

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 March 2021

Public Authority: Cherwell District Council
Address: Bodicote House
Bodicote,
Banbury
OX15 4AA

Decision (including any steps ordered)

1. The complainant has requested information from Cherwell District Council ("the Council") in the form of Building Control Plans regarding a neighbouring property.
2. The Commissioner's decision is that the Council was correct to apply Regulation 13(1) of the EIR to the requested information.
3. The Commissioner does not require the Council to take any further action in this matter.

Request and response

4. On 26 August 2020, the complainant wrote to the Council and requested information in the following terms:

"I would also request that you let me have a copy of their Building Control Plans submitted to you. This request is made under the Freedom of Information Act 2018. It is noted that these are not available on the Cherwell District Council website."
5. The Council responded on 7 September 2020. It refused to provide the requested information, citing Regulation 13 of the EIR – personal data.

6. Following an internal review the Council wrote to the complainant on 24 September 2020. It stated that it upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 25 September 2020, to complain about the way his request for information had been handled.
8. During the Commissioner's investigation, the complainant advised that they did not consider that their request for information fell under the EIR and that Council should have considered it under the Freedom of Information Act 2000 (FOIA).
9. The Commissioner considers that the scope of the case, is to determine if the request falls under the EIR and if the Council has correctly refused to provide the information under Regulation 13 of the EIR.

Reasons for decision

Regulation 2(1) – is the requested information environmental?

10. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form 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... emissions... and other releases into the environment, likely to affect the elements referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes... and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

11. The Commissioner has seen the withheld information and considers that it would fall under categories b) and c) of Regulation 2 of the EIR. This means that the information is environmental and the Council was correct to consider the request under the EIR.

Regulation 13 personal information

12. Regulation 13(1) 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) of the Data Protection Act 2018 is satisfied.
13. In this case the relevant condition is contained in regulation 13(2A)(a)¹ of the Data Protection Act 2018. 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').
14. 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.

Is the information personal data?

¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

15. 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.
16. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names and address of the data subjects quite obviously is information that both relates to and identifies those concerned. There is also further detailed information in relation to the data subject's property. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. 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.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

24. 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.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

27. 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"*².

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, 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;

² 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) FOIA (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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

29. 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

30. 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.

31. 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. If the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. In this case the Commissioner notes that the complainant has valid reasons for requesting sight of the Building Control Plans, as they are attempting to determine whether the Council has complied with various building regulations necessary for safety purposes/to prevent damage to their own property.

33. The Commissioner 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.

Is disclosure necessary?

34. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

35. The Commissioner notes that it is also important to acknowledge that Regulation 13 of the EIR is different from other exemptions in that its consideration does not begin with an expectation of disclosure. As Regulation 13 is the point at which the EIR and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.
36. As disclosure under the EIR is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
37. In this case, the Commissioner understands that while the Planning Permission documents have been published (as per normal procedure), the Building Control Plans have not been. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and she accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure.
38. The Commissioner 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 FOIA 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. Whilst the Commissioner notes that the complainant is concerned that the drainage system for the neighbouring property has not been built correctly, and that it is damaging their own property, against these interests is the reasonable expectations of the data subjects, who own the neighbouring property, and their right to confidentiality to be maintained.
44. When submitting the application, the individual(s) submitting it would have expected the details, which they provided on the form, to be used to establish what the application was for, who made the the application and whether the plans met the building regulation requirements.
45. The Commissioner notes that Planning Application documents are made public as a matter of course and as such, there is a general expectation that the application and copies of the plans will be published and open for comment and/or objection by members of the public. There is no such requirement under the Building Regulations and as such, the Council does not therefore routinely publish the information in Building Control files or generally make them available to other parties.
46. The Council has explained that it believes it is not necessary to disclose the specific Building Control Plans and that the data subjects would not expect their personal information to be disclosed under the EIR.
47. It also advised that the information relates to the data subject's private lives, including work that has been carried out on their personal property and to disclose this could cause significant distress to them.
48. The Commissioner recognises that some of the information held within the Building Control Plans is similar to that provided within the Planning Permission documents. However, as the Building Control Plans are more detailed, there is significantly more personal data included.
49. The Council has not provided any arguments in favour of disclosure of the withheld information, which is due to it considering the information to be personal data.

50. The Commissioner notes that she has decided outcomes on similar cases, some of which have then subsequently been considered at the First-tier Tribunal (Information Rights). Regardless of the similarities and the outcomes of the cases, she must consider each case on its own merit³.
51. The Commissioner sees that there is a legitimate public interest in the building control process to determine that Building Regulations are being applied properly. At the same time, the Commissioner considers that the building control process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately. This in turn, in the Commissioner's view, creates a greater interest in protecting the integrity of the building consent process and that disclosure could damage the public trust in the Building Regulations process.
52. The Commissioner accepts that this case is finely balanced. However, as disclosure is to the world at large, she must consider the detriment it might cause to the owner of the property. While disclosure may not cause any wider detriment to the data subjects, other than a general loss of privacy, the Commissioner considers that the general expectation of privacy for a private citizen, carries a relatively strong weight.
53. The Commissioner also notes that the complainant has referred to the "Planning and Building Guidance notes", specifically points 3.22 and 5.1, which they consider demonstrates why the withheld information should be provided. Whilst the Commissioner acknowledges the document referred to, it must be considered alongside the Data

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615747/fer0770385.pdf>

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2620/Durham,%20B%20-%20EA2019-0346%20\(12.03.20\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2620/Durham,%20B%20-%20EA2019-0346%20(12.03.20).pdf)

<https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259515/fs50713311.pdf>

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2364/Abbott,%20Michael%20John%20EA.2018.0158%20\(24.01.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2364/Abbott,%20Michael%20John%20EA.2018.0158%20(24.01.19).pdf)

Protection Act 2018, when looking to release information. In this case, the personal data of the data subjects narrowly outweighs the need for disclosure.

54. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' 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.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
56. The Commissioner has therefore decided that the Council was entitled to withhold the requested information under regulation 13(1) by way of regulation 13(2A)(a) of the EIR.

Other matters

57. The Commissioner notes that the complainant does not consider that the request falls under the EIR. However, regardless of if the request was considered under the FOIA or the EIR, the outcome would be the same, due to withheld information being considered as personal data. If the complaint was considered under the FOIA, it would have under exemption 40(2) - personal information.

Right of appeal

58. 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

59. 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.
60. 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

Phillip Angell
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