

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 March 2017

Public Authority: The London Borough of Brent
Address: Brent Civic Centre
Engineers Way
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant has requested information from the London Borough of Brent ("the Council") relating to correspondence that the Council has had with his neighbour.
2. The Commissioner's decision is that the Council has correctly applied regulation 13(5)(a) (neither confirm nor deny in relation to personal data) of the EIR to the request.
3. The Commissioner requires the Council to take no steps.

Request and response

4. On 4 August 2016 the complainant wrote to the Council and requested information in the following terms:
"Under the freedom of information act I am asking you to provide all correspondence with the neighbour [which you seem to have a cosy bias relationship with]-in regarding with our loft enforcement -if this request is not supplied then I will request the ICO [The information Commissioners office] to obtain it".
5. The Council responded on 11 August 2016. It refused to confirm or deny whether the requested information was held in accordance with section 40(5).
6. Following an internal review, the Council wrote to the complainant on 28 December 2016. The Council upheld its previous decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The complainant explained that the Council had failed to send him the information he was seeking.
9. During the final stage of the Commissioner's investigation, the Council revised its position and considered that the information sought, if held, would fall under the Environmental Information Regulations (EIR) and not the FOIA. The Commissioner agrees that the proper access legislation is the EIR rather than the FOIA.
10. The Council has sought to rely upon regulation 13(5)(a) which is the equivalent exception under the EIR to section 40(5) of the FOIA. The Council has therefore relied on the same arguments in respect of each application. This means that some of the Council's submissions quoted in the body of this notice refer to section 40(5) even though regulation 13(5)(a) is being claimed.
11. The Commissioner has considered whether the Council was correct to apply regulation 13(5)(a) to the request.
12. The Commissioner is aware the complainant has also sought the information under the Data Protection Act 1998 (DPA). In accordance with regulation (5)(3), the complainant is not entitled to his own personal data under the EIR. Any personal data he is entitled to is being considered in a separate data protection case by the Commissioner.

Background

13. The Council provided the Commissioner with some background to the request. The complainant built a dormer window extension to his property in 2011. Whilst the extension was being built, the Council informed the complainant that he needed planning permission. An enforcement notice was subsequently issued on 5 October 2011. The complainant submitted an appeal which was dismissed on 1 August 2012. The complainant was given six months to remove the dormer. However the Council has informed the Commissioner that the complainant has failed to do this and the Council has proceeded to prosecute him.

Reasons for decision

Regulation 13 – Personal data

14. Regulation 13(1) of the EIR states:

'To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.'

15. Regulation 13(2) of the EIR states that the first condition is –

(a) "in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene – (i) any of the data protection principles..."

Regulation 13(5)(a) – exclusion from the duty to confirm or deny

16. Regulation 13 sub-sections (1) to (4) generally apply to personal data held by a public authority and considered exempt from disclosure. However, regulation 13(5)(a) further excludes a public authority from confirming or denying whether it holds information if to do otherwise would reveal personal data and contravene any of the data protection principles.

17. There may be circumstances in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. In this case, to either confirm or deny that the information is held would indicate that a person has or has not been in contact with the Council regarding the complainant's loft enforcement notice. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

If held, would the information be personal data?

18. The Commissioner has first considered whether the requested information would be the personal data of a third person.

19. The DPA categorises personal data as data that relates to a living individual from which that individual can be identified.

20. The Council has stated that:

"If any individual makes a complaint to the Council, they provide the Council with information. Any information they provide, as well as whether or not they have provided information, is considered their personal information under the Data Protection Act, as it would

contain:

- *Their name*
- *Their address*
- *The fact that they have contacted the Council about an issue*
- *The opinion they have expressed relating to that issue*
- *Any response they have received from the Council relating to the above*

All this information is considered Personal Information under the Data Protection Act as it can identify them as a unique, living individual, and contains information about them. The first Data Protection Principle states that this information should be handled "Fairly and Lawfully". FoIA disclosures are considered public releases of information. The Data Protection Act requires Data Controllers to assess whether individuals have a reasonable expectation of privacy when they provide this information to the Data Controller.

21. The Commissioner is satisfied that if held, the information sought in the request would constitute personal data.

Would confirming or denying the information is held breach any of the data protection principles?

22. The Commissioner must consider whether confirming or denying that the relevant information is held would breach any of the data protection principles of the DPA. The relevant principle in this case would be the first data protection principle.

23. The first data protection principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

24. When considering whether a disclosure of the information would be fair for the purposes of the first data protection principle the Council would need to consider whether the individual would have any expectation that the information held about them would be disclosed. In this case the question is whether an individual would expect the Council to confirm whether or not they have been in correspondence with the Council about an enforcement notice.

25. The Council explained:

With regards to confirming whether any such information was held, I consider that whether or not a named individual has made a complaint or other disclosure to the Council is, in itself, their personal information, as it says something about them as an individual. Therefore I agree with [redacted name] decision that it would be a breach of the Data Protection Act to confirm or deny whether the named individual in your request has ever corresponded with the Council on this matter, and that therefore he was correct to apply Section 40(5) and Section 17(4) to your request, as the duty to confirm or deny whether information is held does not apply when to do so would in itself breach the Data Protection Act.

In the case of any complaint made about Planning issues, it is my view that anyone making such a disclosure would have a reasonable expectation that this disclosure would not be made public merely because it was requested by a third party. This would result in a loss of privacy, and maybe open up individuals to reprisals. There is therefore in my view no justification whatsoever for breaching the privacy and safety of individuals in this way, and to release any such information would not be a Fair or Lawful use of this information. Releasing the information would breach the Data Protection Act and therefore is exempt from disclosure under Section 40 of FoIA”.

26. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
27. The EIR is motive and applicant 'blind' however, and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the EIR if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
28. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard. The Commissioner further recognises that confirming whether or not the requested information is held, would not be within the reasonable expectations of the data subject. Providing this confirmation could lead to an intrusion into the private life of the data subject and the consequences of any disclosure could cause damage and distress to that party.
29. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the

Commissioner finds that the Council is entitled to refuse the request on the basis of regulation 13(5)(a) of the EIR.

30. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider the lawful condition in the first data protection principle or whether one of the schedule 2 conditions is met.

Right of appeal

31. 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

32. 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.
33. 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

Alun Johnson
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