

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

Decision notice

Date: 8 February 2018

Public Authority: Cardiff Council
Address: County Hall
Atlantic Wharf
Cardiff
CF10 4UW

Decision (including any steps ordered)

1. The complainant requested information about a specific property. Cardiff Council ('the Council') applied regulation 13(1) to the request. During the course of the Commissioner's investigation the Council sought to rely on regulation 13(5) to refuse to confirm or deny whether the requested information is held. The Commissioner's decision is that the Council has correctly applied regulation 13(5) to the request. However, the Council failed to issue a valid refusal notice within 20 working days and breached regulation 14 of the EIR.

Request and response

2. On 21 March 2017 the complainant wrote to the Council and requested information in the following terms:

"The occupant residing at the above address is erecting a 'out building' with veranda and closer than 1m from the boundary along with a power supply, windows are facing the property and adjoining property.

Please supply the Building reference number as I am unable to find it.

Please advise what enforcement action you intend to take."

3. The Council responded on 22 March 2017 and asked the complainant to confirm the address of the property in question.

4. The Council issued a further response on 24 March 2017 and stated that:

"As previously stated, Building Control records are subject to data protection and therefore we cannot confirm receipt of application, date of receipt or any details to you.

The surveyor for the area has been made aware of commencement of works on site and will carry out a site inspection in due course to ensure compliance with the regulations".

5. On 31 March 2017 the Council wrote to the complainant to confirm that a site visit had been undertaken, which confirmed that the structure in question was exempt under schedule 2 of the Building Regulations 2010. As such an application for building regulation approval was not required.

6. Following correspondence from the Commissioner, the Council issued an internal review response on 8 June 2017 and stated that it considered regulation 13(1) of the EIR to apply to the request of 21 March 2017.

Scope of the case

7. The complainant contacted the Commissioner on 12 June 2017 to complain about the way his request for information had been handled.

8. During the course of the Commissioner's investigation, the Council changed its stance in relation to the request on a number of occasions. It confirmed that its final position was that it was seeking to rely on regulation 13(5) of the EIR to refuse to confirm or deny whether the requested information was held.

9. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied regulation 13(5) to the request of 21 March 2017.

Reasons for decision

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

10. Regulation 13 sub-sections (1) to (4) generally apply to third party personal data held by a public authority and considered exempt from disclosure. However, regulation 13(5)(a) allows a public authority to refuse a request where confirming or denying whether the requested information is held would disclose personal data and that disclosure would contravene any of the data protection principles.
11. In order to decide whether the Council has correctly applied regulation 13(5), the Commissioner will:
 - Determine whether the requested information (if held) would constitute the personal data of third parties.
 - Determine whether confirming or denying whether the requested information is held would contravene any of the data protection principles.

Would confirming or denying whether the requested information is held disclose personal data?

12. Personal data is defined by the Data Protection Act 1998 (the “DPA”) as information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
13. The Commissioner is satisfied that to confirm or deny if the Council holds information would constitute the personal data of the householder as he/she is directly identifiable from information about their property.

Would confirming or denying whether the requested information is held contravene any of the data protection principles?

14. Having accepted that the information requested, if held, would constitute the personal data of a living individual other than the applicant, the Commissioner must next consider whether confirmation or denial as to whether information is held would contravene one of the data protection principles.

15. The Commissioner considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
- personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
16. In considering whether confirmation or denial of whether the information requested is held would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

The Council's position

17. The Council's representations regarding its application of regulation 13(5) are somewhat limited. It advised the Commissioner that building regulation application records, unlike planning applications are "*not deemed to be a public record. Therefore in line with data protection legislation Building Control is not at liberty to divulge such information*".
18. The Councils considers that:
- "When an applicant submits an application, upon submitting the application they would have no expectation that their details would be put into the public domain or disclosed. Therefore no conditions under Schedule 2 of the Data Protection Act would apply as publishing details is not a legal requirement, and consent of the applicant is not requested. Similarly if an individual were to, as in this case, ask for confirmation from the Council as to whether an application had been received, the Council would not be able to confirm or deny receipt as doing so would be processing of information of an individual".*
19. The Council did not provide any specific representations in relation to the consequences of confirming or denying whether the requested information is held in this case, or the legitimate interests of the public in accessing the information in this case.

The Commissioner's position

20. The Commissioner acknowledges that there is no statutory register of Building Regulation applications. Under the Building Act 1984, if an owner of a property does not follow the correct procedures or carries out work which does not comply with the requirements contained within the Building Regulations, they will have contravened these regulations. Local authorities have a general duty to enforce the Building Regulations and will seek to do so wherever possible by informal means. Where necessary, they have various enforcement powers including the option to serve an enforcement notice requiring the owner of a property to either undertake alterations or remove the building work completely.
21. It is evident to the Commissioner that some local authorities routinely publish information about Building Regulations beyond what is required¹. Further, section 5 of the Planning & Regulatory Services Online guidance notes for practitioners² provides some justification for making certain information about building control applications available to the public. The Commissioner considers that this supports the argument that there is a reasonable expectation that some information relating to building regulations does not require a neither confirm nor deny response unless there are specific circumstances to justify it being used.
22. The Commissioner notes that in this instance there are no building control applications attributable to the structure in question. The Council advised the complainant of this in an email dated 31 March 2017 where it confirmed that the structure was exempt from the requirement for a building control application. Further, the Commissioner does not consider that confirming or denying whether the Council holds a building application reference number would be seen as being confidential or deeply private in nature. Building control applications themselves are commonplace when an individual carries out any kind of building work and confirming that a building control application has been received would not, in itself, carry an inherent confirmation that anything improper has occurred.
23. However, the Commissioner acknowledges that the Council appears to have applied regulation 13(5) to the whole of the request in this case, which includes information about any enforcement action the Council intends to take in respect of the property. The Commissioner is prepared

¹ As an example – please see - <https://www.newcastle.gov.uk/planning-and-buildings/building-control/building-control-public-access-portal>

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/456201/par_sol.pdf

to accept that any reasonable individual would hold an expectation that the Council would not confirm or deny to the public that it holds information relating to any enforcement action about their private property.

24. The Commissioner cannot conceive of any unjustified adverse consequences resulting from confirming or denying whether a Building Control application has been received (or the corresponding application reference number). However, as the request also encompasses information about any potential enforcement action against the property, the Commissioner accepts that an individual would not like it to be public knowledge that any enforcement action has been taken against his or her property and this would represent an intrusion into their private life and could cause distress to the individual.
25. The Commissioner accepts that there is a legitimate public interest in the building control process to determine whether Building Regulations are being applied properly. However, the Commissioner considers that the process has been introduced with the aim of entrusting the Council to apply the Building Regulations appropriately. This, in turn, creates a greater interest in protecting the integrity of the building control process.
26. The Commissioner accepts that the complainant has a private interest in the information in question as he appears to be acting on behalf of the owners of a neighbouring property. However, the Commissioner can only consider whether the information should be released into the public domain without restriction rather than whether the complainant alone should have access to it. The Commissioner notes that the Council has written to the complainant and provided him with details of a site visit undertaken to the property in question and explained the course of action available to him should he disagree with the Council's position regarding the matter.
27. In light of the reasonable expectations of the data subject and the consequences of disclosure, the Commissioner is satisfied that confirming or denying if the requested information is held could potentially cause distress to the data subject. She considers that these arguments outweigh any legitimate interest in disclosure. She has therefore concluded that confirmation or denial in this case would breach the first data protection principle and finds the exception at regulation 13(5) is engaged and the duty to confirm or deny does not arise.

Regulation 14 – refusal notice

28. Under regulation 14(2) of the EIR, a public authority is required to issue a refusal notice no later than 20 working days after the date of receipt of the request. Under regulation 14(3), any refusal should specify any exceptions being relied on by the public authority.
29. In this case, the Council's initial response dated 24 March 2017 stated that *"Building Control records are subject to data protection and therefore we cannot confirm receipt of application, date of receipt or any details to you"*. It did not contain any of the particulars required by regulation 14, and therefore cannot be considered as a valid refusal notice. In particular it did not state which exception it relied on for refusing access.
30. The Commissioner therefore finds that the Council failed to comply with regulation 14.

Other matters

31. As stated in paragraph 29 of this notice, the Council failed to confirm which exception it was relying on in its initial response to the request. Following correspondence with the Commissioner, in its internal review response dated 8 June 2017 the Council confirmed that it was relying on regulation 13(1) of the EIR.
32. During the course of the Commissioner's investigation, the Council changed its position in relation to the request and confirmed that it considered regulation 13(5) applicable. The Commissioner is concerned that, despite asking the Council to notify the complainant of its revised position relating to the request on two separate occasions the Council refused to do so. The Council's position is that it had previously advised the complainant of its position on 31 March 2017. However, the Commissioner notes that the Council's internal review response confirming reliance on regulation 13(1) was issued on 8 June 2017, several months after its response of 31 March 2017.
33. In accordance with her published guidance for public authorities on how she handles complaints³, the Commissioner confirms that she will consider new exemptions which a public authority seeks to apply them for the first time during her investigation. However, the guidance makes it clear that she considers that the responsibility lies with the public

³ https://ico.org.uk/media/for-organisations/documents/1215/complaints_guide_for_public_authorities.pdf

authority to advise her, and the complainant, why it considers any new exemption applies. The Commissioner would like to take this opportunity to remind the Council of the expected standards in cases where it changes its position, or seeks to rely on a new exemption during her investigation in the future.

Right of appeal

34. 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

35. 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.
36. 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

David Teague
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