

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 February 2023

Public Authority: Royal Borough of Kingston upon Thames

Address: Guildhall 2
High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant has requested information relating to neighbouring properties foundation depths.
2. The Commissioner's decision is that Royal Borough of Kingston upon Thames (the Council) was entitled to rely on Regulation 13(1) when refusing this request.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 24 October 2021, the complainant wrote to the Council and requested information in the following terms:
 - "1. What is the retention period for documentation in relation to building control (in particular depth of foundations)?
 - a. Rationale & certificate of sign off.
 2. More specifically please can I be provided with the following information;
 - a. Depth of foundations for the side extension at [address redacted] (approx. 2015)
 - b. Depth of foundations for the rear extension at [address redacted] (approx 2018)

- c. Depth of foundations for the rear & side extension at [address redacted] (current)”
5. The Council’s final response was that it had provided some information within the scope of the request, but the remaining information was exempt under Regulation 13(1).

Scope of the case

6. The complainant contacted the Commissioner on 27 January 2023 to complain about the way his request for information had been handled.
7. The Commissioner considers whether the Council was entitled to rely on Regulation 13(1) when refusing this request.

Reasons for decision

Regulation 13(1) – third party personal data 13.

8. The Council has withheld the third party personal data under Regulation 13(1) on the basis that disclosure would breach the first principle of the UK General Data Protection Regulation (“UKGDPR”).
9. 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.
10. In this case, the relevant condition is contained in Regulation 13(2A)(a)¹. This applies where 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 UKGDPR.
11. 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.

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

12. 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

13. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. 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.
15. 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.
16. All of the withheld information in this case relates to third person properties. The various documents within the Building Control File refers to the construction and design of the properties.
17. The Commissioner is satisfied that the complainant and others would be able to link this information to at least one individual (ie. the occupier(s) of the property in question). The information cannot be anonymised and is therefore the personal data of the individuals concerned. He will now consider whether disclosure would contravene the Data Protection Principles.

Would disclosure contravene any of the Data Protection principles?

18. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
19. 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.
20. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

21. 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.
22. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².
23. 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.
24. 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

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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"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"

25. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, 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.
26. 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.
27. The complainant explained to the Commissioner that they are interested in the requested information was to gain an explanation regarding the foundation depth conclusion drawn by the Council. The complainant had previously sought their own extension and the Council concluded that two neighbouring properties had trees/hedges which would impact the complainants foundation depth. However, when the complainant sought an independent specialist, it concluded a different result.
28. The complainant believes the requested information would show that they had been "treated differently, unfairly and unjustly when compared to... neighbours." The complainant went further and explained that disclosure would assist in challenging the consistency and decision making process of Kingston Council Building Control and provide transparency.
29. The Council acknowledged that disclosure would allow the public to understand the Building Control Process, whilst also providing them with reassurance that the Council processes were fair and transparent. The finally advised that disclosure would provide the public with evidence that the Council was correctly applying Building Regulations.
30. For the above reasoning, the Commissioner is satisfied that there is a legitimate interest in the requested information.

Is disclosure necessary?

31. 'Necessary' means more than desirable but less than indispensable 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.
32. The Council explained that in order for it to disclose the requested information, they would have to breach Regulation 13 of the EIR.

33. The Council advised the complainant in its response that Building Control records are not public records, which mean there is no public right to view or obtain information submitted under the Building Regulations. However, the owner of a property or a solicitor acting in the sale of the property can request to view plans or obtain a copy of completion certificates and decision notices.
34. The Council also informed the complainant that the property owner would have a reasonable expectation that the information contained within the Building Control file would remain confidential and Building Control files are not routinely disclosed or published.
35. Although the information requested may not be deemed to be "sensitive information" it nevertheless remains the fact that the property owner would have a reasonable expectation that the contents of the file would remain confidential and would be a matter between them and the Building Control department.
36. If the complainant feels that they have been treated unfairly, they can raise a complaint with the Council, followed by, if necessary, a referral to the Local Government and Social Care Ombudsman. This could be achieved without revealing third party personal data to the world at large. Showing that there are less intrusive means of achieving the legitimate interests identified.
37. The Commissioner does not consider that it is necessary to disclose the requested information for the complainant to be satisfied that the Council's processes are fair and transparent.

The Commissioner's Decision

38. The Commissioner has concluded that the Council was entitled to rely on Regulation 13(1) to withhold the requested information as it is personal information.
39. The Commissioner therefore does not require the Council to take any further action.

Right of appeal

40. 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

41. 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.
42. 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

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