

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

Date: 21 May 2024

Public Authority: London Borough of Barnet

Address: Hendon Town Hall
The Burroughs
Hendon
London
NW4 4BG

Decision (including any steps ordered)

1. The complainant has requested information regarding a specified property. London Borough of Barnet ("the Council") relied on regulation 13 of the EIR (third party personal information) to withhold some of the requested information and stated that it did not hold any further information, citing regulation 12(4)(a) of the EIR.
2. The Commissioner's decision is that the public authority has correctly relied on regulations 12(4)(a) and 13 of the EIR.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 9 October 2023 the complainant made a Subject Access Request (SAR) to the Council relating to their property and another property. The following information was requested:

E-mails

Letters

Notes of telephone conversations

Microsoft teams messages or any other form of internal communication

All electronic and written communications.

5. On 10 October 2023 the complainant wrote to the Council to state that, insofar as any of the above information related to another property, and was not covered by a SAR, they wished the Council to treat this as a formal FOI request so they could obtain all relevant information relating to [address redacted].
6. On 20 October 2023 the complainant again wrote to the Council reiterating the information covered by the FOI request. On 23 November 2023 the Council responded apologising that the FOI request (which should be treated as EIR) was never logged. The Council at that point stated that it had commissioned further fresh searches using the search terms originally specified by the complainant. It also stated that regulation 12(4)(a) and 13(5) of the EIR applied to the complainant's request.
7. The complainant wrote to the Council on 28 November 2023 disputing the application of regulation 12(4)(a) (information not held) and regulation 13 of the EIR (personal data of third parties). In that correspondence they reiterated that they wanted the following information:
 - Photographs taken by the planning enforcement officer at the time of the site visit.
 - Communications exchanged with the owner of the ground floor flat regarding inspections and outcomes.
8. On 8 December 2023 the Council again wrote to the complainant providing them with some further information and stating that it was unable to locate any further information using the search terms provided. It also stated that, now the complainant had provided the name of a case officer and two new property addresses, it had asked for further searches to be carried out. It stated that the only omissions it had made from the files provided to the complainant were the third party communications and the photographs taken of the property (ground floor flat).

Scope of the case

9. The complainant contacted the Commissioner on 16 April 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under regulation 13 of the EIR. He has also considered whether, on the balance of probabilities, the Council was correct to apply regulation 12(4)(a).

Reasons for decision

Regulation 12(4)(a)

11. The council argues that it does not hold any further information falling within the scope of the request for information. It has therefore applied Regulation 12(4)(a) (information not held).
12. The Commissioner must therefore decide whether, on the balance of probabilities, the public authority holds any - or additional - information which falls within the scope of the request.

The complainant's position

13. The complainant argues that further information may be held by the Council, as they consider that significant search terms have been omitted from the Council's search criteria.

The Council's position

14. The council argues that it has carried out adequate and appropriate searches in order to locate any information held by it falling within the scope of the request for information. It says that it has not located any further relevant information.
15. The council described the searches which it carried out. These included searches of its electronic files, using key words to identify relevant documents, searches of its manual files in relevant Council departments, and consultation with key officers to determine whether any further information may be held which it had not initially identified. No further information was located.
16. The Council specified that its retention period for e-mails was five years and that Microsoft Teams messages were only kept for a period of 48 hours. It also stated that case correspondence is placed on case

management systems and would be more likely to be held there than in individual inboxes. It also stated that some officers involved in planning and building control applications no longer work for the Council and any information held by them would have been deleted within six months as per corporate policy. The Council stated that any records held would be electronic and that they would be held for the purpose of the Council discharging its statutory functions. The Council informed the Commissioner that it would ideally keep planning applications on record permanently to demonstrate accountability and decision-making of its officers. The Council also provided the Commissioner with a copy of its formal records management policies.

17. The complainant is concerned that further information may be held by the council. However, the Council has confirmed that it has carried out adequate and appropriate searches of its records in order to locate any relevant information which it holds falling within the scope of the request for information. Where it has located relevant information, it has disclosed this to the complainant. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.
18. On this basis, the Commissioner has concluded that, on the balance of probabilities, no further information is held by the Council falling within the scope of the complainant's request of 10 October 2023.

Regulation 13 - personal information

19. Regulation 13 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.
20. In this case the relevant condition is contained in regulation 13(2A). 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 UK General Data Protection Regulation ('UK GDPR').
21. 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(2A) of the EIR cannot apply.
22. 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?

19. Section 3(2) of the DPA 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. 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.

22. 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.

23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject. This is because it is information relating to a property and its owner, information which both relates to and identifies the individual concerned.

24. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

28. 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.

29. 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

30. 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”¹.

31. 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.

32. 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

33. 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.

34. 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

¹ 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) the EIR (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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

35. In this case both the Commissioner and the Council note that the complainant has valid reasons for requesting sight of the information, as they are attempting to determine whether the Council has complied with various regulations necessary for safety purposes/to prevent noise nuisance to their own property. The Council considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are carried out and that they are adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions. The Commissioner is satisfied that there is a legitimate interest in disclosure of the requested information and has gone on to consider whether disclosure is necessary to satisfy that legitimate interest.

Is disclosure necessary?

36. '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.
37. The Council does not consider disclosure necessary in this case, however it has not specified any less intrusive means of achieving the legitimate aim.
38. Therefore the Commissioner disagrees with the Council on this point and is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
 42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 43. The Commissioner notes here that the information relates to the data subject's home, and their communications with Council officers. That information would be contained in the Building Control file for the property, which is the occupant's personal data, and in any planning enforcement file. The data subject would have a reasonable expectation that such information would be kept confidential as it relates to their private life.
 44. Whilst the Council notes that the complainant is concerned that insufficient sound insulation has been implemented at the neighbouring property, and that it is damaging their amenity and use of their own property, the Council does not routinely publish the information in Building Control and Enforcement files or generally make them available to other parties. The council did make the sound insulation test report carried out available. The Council considers that the data subject would not expect their personal information to be disclosed under the EIR. It also considers that the information relates to the data subject's private life, including work that has been carried out on their personal property and to disclose this could cause significant distress to them.
 45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
 46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.

Right of appeal

47. 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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF