14(2) of the EIR. This is because the Council initially failed to consider the request under the correct access regime and it also failed to respond to the request within 20 working days.

5. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information.
6. 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

7. On 23 August 2020 the complainant wrote to the Council and requested information in the following terms:
 8. *"I would like to make a new FOI request for all material you hold on:
 1. Building control file with reference number FP2005/0992, which relates to the conversion of an existing building and construction of a four storey addition to retain 1560 m2 of commercial space and to provide 65 residential units. I understand that this work was deemed to be have been satisfactorily completed under the Building Regulations on 3 November 2009.
 2. Building control file with reference number FP2007/0724, which relates to an additional five floors of 33 residential units being added to an existing building. I understand this building work was undertaken at the same time as the previous application, and was also satisfactory completed under Building Regulations on the same day, 3 November 2009.
 3. Building control file with reference number FP2016/24498, which relates to fire stopping compartmentation inspections and improvements. I understand that this work was satisfactorily completed under Building Regulations on 5 December 2016."*
9. On 2 October 2020 the Council responded and refused the request by virtue of section 40(2) FOIA.
10. On the same day, the complainant asked the Council for an internal review of its decision not to release the information requested.
11. On 6 October 2020 the complainant asked the Council to acknowledge his request for an internal review, and to confirm that it was actioning the request.

12. On 3 November 2020, 4 December 2020 and 1 February 2021, the complainant chased the overdue internal review response.

Scope of the case

13. The complainant contacted the Commissioner on 1 February 2021 to complain about the way his request for information had been handled.
14. Further to the Commissioner's intervention, the Council provided the complainant with its internal review response on 18 March 2021.
15. The Council amended its position and considered the request under the EIR. It explained that the information relates directly to the elements of the environment as described in regulation 2(1) of the EIR. The Council acknowledged that it had initially considered the request under the FOIA rather than the EIR and it apologised for the oversight.
16. The Council determined that regulation 12(4) (information not held) of the EIR is engaged and stated that the information requested is not held. It explained that the Council does not have full access to any of its building control records because it was the target of a serious cyber attack which impacted the Council's ability to access information. The Council said that it checked its hard copy archive and confirmed that it does not hold the information requested.
17. On the same day (18 March 2021) the complainant responded to the Council's internal review. They asked the Council to look again at the request "*to ensure that you are responding on the basis of the correct information.*" The complainant stated that the response related to a building control file which the Council said was completed in 2013, and they considered this to be outside the scope of his request. Therefore, the complainant argued that the response did not "*properly engage with my request and is not an adequate response.*"
18. On 7 April 2021 the Council provided the complainant with a further response to his request for information. The Council agreed that its response had not fully addressed the complainant's initial request, and stated that it does not hold the files for references FP2005/0992 and FP2016/24498.

19. However, the Council said that it does hold the file reference FP2007/0724. It advised the complainant that the drawings/details in relation to this file can be viewed (not copied) by submitting a request and paying a fee of £74.58 (VAT included). The Council guided the complainant to its website where further information about the process is available. The Council also explained that "*Building Control records are not public records and there is no public right to view or obtain information submitted under the Building Regulations. Also, a current owner does not have automatic rights to the property records submitted by the previous owner(s). For them to enjoy these rights and be treated in the same way as though they were the previous owner, written consent allowing access to records is required.*"
20. From the correspondence provided to the Commissioner, he has deduced the following:
 - The Council states that it does not hold information to some parts of the request; files FP2005/0992 and FP2016/24498.
 - The Council states that it does hold file FP2007/0724.
 - The Council has withdrawn its reliance of section 40(2) (personal data) of the FOIA.
21. The Council was asked to state the exception it relied on for withholding information to the file FP2007/0724 and to provide the rationale for the parts of the EIR cited.
22. With regard to files FP2005/0992 and FP2016/24498 the Council was asked to provide details of any searches carried out to locate the information, and reasons why it was not held.
23. Following the Commissioner's advice, the Council revisited the request and the complainant's concerns about its handling of his complaint. On 28 October 2021 the Council provided the complainant with a fresh response and confirmed that it does hold file reference FP2007/0724.
24. The Council conducted a further search in respect of file FP2016/24498 and maintained that it does not hold this file. The Council relied on regulation 12(4) (information not held) of the EIR.
25. During the further search, the Council located and confirmed that it does hold file FP2005/0992. The Council relied on regulation 13(1) (personal data), regulation 12(5)(c) (intellectual property rights) and regulations 8(1) and 8(3) of the EIR to both files FP2005/0992 and FP2007/0724 to withhold the information.

26. The Commissioner has had sight of the withheld information consisting of the two requested files; FP2005/0992 "*Deposit of Full Plans*" (9 November 2005) and FP2007/0724 "*Full Plans*" (9 August 2007).
27. The following analysis focuses on whether, on the balance of probabilities, the Council was correct to state that it does not hold information relating to file reference FP2016/24498. The Commissioner will also determine whether the Council was entitled to withhold the requested information; files FP2005/0992 and FP2007/0724 under the regulations it has cited.

Reasons for decision

Regulation 2(1) of the EIR - is the information environmental?

28. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements..."
29. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

30. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
31. The requested information in this case relates to a conversion of an existing building and the construction work regarding residential units.
32. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on measures such as policies, plans and activities which are likely to affect environmental elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b). The Commissioner is therefore satisfied that the Council subsequently handled the request under the correct regime.

Regulation 12(4)(a) - information not held

33. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when the applicant's request is received.
34. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held.
35. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is held.

¹ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

The complainant's view

36. The complainant questioned some parts of the Council's response regarding file FP2016/24498 and this response. He believes that there has been a breach of regulation 4(1)(b) (dissemination of information) of the EIR and if information has been destroyed, he said that the Council should explain how and why in order to maintain public confidence. The complainant also referred to the Council's general statements about cyber-attacks, and said that the Council had not explained, specifically, about what happened to this file.

The Council's view

37. The Council stated that following correspondence from the ICO, a further search was conducted for the files requested, and confirmed that it does not hold file FP2016/24498. It said that the searches included its electronic databases and off-site storage company that holds its building regulations files. The Council explained the reason why these searches were conducted is because all the records would have been indexed and placed on the building control database. It further explained that in order to retrieve the file, staff would have referred to the off-site storage provider using specific search attributes which should match the asset codes held in the inventory. The Council said that the storage facility does not offer a routine 'lid lifting' service in response to file retrieval requests. It added, *"To do so would lead to compromising the integrity of the inventory and the stored files, as there is a high risk of the files not being replaced correctly following a lid lifting exercise. It would be outside the terms of the contract and could mean the Council having to refuse requests as being manifestly unreasonable under regulation 12(4)(b)."*
38. The Council also stated that a further search of the off-site facility was carried out, this included using all available references and documentation relating to the storage of these files. The Council confirmed that the search returned a nil result in respect of the file reference FP2016/24498, and that this file was a wholly electronic file which was impacted by the cyber incident that took place in October 2020. The Council said that having conducted this further search, it has exhausted all efforts at its disposal in respect of this specific file.

39. With regard to any searches of relevant paper/electronic records and any staff consultations, the Council explained that *"staff who dealt with the original enquiry have since left the Council. We would assume that in line with the practice within the service, following receipt of the initial request for information, an electronic search would have been carried out by the technical support team. They would have also contacted the off-site storage company to confirm whether or not the files were held."*
40. The Council said that the database would have been searched using the building regulation reference numbers and the address or variations thereof as search attributes in accordance with the usual practice.
41. If the information was held, the Council confirmed that it would have been held manually at the off-site storage, as well as electronically on the database used by the building regulations service to store application information. The Council reiterated the fact that the database was impacted by the cyber incident of October 2020, (ICO case reference: IC-64699-Y2S7 personal data breach notification form) as a result, the information is no longer available. This response regarding the cyber incident that occurred, the Council applied to some of the other questions about the searches which were carried out, i.e. formal records management policy and the retention and deletion of records of this type.
42. With regard to a business purpose for which the requested information should be held, the Council said that *"the local authority is only obliged to retain records relating to Building regulations projects for a period of 15 years under the Building Control performance standards guidance document and these records only relate to the inspections."*
43. The Council also confirmed *"The information is retained by the council due to the Limitation Act 1980. This allows the customer up to 6 years to make a claim where a defect is discovered with the building works. Additionally, within the Latent Damage Act 1986, Section 14 B provides a maximum of 15 years from when the defect was caused. In line with the above, the Council stores its records for 15 years. As stated in the response to question 11, the Council is only required to provide site inspection records to the building owner upon request in writing and within 15 years where a completion certificate has been issued."*

The Commissioner's decision

44. The Commissioner's remit is to establish whether, on the balance of probabilities, information falling within the scope of the request is held. He acknowledges that the Council searched through its off-site storage facility and electronically on the relevant database. The Commissioner is satisfied that the searches carried out were adequate and appropriately targeted.
45. The Commissioner's decision is that, on the balance of probabilities, the Council is correct to state that it does not hold recorded information falling within the scope of the request – file FP2016/24498.

Regulation 13(1) – personal data

46. 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.
47. In this case, the relevant condition is contained in regulation 13(2A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").
48. 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.
49. 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?

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

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

² As amended by Schedule 19 Paragraph 307(3) DPA.

51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
53. 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.
54. The Council relied on the exception at regulation 13(1) of the EIR for withholding some of the information held in the files FP2007/0724 and FP2005/0992. Within its response to the Commissioner, the Council referred to a section (personal data) of the Commissioner's guidance. The Council stated that "*personal information within the requested files which includes personal information that is not the applicant's will be withheld by way of redacting.*"
55. Having reviewed the withheld information (files FP2005/0992 and FP2007/0724), the Commissioner acknowledges that it contains details relating to building plans along with names, addresses, contact details of the building corporations involved with the development.
56. The Commissioner's guidance on personal data sets out information about companies. It states that "Information concerning a 'legal' rather than a 'natural' person is not personal data. Consequently, information about a limited company or another legal entity, which might have a legal personality separate to its owners or directors, does not constitute personal data and does not fall within the scope of the GDPR."
57. The Council stated in its response to the Commissioner, that it is aware that information relating to companies is not covered by the exception. The Council said however, that it may apply to individuals within a company where the expectation is that their personal information would not be placed in the public domain.
58. The Council has not provided the Commissioner with any further representations (other than details in the above paragraph) for its reliance of regulation 13(1) of the EIR to information relating to the two building control files.

59. The Commissioner notes that the complainant's request is for information the Council holds on specific building control files relating to a conversion, and not for information about a person. The Commissioner has determined that the withheld information does not constitute personal data as defined by the Data Protection Act 2018 ("DPA"). The names and contact details contained within the files are of limited companies, corporations and not individuals. The names of the corporations have been checked and are available within the public domain.

The Commissioner's decision

60. As the Commissioner has decided that the information is not personal data, regulation 13(1) of the EIR is not engaged. Therefore, he has not gone on to consider if any of the DP principles would be breached. The Council is not entitled to rely on this exception to withhold the information within the files.

Regulation 12(5)(c) – intellectual property rights

61. Regulation 12(5)(c) states:

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

(c) intellectual property rights"

62. As stated in the Commissioner's guidance on regulation 12(5)(c)³, Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:

- the material is protected by IP rights;
- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
- the identified harm is a consequence of the infringement or loss of control over the use of the information; and

³ https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

- the potential harm or loss could not be prevented by enforcing the IP rights.
63. In determining whether this exception has been correctly applied, the Commissioner considers that the onus is on the public authority to identify the specific IP right that would be adversely affected and its owner. The Commissioner considers that there are three main forms of IP rights: copyright, database rights and copyright in databases. In demonstrating that information falls within the scope of the exception, public authorities must, therefore, identify the form of IP right which information is protected by and explain why.
64. The Council advised the Commissioner that it also relied on the exception at regulation 12(5)(c) of the EIR to both files; reference FP2005/0992 and FP2007/0724. The Council explained that:

"The architectural drawings present on the file are not the property of the Council and the copyright to these documents is retained by the owner. This right is protected by law. Copies of the drawings and plans cannot be reproduced without the express permission of the copyright owner. Neither the Council nor the property owner for whom the plans were produced can transfer any right to those documents without the consent of the document owner.

Breach of the said copyright could also give rise to liability on the part of the Council, making it subject to legal action by the copyright owner. The Council considers that it would be impractical for the owner of the copyright to enforce their rights arising from wide-ranging infringement through EIR disclosure. The Council recognises that copyright is not infringed by taking photographs of the drawings and plans and the applicant may wish to take such photographs and sketches when accessing the file. The applicant is welcome to do this should they choose to."

65. The Council stated that it recognises the presumption in favour of disclosure with regard to environmental information under regulation 12(2). It said that it also recognises the public interest in transparency and accountability regarding its actions, as well as the public interest in maintaining confidence about the way it conducts business on behalf of the public.

66. The Council said that building control records are not public records, and that plans deposited with a local authority in accordance with Building Regulations are not documents which the public are entitled to inspect. The Council stated; *"There is no requirement under the Building Regulations that the application and copies of the plans and drawings be made open for comment or scrutiny by members of the public and, the Council does not routinely publish the information in these files or generally make them available to other parties."*
67. The Commissioner notes the Council's argument that the information within the files is not available in a public register or a list. The Council stated that access to the information cannot be obtained without specific application to the Council.
68. The Council argued that as information provided under the EIR is deemed to be disclosed to the world at large, disclosure of the information would result in a significant lack of confidence in the activities of the Council. It said that this would undermine the entire building control process if information provided as part of a building control application (that is not already in the public realm), was being routinely published and shared more widely than intended.
69. Having viewed the Council's submissions regarding its reliance of regulation 12(5)(c) of the EIR to the request, the Commissioner is not persuaded by its arguments. Although the Council states 'copyright' as the specific IP right which is being protected, it has not explained how the IP rights holder would suffer harm if the information was disclosed.
70. It is not sufficient to simply state that the property owner owns IP rights to some of the information within the requested file. As this does not explain information subject to an IP right or demonstrate that this is the case.

The Commissioner's decision

71. As the Council has failed to provide any further representations in respect of its application of regulation 12(5)(c) of the EIR, the Commissioner's decision is that the Council have failed to demonstrate why this exception is engaged in this case.

Regulation 8 – Charging

72. Regulation 8(1) of the EIR allows a public authority to charge for making environmental information available, subject to the following conditions:
- Regulation 8(2) provides that no charge can be made to allow access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available;
 - Regulation 8(3) requires that any charge must not exceed an amount which the public authority is satisfied is reasonable;
 - Regulation 8(8) requires the public authority to publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived.
73. The Commissioner accepts that a charge can include the staff costs of locating, retrieving and extracting the requested information, as well as any disbursement costs. This follows the findings of the First-tier Tribunal (Information Rights) in *East Sussex County Council v Information Commissioner and Property Search Group* (EA/2013/0037) which found that the drafters of the original EU Directive 2003/4/EC (from which the EIR are derived) made a clear decision not to exclude the cost of staff time in searching for the environmental information when considering a reasonable amount for a charge. However any charge should be reasonable, and a requester should not be disadvantaged by a public authority's poor records management.
74. The information requested in this case, is all material the Council holds on building control files FP2005/0992 and FP2007/0724 which relates to the conversion of an existing building and construction of a four storey addition, also additional residential units being added to an existing building.
75. The Council informed the Commissioner that there is a section within the Building Control pages (the Council's website) which outlines who has access to the information that individuals have added during the building control process. The Council stated that the information provided would not generally be further shared, except in specific and limited circumstances. It added that it has a mechanism to maintain accountability and transparency relating to building control records and charges a reasonable fee to cover the cost of maintaining and providing the service to the public. The Council relied on regulations 8(1) and 8(3) of the EIR.

76. The Council stated in its response to the complainant, that in line with its duty under regulation 9(1) of the EIR to provide advice and assistance to requesters, it advised that the drawings/details in relation to this specific file can be viewed by submitting and paying a fee of £74.58 (VAT included). The Council informed the complainant that more information about the process is available via the following link: <https://hackney.gov.uk/bc-property-enquiries> on its website.
77. The Council also reiterated that building control records are not public records and there is no public right to view or obtain information submitted under the Building Regulations. The Council said, *"Also a current owner does not have automatic rights to the property records submitted by the previous owner(s). For them to enjoy these rights and be treated in the same way as though they were the previous owner, written consent allowing access to records is required."*

The Commissioner's decision

78. The Commissioner considers that the charge of £74.58 for viewing the drawings/details relating to the specific files in this case, may appear to be a reasonable amount. However, the Council has not provided the Commissioner with any calculations of the charge, and on what basis the Council believes the charge is reasonable in respect of its reliance of regulations 8(1) and 8(3) of the EIR. Therefore, the Commissioner's decision is that the exceptions are not engaged in this case.

Procedural matters

Regulation 5(2) – time for compliance

79. Regulation 5(2) of the EIR states that a public authority that holds environmental information shall make it available on request "as soon as possible and no later than 20 working days after the date of receipt of the request".
80. In this case, the Commissioner notes that the Council initially considered the request incorrectly under the FOIA and relied on section 40(2) to withhold the information requested.
81. The Commissioner also notes that the complainant submitted his request on 23 August 2020. The Council provided its response on 2 October 2020 (29 working days) which falls outside of the statutory time limits. The Council therefore breached regulation 5(2) of the EIR by not providing a response within 20 working days.

Regulation 14(2) – time limits for refusing a request

82. Regulation 14(2) states that if a public authority is refusing a request for information, “the refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request”.
83. The Commissioner notes that the Council provided its refusal notice on 7 April 2021. The complainant had asked for an internal review on 2 October 2020 and sent chaser letters on 3 November 2020, 4 December 2020 and 1 February 2021. The Commissioner has found a breach of regulation 14(2) of the EIR because the refusal notice was provided 129 working days after the date of receiving the request, this exceeds the time limits.

Other matters

84. The Commissioner is concerned with the Council’s delays in responding to the request, and providing its submissions and the withheld information to the Commissioner. He considered that the Council’s reasons for refusing the information were inconsistent with its previous correspondence, and not in accordance with the FOIA or the EIR and the ICO’s guidance. The Commissioner also notes that the Council had not set out its reasons for applying the exemptions. Nor did the Council identify a valid exception under the EIR to withhold information within the files in question.
85. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. He suggests that requests for information relating to planning matters should generally be handled under the EIR⁴ and he expects the Council to be aware of this.

⁴ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/#eir5>

Right of appeal

86. 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: 0116 249 4253

Email: grc@justice.gov.uk.

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

87. 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.
88. 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

Phillip Angell
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