

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

Date: 23 December 2020

Public Authority: London Borough of Croydon
Address: Bernard Wetherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested information, consisting of a statutory building notice, from the London Borough of Croydon.
2. London Borough of Croydon relied on the following exceptions to withhold the requested information.
 - Regulation 12(3) - third party personal data
 - Regulation 12(5)(e) - confidentiality of commercial or industrial information
3. The Commissioner's decision is that the London Borough of Croydon incorrectly relied on the said exceptions to withhold the requested information from the complainant.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
5. Disclose the withheld information to the complainant but it is to withhold the names and contact details of all persons therein as this information

is not requested by the complainant, to ensure compliance with the legislation.

6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

7. The Building Regulations 2010¹ set out the legal requirements about how buildings and extensions should be built. They cover for example the structure of the building, fire safety, and the provision of sanitation, hot water safety and water efficiency measures.
8. The role of checking that Building Regulations are being complied with falls to Building Control Bodies (BCBs).
9. There are two types of BCBs, a Local Authority Building Control service and a private sector Approved Inspector Building Control service.
10. If an Approved Inspector is used, instead of the Local Authority Building Control Service, then an 'Initial Notice' must be submitted to the local authority jointly by the Approved Inspector and applicant before work commences on site. Once submitted, the local authority should check the details of the Initial Notice within 5 working days – the local authority can reject the notice if the details are found to be incorrect.

Request and response

11. On 10 July 2019, the complainant wrote to London Borough of Croydon ("the public authority") and requested information in the following terms:
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¹ <https://www.legislation.gov.uk/ukxi/2010/2214/regulation/19/made>

- “The Building (Approved Inspectors etc.) Regulations 2010. Please provide copies of any Initial Notice and/or Notice of Cancellation served by an Approved Inspector under the Regulations, with regard to the current works” at a specified property.
12. The public authority responded on 6 August 2019 and stated that.
- The Council is required to maintain a register of Initial Notices given to them including information as to whether such notices have been accepted or rejected. This information can be obtained using the Council's search facility which can be found at the link below. Regulation 6(1)(b) of the Environmental Information Regulations therefore applies where the requested information is already publicly available and easily accessible to the applicant in another form or format.
- <https://publicaccess3.croydon.gov.uk/onl...>
13. On 26 August 2019, the complainant requested an internal review and stated that he was not able to view the requested information via the link the public authority had provided.
14. The public authority sent him the outcome of its internal review on 23 September 2019. It revised its position by saying as follows.
- Having considered the issues raised in your Internal Review and the status of the Notices, the Council is of the view that they are excepted from release. The exceptions provided for in Environmental Information Regulations, 12(3)(data of someone other than the applicant) and Regulation 13 (personal information), prevent the Council from providing the requested information, if this would contravene the General Data Protection Regulations (GDPR) and/or the Data Protection Act 2018 (DPA18).

Scope of the case

15. The complainant contacted the Commissioner 15 January 2020 to complain about the way his request for information had been handled.
16. On 28 September 2020, during the Commissioner's investigation, the public authority informed her that it also relied on Regulation 12(5)(e) (confidentiality of commercial or industrial information) to withhold requested information.

17. On 2 October 2020, the public authority provided the complainant with the name of the company that employed or engaged the building inspector .
18. On the 3 December 2020 the complainant informed the Commissioner that he did not take issue with the public authority withholding the personal names and email addresses contained in the withheld information.
19. The public authority has provided the Commissioner with a copy of the withheld information and she has considered the same.
20. The Commissioner considers she must determine whether the public authority has correctly relied on its cited exceptions (Regulations 12(3) and (5)(e)) to withhold requested information.

Reasons for decision

21. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements.
22. In this case, the information requested concerns property development and planning information. Therefore, it is information on a measure affecting the elements of the environment and is thus environmental information for the purposes of the EIR.

23. The public authority relies on regulations 12(3) and (5) to withhold requested information.

Regulation 12(3)

24. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exception. Regulation 13(1) 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.
25. In this case the relevant condition is contained in regulation 13(2A)(a). 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 General Data Protection Regulation ('GDPR').
26. 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.
27. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

28. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

The public authority's submissions are in the three paragraphs below.

30. It has been established that a Building Control file (and notices included within it) consists of information about building works proposed by the owners of the property and submitted to the public authority for inspection and certification under the Building Regulations. It relates to those individuals because it is about their plans in relation to their property. It includes information that is obviously personal in nature (names, addresses and telephone numbers etc.).

31. It has also been established that all the other information (including information such as measurements, technical details, results of tests and certificates) also relates to those individuals and that this information about the owners' property is biographical in a significant sense. Given that it is clearly possible to identify the owners from this information, it has been established that the information falls within the definition of "personal data" and redaction of names would therefore not remove the "personal data".
32. In terms of the previous ICO Decision Notices and those related decisions from the Information Tribunal, it referred the Commissioner to; FER0574247; FER0681637 and FS50713311. It should be noted that each of these decisions were challenged and were dismissed by the Information Tribunal. The public authority next referred the Commissioner to a decision by the Information Tribunal, EA/2018/0158.
33. The Commissioner then asked the public authority to specify the individual who was the data subject. The public authority replied as follows.

"In this instance the personal data would relate to the named individual, who signed the notice with regards to the works being carried out. However, this may not always be the case. Indeed, in this and any other instance it may also be the property owner/s and/or any partnership that may own or be responsible for the carrying out of any works".
34. The Commissioner is of the view, that the public authority has not demonstrated to her, which identifiable person this data is said to belong to. A viewing of the withheld information shows that the building works are concerned with a new property which appears to be owned by a limited company which is not an identifiable individual for the purpose of the GDPR. It is therefore not apparent whose personal data the withheld information is concerned with or about. Additionally, as explained above, the complainant does not challenge the withholding of personal names and email addresses contained in the withheld information.
35. In the absence of there being an identifiable data subject the Commissioner finds the exception not to be engaged .
36. Regarding the Information Tribunal case the Commissioner notes that that case was concerned with an identifiable data subject, namely the neighbour of the complainant in that matter. Accordingly, that matter is readily distinguishably from this matter and does not aid the public authority. Similarly, the previous Commissioner's decisions referred to

above are also concerned with an identifiable data subject and they do not aid the public authority and, in any event, the Commissioner's previous decisions do not make binding legal precedents.

Regulation 12(5)(e)

37. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate commercial interest. Regulation 12(5)(e) is subject to the public interest test.
38. The Commissioner considers that for this exception to be applicable, there are several conditions that need to be met. She next considers the applicability of the conditions to the facts of this case.
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

39. The Commissioner's published guidance on regulation 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
40. The public authority's submissions, as to whether the information is commercial or industrial in nature, are given in full below.
- The Initial Notice is given in relation to the intention to undertake building work
 - Building work is by its very nature both commercial and industrial
 - It is possible that the building work will be carried out by the building owner and may not in itself be commercial if the intent is not derived or driven by financial gain. However, this will not be known by or disclosed to the local authority and as building work

will almost certainly result in enhancement to the value of the property, as such it will almost inevitably be commercial in nature.

- Notwithstanding the above, the notice is in relation to work and operation of the Approved Inspector that is party to the notice. Therefore, the notice will in every instance represent information that is commercial in nature.
41. The Commissioner must respectively disagree with the public authority's assertion that all building work is by its very nature both commercial and industrial. Whilst this may be often true, it is not true in all cases. Building work is often not done for commercial gain or industrial usage. Building work can be undertaken for a variety of non-commercial reasons; it may be done (for example) purely on aesthetic grounds without any thoughts to commerciality.
 42. The public authority submissions are too generic and are not sufficiently focused on the withheld information. The withheld information provides a most basic plan of some works to be done in the construction of new build property. The plans do not include information, such as costings, where commercial sensitivity would be more readily discernible.
 43. The withheld information also includes the approved building inspectors' initial notice. However, the public authority has not established to the Commissioner's satisfaction that on the balance of probabilities that its disclosure would cause commercial harm to any interested party. The initial notice merely states that the proposed building works are compliant with statutory building regulations.
 44. In any event even if the Commissioner is wrong on this point the withheld information primarily consists of information that is already in the public domain. The plans that comprise the withheld information have been publicly disclosed due to the planning process, for the public's scrutiny and comment. Accordingly, this removes the requisite confidentiality that is needed for this exception to be engaged.
 45. It is for the above reasons, the lack of obvious commerciality and confidence, that the Commissioner finds this exception not to be engaged.
 46. Given that the Commissioner finds neither of the exceptions cited by the public authority to withhold the requested information are engaged, she directs that the disputed withheld information be disclosed to the complainant.

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: 0300 1234504

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.

Signed

Gerrard Tracey
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