

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

Date: 14 February 2023

Public Authority: London Borough of Southwark
Address: PO BOX 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant requested information relating to a building regulation regularisation application. London Borough of Southwark (the Council) refused to provide the requested information, citing Regulation 13(1) (personal information) of the EIR.
2. The Commissioner's decision is that the Council has correctly applied Regulation 13(1) of the EIR.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 10 May 2022, the complainant wrote to the Council and requested information in the following terms:

"[Address redacted] - Acoustic separations ceiling

I would be grateful if the following information is provided:

A copy of the drawings submitted to the council supporting Building Control regularisation application Reference Number [redacted] dated 02 September 2021.

Confirmation whether any revised plans concerning application [redacted] have been submitted after 02 September 2021 together with a copy of any such plans.

Confirmation of the date that the works subject to application [redacted] were inspected by the Council's Building Control Department and the written findings of any such inspection.

Confirmation whether the council is satisfied that the work to install an acoustic separations ceiling subject to application [redacted] meet the requirements of the Building Regulations together with a copy of any Certificate of Regularisation issued.

A copy of any Council Delegated Report concerning application [redacted]".

5. The Council responded on 13 June 2022. It refused to provide the requested information citing EIR Regulations 12(3) and 13(1), a position it upheld at internal review. It did, however, advise that the requested information is either sought directly from the building owner or via a legal representative.
6. During the course of his investigation, the Council provided the Commissioner with a copy of the withheld information.
7. The following analysis explains why the Commissioner is satisfied that the Council was entitled to apply regulation 13(1) of the EIR to withhold that information.

Reasons for decision

Regulation 13 personal data

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 the disclosure of the information to any member of the public would contravene any of the principles relating to the

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

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

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?

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.
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, 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. 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.
16. It is not in dispute that the address of the property concerned is specified in the request.
17. To the extent that the five items of requested information are held, the Commissioner is satisfied, in the circumstances of this case, that the information relates to a third party, namely the applicant/owner of the property that is the subject of this request.
18. The Commissioner is satisfied that this information both relates to and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. 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.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. 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”.

22. 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.

23. 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

24. 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.

25. 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.

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”.

26. 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;
 - 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.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

The Commissioner's view

28. The Commissioner considers that the request in this case is similar to requests for information which he has previously considered. The decision notices in those cases (IC-61183-H2F1) and (IC-185168-Q3R6) were issued on 4 March 2021³ and 17 January 2023⁴ respectively.
29. He is satisfied that there is a high level similarity between the matters to consider in this case and the issues raised in those cases.
30. As in those cases, 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. However, 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.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619414/ic-61183-h2f1.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023611/ic-185168-q3r6.pdf>

31. In that respect, the Commissioner understands that building control information relates purely to works undertaken to an individual's property and is separate to the planning process.
32. The disputed information in this case relates to a building regulation regularisation application. The Commissioner acknowledges that the complainant considers both that he has a legitimate personal interest in disclosure of the withheld information, given the location of the property in question, and that there is a wider public interest in disclosure.
33. The Commissioner also recognises 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.
34. In reaching a decision in this case, the Commissioner must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
35. The Commissioner is satisfied that the individual concerned would have the reasonable expectation that their personal data would not be disclosed to the wider world in response to an EIR request. Disclosing their personal data would be likely to cause them unjustified harm or distress.
36. 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.
37. Accordingly, 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.
38. 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.

Conclusion

39. 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).

Right of appeal

40. 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

41. 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.
42. 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

**Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
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SK9 5AF**