

## **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 a neighbour's building extension.
2. The Commissioner's decision is that Royal Borough of Kingston Upon Thames (the Council) is 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 13 October 2022, the complainant wrote to the Council and requested information in the following terms:

"This is a written request for the following documents in relation to the building extension at [address redacted] under reference 16/06881/FP and linked cases (16/14309/PNH, 17/14045/NMA which also reference to the joint wall with [address redacted] in paragraph 6. And 17/14128/HOU);

Site Inspection Records (Initial ones detailing the environmental features)

Structural Engineers Report in relation to the foundation calculations

Tree & Landscape Officers report

Please accept this email as a formal request for the documents which has been submitted within the 15 year time limit.

Please can the redacted documents be provided”

5. The Council’s final position was that the requested information is exempt under Regulation 13(1).

### **Scope of the case**

---

6. The complainant contacted the Commissioner on 4 January 2023 to complain about the way his request for information had been handled.
7. The Commissioner considers whether the Council was entitled to rely on Regulation 13(1) to refuse the request.

### **Reasons for decision**

---

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

8. 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”).
9. 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.
10. In this case, the relevant condition is contained in Regulation 13(2A)(a)<sup>1</sup>. 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.
11. 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.

---

<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

12. 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?**

13. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
14. 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.
15. 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.
16. All of the withheld information in this case relates to third person properties. The various documents within the Building Control File refers to the construction and design of the properties.
17. The Commissioner is satisfied that the complainant and others would be able to link this information to at least one individual (ie. 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?**

18. 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".
19. 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.
20. 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**

21. 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.
22. 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"<sup>2</sup>.
23. 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.
24. 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

---

<sup>2</sup> 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"

25. 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.
26. 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.
27. The complainant explained to the Commissioner that their interest 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 complainants foundation depth. However, when the complainant sought an independent specialist, it concluded a different result.
28. 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.
29. The complainant explained that any of the requested information which contained personal information, could be removed or redacted from the documents. They further explained that they are a joint owner of the foundation and wall built, and therefore have a legitimate interest in the information.
30. The Council acknowledged that disclosure would allow the public to understand the Building Control Process, whilst also providing them with reassurance that the Council processes were fair and transparent. The finally advised that disclosure would provide the public with evidence that the Council was correctly applying Building Regulations.
31. For the above reasoning, the Commissioner is satisfied that there is a legitimate interest in the requested information.

### **Is disclosure necessary?**

32. '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.

33. 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. The Council concluded that it would therefore not be providing the requested information.
34. The Council explained 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 to the complainant.
35. If the complainant feels that they have been treated unfairly, they can raise a complaint with the Council, followed by, if necessary, a referral to the Local Government and Social Care Ombudsman. This could be achieved without revealing third party personal data to the world at large. Therefore disclosure under FOIA is not the least intrusive means of achieving the legitimate aim in question.
36. 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's decision**

37. 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.
38. The Commissioner therefore does not require the Council to take any further action.

### **Other matters**

---

39. The Commissioner would like to remind the complainant that any request which they believe is related to their own personal data shouldn't be made under the Freedom of Information Act (FOIA).
40. The complainant must remember that disclosure under FOIA is not just to them, but rather to the world at large. This means it is not appropriate to make any personal data requests under FOIA.

## Right of appeal

---

41. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**