

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 January 2018

Public Authority: Warwick District Council
Address: Riverside House
Milverton Hill
Leamington Spa
Warwickshire
CV32 5HZ

Decision (including any steps ordered)

1. The complainant has requested information held by Warwick District Council (the council) relating to planning enforcement action taken in respect of a particular property.
2. The council withheld the information requested in its entirety under regulation 13 of the EIR.
3. The Commissioner's decision is that the council:
 - correctly withheld personal information under regulation 13(1).
 - issued a late internal review response and therefore was in breach of regulation 11(4).
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 18 December 2017, the complainant wrote to the council and requested information in the following terms:

'I wish to make a Freedom of Information (FoI) request for copies of all correspondence, meeting notes, transcripts of any conversation, decisions and any other information held relating to enforcement action [case number redacted] [address redacted]. I am advised by [officer name redacted] that this was carried out by Building Control.'

6. The council responded to the complainant on 19 January 2018 stating that it considered his request to fall under the scope of the EIR, rather than the Freedom of Information Act 2000 (FOIA).
7. The council confirmed that it did hold information relevant to the request. However, it refused to provide this information advising that it regarded the exception at Regulation 13(1) of the EIR to be engaged as it was of the opinion that the information was the personal data of third parties. It went on to explain that it believed that the disclosure of this information would breach *'Schedule 1 of the Data Protection Act as it would not constitute fair and lawful processing'*.
8. The complainant contacted the council on 22 January 2018 to advise that he was not satisfied with the response that he had received. He also asked the council to consider redacting that information which, if disclosed, would breach the Data Protection Act 1998 (DPA 1998).
9. The complainant contacted the council again on 2 February 2018 as he failed to receive a response to his correspondence of 22 January 2018. He then submitted a complaint to the ICO about the way in which the council had handled his request.
10. The ICO contacted the council on 27 June 2018 to request that it carry out an internal review and provide the complainant with its decision within 10 working days, if it had not already done so.
11. The council then contacted the complainant on the same date to advise that an internal review had been undertaken by a solicitor acting for the council on 2 February 2018. It went on to apologise for its failure to communicate this decision at that time, confirming that it would investigate further how this had occurred.
12. The council confirmed that the outcome of the internal review was to uphold the original decision that the information held relevant to the complainant's request should be withheld. It went on to confirm that this was in accordance with Regulation 12(3) and Regulation 13 of the EIR.
13. On 28 June 2018 the complainant contacted the council again to express his dissatisfaction with the internal review decision. He advised that he had submitted his information request because of *'the significant personal and financial impact of the of the [sic] Council's original planning enforcement notice [case number redacted] decision.'*
14. The complainant also asked the council to provide confirmation of the specific subsection of Regulation 13 which had been applied to the withheld information. In addition, he requested again that the council consider providing the requested information in a redacted format, with the third party personal data removed.

15. The council responded to the complainant on the same date to advise of the following:

'Regulation 13 is designed to protect the unlawful release of individuals personal data. The specific aspects relate to 13(1) and 13(2)(a)(i). This is because the decision would contravene principle 1 of the Data Protection Act.'

16. The council went on to refer the complainant to decision notice FER0574247¹ and decision notice FER0598170² stating that these were similar in nature to the complainant's request and that, in both those cases, the Commissioner had concluded that the public authority was correct to have withheld the information.
17. The complainant then contacted the council again to confirm that he still had concerns about its decision to withhold all the information relevant to his request. He went on to say that, in all likelihood, he was already aware of the identity of that third party to whom the withheld information related. The complainant also requested further clarity as to why he could not have the information in a redacted format, with the relevant identifying personal data removed.
18. The council responded to the complainant to advise that it had nothing further to add to that which it had already provided in its previous responses to him.

Scope of the case

19. The complainant had originally contacted the Commissioner on 4 June 2018 to express dissatisfaction at the council's failure to respond to his request for an internal review. Following confirmation of the outcome of the internal review, it was apparent that the complainant remained dissatisfied and the Commissioner commenced her investigation into how the council had handled this request.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432127/fer_0574247.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560586/fer_0598170.pdf

20. The Commissioner has noted that the complainant requested copies of information relating to '*enforcement action*' in respect of a particular property which he states an officer at the council had previously confirmed to him was '*carried out*'.
21. The council has confirmed to the Commissioner that whilst it holds an 'enforcement file' and this contains details of an alleged breach of planning control, no formal enforcement action was ever taken. Given this, it is the Commissioner's opinion that if the request was taken literally, it could be concluded that the council does not actually hold the information requested.
22. However, in this instance, it would seem that the council took a broader approach when considering the meaning of the complainant's request, considering all that information which was held at the time of the request which related to the alleged breach of planning control. The Commissioner does not regard this to have been an unreasonable approach to have taken in this particular instance.
23. The Commissioner would, however, add that during her investigation the council did confirm that it could not find any record that it had ever explicitly stated to the complainant that an enforcement notice had not been issued. Given this, to ensure that there was no ambiguity, on 23 November 2018 the council did contact the complainant directly to confirm this. However, it has maintained its decision that it was correct to withhold that information held relating to the alleged breach of planning control in its entirety under regulation 13 of the EIR.
24. The Commissioner considers the scope of this case to be to determine whether the council has correctly applied Regulation 13 of the EIR to the information that has been withheld in response to the complainant's request dated 18 December 2017.

Reasons for decision

Regulation 11-internal review

25. Under regulation 11(4) of the EIR, a public authority must provide an internal review response within 40 working days of the date of receipt of a submission.
26. In this case, the complainant submitted his request for an internal review on 22 January 2018. Whilst the council has confirmed that it completed the internal review on 2 February 2018, as a result of what would appear to be an oversight, it then failed to notify the complainant of the outcome until 27 June 2018.

27. As the council's internal review response was issued outside the 40 working day time frame, it has breached regulation 11(4) of the EIR in this instance.

Regulation 13-personal data

28. The council, in its internal review decision, made reference to both regulation 12(3) and regulation 13 of the EIR.
29. Regulation 12(3) requires a public authority not to disclose the personal data of someone other than the requester, unless to do so would be in accordance with the provisions set out in regulation 13.
30. Regulation 13 prohibits the disclosure of third party personal data where to do so would contravene any of the data protection principles.
31. The Commissioner notes that at the time that the council dealt with the request the DPA 1998 had not yet been superseded by the current legislation in place, that being the GDPR and The Data Protection Act 2018. Therefore, it is the DPA 1998 that is relevant to her consideration of this case.
32. Taking into account the above, in order for regulation 13 to be engaged, the Commissioner must firstly be satisfied that the information that has been withheld is personal data as defined by section 1 of the DPA 1998.
33. She must then go on to establish whether disclosure of that data to 'the world at large' would breach any of the data protection principles contained within Schedule 1 (Part I) of the DPA 1998.

Is the requested information personal data?

34. Section 1(1) of the DPA 1998 states that:

"personal data" means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'

35. The council has advised that, in its opinion, the withheld information is the personal data of the owner/occupier of the property to which the alleged breach of planning control relates. It goes on to make reference to decision notice FER0647004³ in support of this argument.
36. The Commissioner accepts that it should not be assumed that information about a planning matter relating to a particular property is automatically the personal data of the owner of that property. In this instance, she also notes that the complainant's focus is on the enforcement action taken in relation to the alleged breach of planning control, and not any one individual.
37. However, it is the Commissioner's view that it is the owner/occupier of the relevant property that is held ultimately accountable for a breach of planning control. Any investigation that is carried out, and decisions that are reached, including any enforcement action which is considered, or taken, is likely to involve the owner of that property.
38. Having considered the withheld information, the Commissioner is of the opinion that this extends merely beyond an observation that the property may not have the correct planning permissions. The owner of the relevant property is clearly identifiable from the information that has been withheld and the personal information extends to much more than just establishing the identity of the owner.
39. The Commissioner is satisfied that the information that has been withheld relates to a third party's home and to their personal life and is about a matter that has had a direct impact on them. She has therefore concluded that the information that has been withheld does constitute personal data as defined by section 1 of the DPA 1998.

Could personal data be redacted from the withheld information?

40. The complainant has indicated in his various communications with the council that he would be happy for the information to be 'anonymised', with relevant third party personal information redacted.
41. The Commissioner has already determined that, in its current format, the majority, if not all, of the withheld information can be regarded to be the personal data of the third party. She has therefore considered to

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014176/fer0647004.pdf>

what extent the information that has been withheld could be regarded to still be personal data, should the names of the property and the name of the owner be redacted before being disclosed to 'the public at large'.

42. The complainant has already confirmed that he is likely to be aware of the identity of any third party to which the information is likely to relate. Given this, even if the name and address were removed, he would be able to ascertain to whom the remaining information related.
43. The Commissioner is also aware that there is detailed information published on the council's website in relation to planning matters (but not the council's involvement into any alleged breach of planning control) concerning the relevant property.
44. Having considered the information which is already publicly available, the Commissioner is of the view that even if the name and address were to be redacted from the information that has been requested, there is a strong likelihood that third parties, including other local residents, would still be able to identify the relevant third party from the details that would remain. In her view, that likelihood is increased yet further if linked to the information that is published on the council's website in relation to the relevant property.
45. The Commissioner is also of the view that if any information were to remain after the redaction of all relevant identifying third party personal data, this is likely to be rendered meaningless when provided in isolation.
46. The Commissioner is therefore satisfied that the withheld information is so biographically significant to the third party that it would not be reasonable to provide any information in a redacted format to the complainant.

Would disclosure of the information breach any of the data protection principles?

47. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. The Commissioner notes that in this case the council has advised that the disclosure of the withheld information would breach the first principle of the DPA 1998.
48. The Commissioner agrees with the council that it is the first data protection principle that is most relevant to this case. This 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.'

49. The Commissioner has issued guidance⁴ on section 40 of the FOIA and regulation 13 of the EIR (which both relate to personal information). Whilst such guidance is primarily written from the perspective of FOIA, it explains that it is also relevant to, and should be applied in exactly the same way, to regulation 13 (and other specified regulations) of the EIR.
50. When considering the first data protection principle, the Commissioner's approach is to consider firstly whether the disclosure of the information would be fair. She will then only go on to consider whether a Schedule 2 condition has been met if it is found that the disclosure of the information requested would be fair. This is supported by the First-tier Tribunal case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council (EA/2012/0160)*.⁵
51. When considering whether the disclosure of the information requested would be fair, the Commissioner has taken into account the following factors:
- The nature of the information.
 - The reasonable expectations of the third party with regard to the processing of their personal data.
 - The consequences of disclosure to the third party.
 - Any legitimate interest in the public or the complainant having access to the information and the balance between this and the rights and freedoms of the third party to whom the information relates.
52. The council has advised that in circumstances where there has been an alleged breach of planning control, or similar, owners/occupiers provide details to the council in order to comply with the law and/or to assist

⁴ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

⁵ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i939/20130129%20%20Clark%20Judgment%20EA%202012%200160%20.pdf>

with the investigation relating to the alleged planning breach. It goes on to say that, unlike planning applications, information relating to alleged breaches of planning control is not ordinarily disclosed or published into the public domain. The council states that, on this basis, it is not unreasonable for the owner/occupier to have the belief that the information would be kept private, and only used for that purpose.

53. The council goes on to point out that it regards decision notice FER0574247 (previously referred to in paragraph 16 of this notice) to relate to a similar set of circumstances to this case. The council states that, in that case, it was concluded that the applicant had a reasonable expectation of privacy due to the fact that they had disclosed information to the council for a specific purpose, and that the normal procedure was not to make that information public.
54. The council goes on to argue that the third party would expect a right to engage with an organisation in confidence as opposed to having details relating to their engagement being available to the public, particularly in those circumstances where no enforcement action was taken.
55. A disclosure under the EIR is considered to be to the 'world at large' and not just to the complainant in response to their request. Therefore the Commissioner is required to consider whether a disclosure to any member of the public, and not just the complainant, would be fair under the circumstances of the case.
56. The Commissioner understands that statute requires planning authorities to publish certain information relating to planning matters, including planning applications and objections, and also enforcement notices. However, this does not include alleged breaches of planning control.
57. This suggests that the planning process itself recognises that there is a greater degree of privacy afforded to the owners/occupiers of a property in relation to alleged breaches of planning control.
58. Planning authorities, including the council, make details available about the publication of personal information in relation to planning and building control matters. For example, the council has published a planning privacy notice⁶ and other guidance⁷ for individuals wishing to

⁶https://www.warwickdc.gov.uk/info/20762/privacy_and_data_protection/1246/privacy_notices/9

make a comment on a planning application on the planning pages of its website. Such information manages people's expectations about what details will be made public as part of the planning process and ensures that the council processes personal information fairly.

59. The Commissioner is aware that guidance published on the planning portal website⁸ in relation to potential breaches of planning control recommends that planning authorities provide updates to any person who reports an alleged breach, and also notify them of the decision that is reached, and the reasons for this decision. However, a planning authority is under no statutory obligation to provide the information; this is just a recommendation and any disclosure of personal information to the informant in such circumstances must still comply with the DPA 1998.
60. In any event, it would appear that in this case the complainant did not report the alleged breach to which his request relates. In addition, it should be noted that the disclosure of certain information by the planning authority to the individual who has reported an alleged breach of planning control is very different to the situation under the EIR. In the latter the test when applying regulation 13 is whether it would breach the data protection principles to disclose information to the 'world at large' rather than to just the informant as part of the planning process.
61. The Commissioner is satisfied that individuals have a reasonable expectation that their identity will be published in line with statutory requirements in respect of certain planning matters. This is because the fair processing notices, and other information, published by planning authorities make individuals sufficiently aware of such processing. It also ensures compliance with the fair processing element of first principle of the DPA 1998.
62. However, in the Commissioner's opinion, this reasonable expectation does not extend to the disclosure of personal information held relating to an alleged breach of planning control, particularly as there is no statutory requirement to make such information publicly available.

⁷https://www.warwickdc.gov.uk/info/20374/planning_applications/249/viewcomment_on_a_planning_application

⁸ https://www.planningportal.co.uk/info/200127/planning/103/having_your_say/5

63. The Commissioner is satisfied that the process by which suspected breaches of planning are managed would mean that, in most instances where no enforcement action was taken, the owner/occupier of the relevant property would not have any reasonable expectation that their information would be disclosed to the public at large. It would reveal details that are not currently in the public domain and, in the Commissioner's opinion, has the real potential to cause distress to an individual.
64. The Commissioner, when considering the issue of fairness, has also considered the balance of the legitimate interests in making the requested information publicly available against the rights and freedoms of the third party.
65. The council states that the complainant is already aware that enforcement action was not taken in the case relevant to the request. He has also been informed by the council that the disclosure of the withheld information would not lead to any change in this decision.
66. The Commissioner accepts that there is a legitimate public interest in the disclosure of information which would provide greater understanding and transparency in relation to the planning process. She is also mindful that the statute by which the planning process is governed makes it a requirement for planning authorities to make certain information relating to planning matters publicly available. However, this does not extend to information which relates to alleged breaches of planning control (although information may subsequently published where a breach of planning control is found to have occurred).
67. In this case, the fact that the complainant may be aware of the identity of the individual to whom the information predominantly relates does not then mean that the information itself loses the confidentiality to that third party. The information that has been withheld will provide the complainant, and the 'public at large' with an insight into the life of that third party, and reveal information about them which, at present, is not in the public domain.
68. The Commissioner notes that the complainant has advised the council that the decision not to take enforcement action has caused him detriment. He states that it has had a financial and personal impact and, it would seem, has had an effect on the sale of his property.
69. However, the Commissioner is mindful that the complainant is already aware of what the alleged breach related to, and that no enforcement was taken. The council has already confirmed to him that the disclosure of the information requested would not change this decision.

70. The Commissioner also considers it to be the case that should any interested party disagree with the way in which a planning authority has handled any particular matter, then there are likely to be mechanisms in place which will allow them to pursue this further.
71. The Commissioner fully accepts that whilst other statute does not require the disclosure of the information requested this does not, in itself, provide sufficient justification for withholding information in response to an information request. Each case must be considered on its own merit.
72. In this instance the Commissioner appreciates that the complainant's motive for requesting the relevant information does carry some weight when considering the balance of the legitimate interest and the rights and freedoms of the third party, particularly if it is the case that the decision not to take action has had an impact on himself and his property. The Commissioner is mindful that there is a strong possibility that the decision that was reached may have also had an effect on other local residents; it therefore cannot be assumed that details of the decision would only be of interest to the complainant in this instance.
73. The Commissioner accepts that there is a legitimate public interest in the disclosure of information which would provide greater understanding and transparency behind planning matters, and this would include breaches of planning.
74. However, the legitimate interest arguments in support of the disclosure of the information must be weighed up against the intrusion into the private lives of the third party to whom the information relates, and the distress disclosure would cause to them.
75. It is the Commissioner's view that the strong expectations that the third party would have about how their information would be processed, and the need to protect their privacy rights, outweighs the legitimate public interest arguments for disclosure in this particular case.
76. As a result, the Commissioner is satisfied that the disclosure of the information held relating to the alleged breach of planning control would be unfair to the third party to whom the information relates, and would therefore breach the first principle of the DPA 1998. Given this, in accordance with the decision set out by the First-tier Tribunal in the case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council* (previously referred to in paragraph 50 of this decision notice), it has not been necessary for the Commissioner to go on to consider whether one of the conditions contained within Schedule 2 of the DPA 1998 has been met in this instance.

77. The Commissioner's decision is that the council has correctly applied regulation 13 to the withheld information and accordingly requires the council to take no steps.

Right of appeal

78. 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

79. 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.

80. 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

Andrew White
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