

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 February 2023

Public Authority: Royal Borough of Kingston upon Thames

Address: Guildhall 2
High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant has requested information relating to foundation depths at two properties.
2. The Commissioner's decision is that Royal Borough of Kingston upon Thames (the Council) was entitled to rely on regulation 13(1) of EIR to withhold the requested information.
3. The Commissioner does not require the public authority to take any additional steps.

Request and response

4. On 20 December 2021, the complainant wrote to the Council and requested information in the following terms:

"Please can I request the following information in relation to the rear extension at [address redacted] and the side extension at [address redacted].

Please can I be provided with the RBK Building Control rationale/explanation in full (text) to justify the requirement of foundation depths of the extensions described above.

Ideally I would appreciate full disclosure of the document however the only elements I require are; the date the document was created and the text of the rationale, unrelated elements can be removed.

The rationale text should include any details pertaining to the land/soil conditions and existence of trees & plants (and their locations) and any other matters relating to the justification to the type and depth of the foundations at both [address redacted] & [address redacted].

Personal Details (Principle 1)

The required details are purely of an environmental nature and does not encroach on any personal details relating to either of my neighbours. On this occasion since the FOI request is focussed on the environmental areas of the relevant extensions and does not venture any further such as internal layout or requesting actual copies building control documents. It does not relate to a living human being and would in no way lead to the identification of individuals directly or indirectly at either of the properties even if combined with any other information. I do not require any details of the RBK employees involved in the process. Therefore I would hope that Principle 1 does not apply in these circumstances.

Public Interest Test (Principle 2)

This FOI request is aimed at environmental features and as this is a qualified exemption, please take the following into account in relation to the PIT;

- This request is not for personal information and will not reveal anyone's identity
- The response is not of any significance or sensitive information
- The response will not have a detrimental impact or unfairness on either set of neighbours or likely to place any distress on them should the information be disclosed.
- Does not relate to detailed information of either individuals or property (namely internal layout)
- No tangible consequences to my neighbours such as a financial loss
- No unjustified adverse consequences to either set of neighbours
- Does not reveal any RBK building control processes
- Maintains a full level of privacy for my neighbours...

This request is not for a copy of the document but relevant facts and does not impact on the Building Control processes...

- please can I be provided with the full details to justify the exemption and how it outweighs my request for disclosure. There may be more than one rationale/justification in existence for each property that would have been completed on various dates, please can dates/text be provided for all subsequent reviews. Many thanks”
5. The Council’s final position was that the requested information was environmental but was exempt under Regulation 13(1) of the EIR.
 6. The Commissioner’s investigation will focus on whether the Council was entitled to rely on Regulation 13(1) when refusing the request.

Reasons for decision

Regulation 13(1) – third party personal data 13.

7. The Council has withheld the third-party personal data under Regulation 13(1) on the basis that disclosure would breach the first principle of the UK General Data Protection Regulation (“UKGDPR”).
8. 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.
9. In this case, the relevant condition is contained in Regulation 13(2A)(a)¹. This applies where 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 UKGDPR.
10. 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.
11. 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.

Is the information personal data?

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

12. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
13. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. 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.
14. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
15. All of the withheld information in this case relates to two properties. The various documents within the Building Control File refer to the construction and design of the properties.
16. The Council advised the complainant in its response, that Building Control records are not public records and there is no public right to view or obtain information that is submitted under the Building Regulations and therefore it would not be providing the requested information.
17. The Council explained to the complainant in its Internal Review that it had provided as much information as it was able to, it advised that attention should be drawn to an Internal Review for a previous request and that Building records are exempt under Regulation 13(1). The Council also drew the Commissioner's attention to this Internal Review in relation to this matter.
18. The Complainant stated that the requested information is not personal information. The Complainant advised that the Council "place documents [online] for full public access, the details of my neighbours name, addresses [and] full plans are available, therefore they are public documents and this contradicts FOIA standpoint"
19. The Commissioner is satisfied that the complainant and others would be able to link this information to at least one individual (i.e. the occupier(s) of the property in question). The information cannot be anonymised and is therefore the personal data of the individuals concerned. He will now consider whether disclosure would contravene the Data Protection Principles.

Would disclosure contravene any of the Data Protection principles?

20. 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".

21. 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.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

23. Article 6(1) of the UK 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.
24. 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.
25. In considering the application of Article 6(1)(f) of the UK 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;

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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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"

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.

26. 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

27. 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.

28. 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.

29. The complainant explained to the Commissioner that their interested in the requested information was to gain an explanation regarding the foundation depth conclusion drawn by the Council. The complainant had previously sought their own extension and the Council concluded that two neighbouring properties had trees/hedges which would impact the complainant's foundation depth. However, when the complainant sought an independent specialist, it concluded a different result.

30. The complainant believes the requested information would show that they had been "treated differently, unfairly and unjustly when compared to... neighbours." The complainant went further and explained that disclosure would assist in challenging the consistency and decision-making process of Kingston Council Building Control and provide transparency.

31. The Council acknowledged that disclosure would allow the public to understand the Building Control Process and provide them with reassurance that the Council processes were fair and transparent. The Council finally advised that disclosure would provide the public with evidence that the Council was correctly applying Building Regulations.

32. For the above reasoning, the Commissioner is satisfied that there is a legitimate interest in the requested information.

Is disclosure necessary?

33. '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.
34. The Council advises that the inspections in question took place a number of years ago and are, in its opinion, of minimal interest to the public at large. It went further and advised it had already provided as much information as possible.
35. The Commissioner does not consider that it is necessary to disclose the requested information for the complainant to be satisfied that the Council's processes are fair and transparent. The Commissioner is satisfied that the Council have provided as much information as it is able to.
36. The Commissioner further notes that disclosing the requested information, would not be the least intrusive method to ensure the Council is acting with fairness and transparency.
37. When considering the interest in the requested information, the complainant is clearly already aware that the Council had a different conclusion than the private specialist employed by the complainant. Although the Commissioner realises the requested information may give more understanding to the conclusion of the Council, he does not think it is the least intrusive method to give the complainant nor the public a general understanding of the process of the Building Control Regulations.

The Commissioner's Decision

38. The Commissioner has concluded that the Council was entitled to rely on Regulation 13(1) to withhold the requested information as it is personal information.
39. The Commissioner therefore does not require the Council to take any further action.

Other matters

40. The Commissioner would like to remind the Council to focus only on FOIA and EIR legislation when considering a request for information. The Council should also be very clear which exemption/exception it is relying on in future to prevent any unnecessary delays or confusion.

41. The Commissioner would like to remind the complainant that if they are dissatisfied with the service provided by the Council, they can complain directly to the Council or to the relevant Ombudsman Service.

Right of appeal

42. 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

43. 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.
44. 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

Catherine Fletcher
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