

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

Date: 6 December 2021

Public Authority: London Borough of Hillingdon
Address: Civic Centre
High Street
Uxbridge
Middlesex
UB8 1UW

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Hillingdon (the Council) seeking information it held about concerns that a particular building was being used for education and training purposes. The Council provided the complainant with information falling within the scope of his request but withheld the names and addresses of individuals who had made complaints in relation to the use of a particular building. The Council withheld such information on the basis of regulations 13 (personal data) and 12(5)(f) (interests of the person who provided the information to the authority) of the EIR.
2. The Commissioner has concluded that this information is exempt from disclosure on the basis of regulation 13 of the EIR.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Council on 12 February 2020:

'Your Enforcement Officer [name redacted] has contacted me about concerns raised about the partial use of the above [the complainant cited a particular address] for education and training purposes these being associated parking, noise and groups of people congregating.

My client, Automatic Sales Ltd owns the property and occupies all of the ground floor. The first floor is part occupied by Wellcom Ltd and part by Promise Training Centre Ltd.

In order to gain a picture of how these undertakings operate and any impact they may have on their surroundings it would be useful if you could disclose any contact your Council has had with one or more of these firms since 2016 about these concerns with an explanation of any outcome.'

5. On 3 March 2020 the complainant contacted the Council again and explained that:

'May I request that as part of my inquiry as set out below (FOI 8041645) that you ask each Council dept contacted if they have received complaints since 2016 about one or more [of] the 3 companies concerned from third parties including members of the public that have not been passed onto them'

6. The Council provided the complainant with a response to the request on 11 March 2020, disclosing information falling within the scope of the request.

7. The complainant subsequently contacted the Council on 28 April 2020 and made a number of comments about the content of the disclosed information. In addition, he also explained that:

'I should also be pleased to hear from you as to whether there is any further information/complaints about usage of Heath House since 2016 as an education and training facility from about 2016 and 2018'.

8. The Council contacted the complainant on 11 May 2020 and explained that the response of 11 March had been sent to him in error and instead it wished to send him a redacted version of the information in substitution.

9. The Council provided him with a redacted version of the information sought by his request on 1 June 2020. The Council explained that the redacted material was considered to be exempt from disclosure on the basis of sections 40 (personal data) and 42 (legal professional privilege) of FOIA.
10. The complainant contacted the Council on 17 June 2020 and explained that he was dissatisfied with the decision to redact information from the documents provided. He also explained that the information he required as part of his FOI request included the further information outlined in his email of 3 March 2020 (which the Commissioner notes was repeated in his email of 28 April 2020).
11. The Council conducted an internal review and informed the complainant of the outcome on 21 July 2020. The review upheld the application of section 40 of FOIA and explained that it considered section 21 to also apply as the information was reasonably accessible to the complainant's client via the planning appeal process.
12. The complainant contacted the Council on 27 July 2020 to clarify the route by which his client could access the information. Following a further exchange of emails, the Council informed the complainant on 1 September 2020 that it was content that section 21 of FOI applied and advised him to submit a complaint to the Commissioner if he remained dissatisfied with its handling of his request.

Scope of the case

13. The complainant contacted the Commissioner on 15 September 2020 to complain about the way his request for information had been handled. More specifically, he challenged the use of the exemptions cited to withhold information falling within the scope of his request. He has also emphasised that his request did not simply cover the planning file for the property, including the Enforcement Officer's report to the Planning Committee, but also any further information the Council held about complaints regarding the usage of the property. That is to say, the information sought by his emails of 3 March and 28 April 2020.
14. During the course of the Commissioner's investigation the Council contacted him in August 2021 and explained that it had considered whether, given the passage of time and also because the unauthorised use of the building had ceased several months ago, further information could be disclosed. As result, the Council provided the complainant with a further version of the information in the scope of the request on 22 September 2021. The only material that had been withheld from this disclosure were the names and contact details of the individuals who had submitted complaints about the property in question.

15. The Council confirmed to the Commissioner that it considered such information to be exempt from disclosure under the EIR on the basis of regulations 13 (personal data) and regulation 12(5)(f) (interests of the person who provided the information to the authority)¹.
16. The focus of this decision notice is therefore to determine whether this redacted information is exempt from disclosure on the basis of these exceptions. It is relevant to note that the Commissioner's role is limited to considering the application of any exceptions within the EIR at the point that the request was submitted or at the point of the internal review.

Reasons for decision

Regulation 13 - personal data

17. 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) is satisfied.
18. In this case the relevant condition is contained in regulation 13(2A)(a)². 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').
19. 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.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

¹ During the course of his investigation the Commissioner had explained to the Council that given the nature of the requested information this request should have been considered under the EIR rather than under FOIA. The EIR provide a right of access to 'environmental information' such as that which is the focus of this request.

² As amended by Schedule 19 Paragraph 307(3) DPA 2018.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

23. 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.

24. 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.

25. In the circumstances of this case, having considered the withheld information which consists of the names and contact details (including addresses) of individuals who made complaints about the property in question, the Commissioner is satisfied that such information both relates to and identifies the individuals in question. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

26. However, as explained above 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.

27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. 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”.

29. 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.

30. 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.

31. 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"*³.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, 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;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. 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

34. 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.

³ 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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) 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".

35. 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The complainant argued that he needed the redacted information in order to progress an appeal against the Council's service of a planning enforcement notice on his client's company. In support of this position the complainant explained that much of the information that the Council relied upon for taking this action appears to be based on complaints made by local residents who lived close to his client's premises. He argued that in order to fully understand these complaints it was necessary to know the identity of the complainants, where they lived in relation his client's property and the full gist of their complaints.
37. The Commissioner accepts that this constitutes a legitimate interest in wanting to access the information and therefore this criterion is met.

Is disclosure necessary?

38. '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 EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The Commissioner accepts that in order to fully meet the legitimate interest set out above disclosure of the withheld information is necessary.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

40. 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 EIR 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.
41. 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 about the disclosure;
and
 - the reasonable expectations of the individual.
42. In the Commissioner's view, a key factor will be the reasonable expectations of the individuals. 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.
43. The Council argued that in its view the public interest was best served by the personal details of the complainants in the planning enforcement case being withheld so that residents can come forward in confidence to the Council and not be subject to the risk of possible reprisals or adverse comment. The Council emphasised that this was particularly important in a case such as this where the complainants reside nearby.
44. Furthermore, the Council argued that if the identify of those who had submitted complaints was crucial to the planning enforcement appeal lodged by the complainant, then the Planning Inspectorate has jurisdiction to order disclosure of these details pursuant to Rule 7 of the Town and Country Planning (Enforcement) (Inquiry Procedure) England Rules (SI 2002/2686).
45. For his part the complainant made the following further submissions to the Commissioner:
46. Firstly, in response to the Council's position that withholding the personal details of complainants allows residents to come forward in confidence, he argued that this gives a complainant carte blanche to make unsubstantiated allegations without the responsibility of having to justify such comments. He argued that this could encourage at least vexatious, and in the extreme malicious complaints seriously disadvantaging the appellant with no proper right of scrutiny or reply. Furthermore, the complainant explained that enforcement notice appeals can involve the making of statutory declarations, and in his view the responsibility for which should rest not only on the Council and appellant but also on interested parties including complainants. The complainant also argued that such individuals should be prepared to accept adverse comment from the appellant should the latter seek to rebut their case in the course of legitimately defending their position. He also argued that the risk of possible reprisals is covered by criminal and civil law as well as by anti-social behaviour (ASB) measures.
47. Secondly, the complainant argued that the Council's reference to the SI above demonstrated its incomplete understanding of the enforcement notice appeal procedure. The complainant explained that in this case it

appeared that the Council were prepared to proceed with the appeal via written representations where Rule 7 statements would not apply. The complainant explained that the usual procedure for written planning and enforcement notice appeals is for the appellant to lodge grounds of appeal to which the Council responds which then gives the appellant an opportunity of rebuttal. He explained that appellants are encouraged by the Planning Inspectorate to submit their full case when lodging their appeal. However, this was difficult when they only have the enforcement notice to respond to rather than the Planning/Enforcement case file which normally provides the material for the report to the Council's relevant committee seeking enforcement notice authorisation, including information submitted by third parties such as complainants. Therefore, the complainant argued the appellant would have no or little information, including the identity of individuals who had submitted complaints, to use to defend his case.

48. The complainant noted that in this case the Council's concerns, and those of residents, revolve around the impacts of the alleged breach of planning control principally on the amenity and living conditions of nearby residents. He argued that without being able to tie complaints to addresses the appellant is seriously hampered in assessing such effects. Likewise the non-disclosure of the Enforcement Officer's report to the relevant Council Committee seeking the authorisation of enforcement action puts the appellant at a major disadvantage in mounting a rebuttal of the Council's case through lack of hard facts and context. The complainant argued that in situations where the Council does disclose the Planning/Enforcement file and related documents to the appellant in response to the lodging of the appeal, the grounds of appeal to the Planning Inspectorate normally only allows the appellant about 2 weeks to prepare a rebuttal. The complainant argued that this was hardly enough time to deal with potentially complex issues, some of which may require further research and input from other parties.
49. Thirdly, the complainant argued that it was clear from the above that the withholding of third party personal data had put the appellant in an unfair position and obscured the relevant links between the complaint and the individuals who had raised concerns. It thus prevented the latter's arguments to be fairly assessed.
50. Finally, the complainant argued that one of the grounds of the appeal was that the planning permission should be granted for the activities identified in the enforcement notice which in effect amounted to a deemed planning application for the uses concerned. The complainant argued that in these circumstances the statutory duty to name objectors to the planning application should therefore apply and such disclosures should be allowed in this particular situation.

51. The complainant noted that it is normal practice for those making representations on planning matters to a Council to accept that their personal data could be placed in the public domain in certain circumstances. He argued that in such cases it must be accepted that, to a degree, personal data can and should be divulged in the public interest and this should be implicitly recognised by those making representations to the Council.
52. The Commissioner accepts the complainant's position that disclosure of the withheld information at the time of the request would have allowed him to better understand and challenge the enforcement notice. As noted above, he accepts that this is a legitimate interest and in applying weight to this interest he acknowledges that not only would disclosure aid the complainant and his client, but it could also arguably serve a broader legitimate interest in relation to making the process of dealing with this enforcement notice a more equitable and potentially more efficient process.
53. However, in terms of assessing the data subjects' legitimate interests, as the Commissioner has noted above, a key factor is the reasonable expectations of the individuals concerned. The Commissioner accepts that when a standard planning application is submitted any third parties who comment on the application should expect their personal data to be placed into the public domain. This is because this is the established practice of this aspect of the planning system.
54. However, the scenario here is a different one. Rather, the individuals in question made complaints about the operation of the building in question, which following consideration by the Council, resulted in the Council serving the complainant's client with an enforcement notice.
55. In such circumstances, the Commissioner is satisfied that the individuals in question would not have expected their comments/personal data to be placed into the public domain as would be the case with a standard planning application. This is on the basis that the Commissioner understands that it is not established custom and practice that such personal data would be disclosed; rather the opposite is true, i.e. the identities of those making complaints would not be disclosed. This is evidenced by the Council's refusal to disclose the disputed information in this case.
56. In respect of assessing the reasonable expectations of the individuals concerned, the Commissioner notes the complainant's point that as a result of the enforcement notice his client has applied for a deemed planning application and therefore the statutory duty to name objectors should apply. However, the Commissioner is not persuaded by this argument. When the individuals in question provided their personal data to the Council they did not know that a deemed planning application

would later be submitted. Nor does the Commissioner consider it reasonable to expect a member of the public to have foreseen that as a potential outcome of their complaint. In contrast, when a normal planning application is made, any individual who provides comments to the planning authority does so in the knowledge that such comments, along with their names, would be disclosed. In light of the above the Commissioner is satisfied that the individuals in question would have had a clear, in his view, reasonable expectation that their names and contact details would not be disclosed under the EIR.

57. Turning to the consequences of disclosing this information, the Commissioner notes the complainant's reference to civil and criminal law, as well as ASB measures. The Commissioner accepts that such measures exist and could potentially be relevant in certain scenarios. However, in the context of regulation 13 of the EIR it is important to remember that the issue which the exception is designed to protect is the privacy of individuals rather than the physical health and safety of individuals. Moreover, in assessing any infringement of that privacy it is important to remember that disclosure of information is to the world at large not simply to the requester.
58. In the context of this case, the Commissioner is satisfied that disclosure of the withheld information risks invading the privacy of the individuals in question by making public the fact that they had complained about the operation of a company at the premises in question. The Commissioner accepts that given the basis on which the information was provided to the Council, ie an implied understanding that it would remain confidential existed, then disclosing the information under the EIR would be likely to cause the individuals some distress and infringement into their privacy. A further factor, which in the Commissioner's view adds weight to this finding, is the close location of the complainants to the property in question.
59. Taking all of the above into account, the Commissioner has concluded that there is an insufficient legitimate interest to outweigh the data subjects' rights and freedoms. In reaching this conclusion the Commissioner accepts the complainant's position regarding access to the withheld information assisting his client with challenging the enforcement notice. However, he finds that the cumulative weight of the reasonable expectations and of the consequences of disclosure outweigh such arguments. Furthermore, the Commissioner has also taken into account the Council's position that the current legislation provides sufficient due process for the challenging of such notices. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the withheld information would not be lawful.

60. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
61. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).
62. In reaching this finding the Commissioner also notes that this is consistent with previous cases where requesters have sought the identities of those making complaints about planning matters but the Commissioner has concluded that such personal data is exempt from disclosure on the basis of regulation 13 of the EIR.⁴
63. In light of his findings in relation to regulation 13 the Commissioner has not considered the Council's reliance on regulation 12(5)(f).

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560722/fs50597259.pdf>

https://ico.org.uk/media/action-weve-taken/decision-notices/2017/1625704/fs_50643252.pdf

Right of appeal

64. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.

66. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF