

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

Date: 16 January 2023

Public authority: Royal Borough of Kensington & Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested information redacted from the Council's response to a subject access request. The Council relied on regulation 13 of the EIR, on the basis that the requested information is third party personal data.
2. The Commissioner's decision is that the Council is entitled to rely on the exception at regulation 13 in respect of the withheld information. No steps are required.

Request and response

3. The complainant in this case has been in dispute with the Council for several years regarding the Council's handling of noise complaints submitted by the complainant's neighbour about the complainant's family home in 2015. The Commissioner has considered several complaints submitted by the complainant in respect of requests handled under the EIR and the UK GDPR.
4. The Commissioner does not have a dated copy of the complainant's request but its scope is not disputed since it was quoted in full in the Council's response. The request is set out in full in annex 1 to this decision notice, and can be summarised as requesting information relating to the Council's handling of the noise complaints.

5. The Council responded to the complainant on 27 July 2021. It handled the request primarily as a subject access request¹ under the provisions of the UK General Data Protection² (the UK GDPR) on the basis that most of the requested information, if held, would comprise the complainant's personal data. The Council advised the complainant that it was withholding a small piece of information under regulation 13 of the EIR because it was third party personal data. It also withheld some information in reliance on an exemption from the right of subject access.
6. The complainant contacted the Commissioner on 27 August 2021. She asked the Commissioner to make a decision as to whether the withheld information should be disclosed. The complainant maintained that there was a strong public interest in disclosure.
7. The Commissioner considered the complaint under the UK GDPR, which provides a separate complaints regime in respect of the right of subject access.³ The Commissioner's handling of the data protection element of the complaint is entirely separate from his decision under the EIR.
8. Subsequently the Council reconsidered the request and wrote to the complainant on 18 May 2022. It maintained that the withheld information should not be disclosed for the reasons set out at paragraph 4 above.

Scope of the case

9. Following the Commissioner's consideration of the data protection element of the complaint, the complainant asked him to make a decision with regard to the EIR element of the complaint.
10. The Commissioner has emphasised to the complainant on several occasions that he cannot consider the Council's handling of her personal data under the EIR. This is because regulation 5(3) states that the personal data of a requester does not fall within the scope of the EIR.

¹ <https://ico.org.uk/for-the-public/your-right-to-get-copies-of-your-data/>

² <https://www.legislation.gov.uk/eur/2016/679/contents>

³ <https://ico.org.uk/make-a-complaint/data-protection-complaints/what-to-expect/how-your-complaint-is-processed/>

11. In light of the above the Commissioner's decision in respect of the EIR relates only to the withheld information that is not the complainant's personal data, ie solely third party personal data.
12. The Commissioner has also emphasised that his role is to decide whether a particular request has been handled in accordance with the requirements of the EIR. He cannot comment on or become involved in the complainant's dispute with the Council, and has stressed to the complainant that the EIR only allows for information to be disclosed into the public domain. The Commissioner cannot require information to be disclosed to the complainant unless it could be disclosed to any person who requested it.

Reasons for decision

Regulation 13: personal data of third parties

13. 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.
14. In this case the relevant condition is contained in regulation 13(2A)(a).⁴ 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 UK GDPR.
15. The Council relied on regulation 13 in respect of the name of an individual referred to in a particular email. It disclosed the content of the email to the complainant under the right of subject access, but maintained that the name of this individual should be withheld.
16. The Commissioner is satisfied that the information in question, ie the name of an individual, is the personal data of that individual since the individual could clearly be identified from their name. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would be unlawful.
17. Article 5(1)(a) of the UK GDPR states that personal data shall be:

⁴ As amended by Schedule 19 Paragraph 307(3) of the Data Protection Act 2018.

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

18. The public authority must be able to rely on a lawful basis for processing (in this case disclosure of the information into the public domain) as set out in Article 6(1) of the UK GDPR.

19. The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the EIR is article 6(1)(f) (legitimate interests):

"...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".

20. In considering the application of article 6(1)(f) the authority should 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 interests, fundamental rights and freedoms of the data subject.

21. In particular, the Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied. If the public authority cannot satisfy this three-part test then disclosure of the information into the public domain is likely to be unlawful and thus contravene the first DP principle.

22. The Council recognised a general legitimate interest in being open and transparent about its activities. It has not identified a legitimate interest in disclosing the specific withheld information.

23. The Commissioner understands the complainant's position to be that disclosure of the name of the recipient will inform the public whether another party intervened on behalf of the complainant's neighbour in the context of the noise dispute. The complainant is of the opinion that such intervention, if it occurred, would have been inappropriate.

24. The Council set out that disclosure of the specific withheld information was not necessary to meet the general legitimate interest in informing the public about its activities.
25. The complainant maintained that it was necessary to disclose the information in order to clarify whether inappropriate intervention had taken place. The complainant pointed out that she had already been provided with a large amount of information under the right of subject access, therefore she suspected that the Council wished to avoid confirming who had intervened.
26. The Commissioner has inspected the withheld information in this case. He observes that the content of the email in question, including the names of the sender and recipient has been disclosed to the complainant. The withheld information is the name of an individual who was to receive an update on the handling of the noise complaint.
27. The Commissioner is mindful that disclosure under the EIR differs from disclosure under the right of subject access. Disclosure under the EIR is to the public at large, rather than to interested individuals. The Commissioner must therefore be careful to avoid inadvertently disclosing withheld information in his analysis. The Commissioner can say that in his opinion, the withheld information itself would not indicate whether or not inappropriate intervention as envisaged by the complainant actually occurred. It would not inform the public as to how the Council handled the noise complaint, or made decisions regarding it.
28. Consequently the Commissioner is not satisfied that disclosure of the information withheld under regulation 13 of the EIR is in fact necessary in order to meet the legitimate interest identified. The Commissioner is not persuaded that the Council could rely on Article 6(1)(f) as providing a lawful basis for disclosing the third party personal data. It follows that disclosure of this information would be unlawful and in breach of DP principle (a). Consequently, the Commissioner finds that the Council was entitled to rely on regulation 13 of the EIR as a basis for withholding this information.

Right of appeal

29. 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

30. 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.
31. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

The complainant's request

"Upon further consideration, I would be grateful if you could please be more specific in your response to me regarding the information I had requested to which you responded last week on 28th April. Information regulations require a public authority to state explicitly whether or not information is held and if it is held, what exceptions are being relied upon to refuse disclosure. Please respond according to both personal data and FOI or EIR regimes where information is being refused.

Question (ii) A signed authorisation from any Member or senior executive authorising the appeal of the Magistrates' Court judgment to the High Court. Please state whether or not this information is held, and if it is held what exception is being relied upon to refuse disclosure.

Question (iii) In respect of each piece of information, itemised as follows, please state whether or not this information is held, and if it is held what exception is being relied upon to refuse disclosure.

(a) Briefing notes or briefing report

(b) Emails from 1st April 2016 to 4th July 2017: Keith Mehaffy to Legal Services Tim Davis to Legal Services Nicholas Austin to Legal Services Richard Buckley to Legal Services Tim Ahern to Legal Services Nicholas Paget-Brown to Legal Services Nicholas Coleridge to Legal Services Will Pascall to Legal Services

(c) Instructions issued to the QC, James Pereira, when he was appointed;

(d) Instructions issued to Joyce Golder with respect to drafting the appeal document dated 28th April 2016.

Finally, your response in email 2 of 3 included an email from Keith Mehaffy to Cllr Husband. It is apparent that Keith Mehaffy is responding to an email from Cllr Husband but that original email has been fully redacted.

(a) As an elected official, Cllr Husband's communications with council officers should be disclosed. Otherwise, please state what exceptions you are relying upon to refuse disclosure of Cllr Husband's email to Keith Mehaffy.

(b) Please also confirm if the other recipient of the email from Keith Mehaffy to Cllr Husband is the complainant. If it is not, please confirm in what capacity this other recipient is included in this email.

(c) Please disclose the email dated 1st December 2016 from Tim Ahern to cllr.ahern@rbkc.com or state the exceptions relied upon for redacting the entire email.

(d) Please disclose the document entitled 'Carrabino Nov 2016.pdf' attached to Tim Ahern's email to cllr.ahern@rbkc.com or please state the exception relied upon to refuse disclosure.