

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 October 2023

Public Authority: London Borough of Richmond upon Thames
Address: Civic Centre
44 York Street
Twickenham
TW1 3BZ

Decision (including any steps ordered)

1. The complainant made two requests relating to planning enforcement and building enforcement records for an outbuilding at a particular address. The London Borough of Richmond upon Thames ('LBRUT') considered both requests jointly given they relate to the same matter. Ultimately, LBRUT disclosed some of the requested information with redactions under Regulation 13(1) (third party personal data). During the course of the Commissioner's investigation, LBRUT located additional emails which it disclosed, with Regulation 13(1) redactions. The complainant remained concerned solely with the withholding of the internal measurements of the outbuilding and floorplan under Regulation 13(1) and the delay in responding to his requests.
2. The Commissioner's decision is that LBRUT was entitled to withhold the internal measurements under Regulation 13(1) of the EIR for the reasons set out in this notice. However, LBRUT breached Regulation 5(2) of the EIR as it took over the statutory maximum of 40 working days to respond and to provide the non-excepted environmental information held falling within the scope of the request.
3. No steps are required as a result of this notice.

Background

4. The complainant is concerned with the erection of an outbuilding at a specified address near to his own property. He claims that "there is a suggestion of maladministration by the Council and therefore in the interests of accountability and transparency, disclosure of certain information should be required, namely disclosure of the internal floor area of the outbuilding, the dimensions of which the Council has said are the basis for its lack of enforcement action".
5. The complainant brought a complaint to LBRUT concerning the outbuilding which was considered and the outcome then conveyed to him. The Commissioner is aware that the complainant secured the overall internal measurements of the outbuilding through this private correspondence with LBRUT.
6. In his correspondence with the Commissioner, the complainant said it appears that LBRUT has not actually measured the floorspace and considers that it relied on dimensions provided by the building owner. Accordingly, he stated:

"...the Council has seemingly made an enforcement decision by accepting at face value, details of internal floor dimensions which the homeowner claimed applied to the building, but apparently without the Council having themselves carried out any relevant measurements".
7. It is important to note that the Commissioner cannot consider any allegations of maladministration in relation to planning, enforcement or building regulations as these are outside his remit. He can only determine whether LBRUT is entitled to withhold any information held in scope of the jointly considered requests.

Request and response

8. On 20 December 2022 the complainant wrote to LBRUT and requested information in the following terms:

"All planning enforcement records (including investigation records and any decision records) relating to development of an outbuilding at [address redacted], [reference redacted]."
9. Again, on 20 December 2022, the complainant made a further related request for:

“All records (including investigation records and any decision records) relating to building control enforcement concerning the outbuilding at [address redacted].”

10. LBRUT responded, late, to both requests jointly (as it said they were “closely related”) on 24 February 2023. It disclosed some information, citing Regulation 5(3) of the EIR for the redactions, withholding both the external and internal measurements at this stage.
11. The complainant requested an internal review on 7 March 2023, solely in relation to LBRUT withholding the internal dimensions of the outbuilding and the floorplan.
12. Following its internal review LBRUT wrote to the complainant on 9 May 2023, revising its position. LBRUT acknowledged that Regulation 5(3) of the EIR could not be applied to third party personal information because this exception applies only to the personal data of the applicant or complainant. LBRUT instead cited Regulation 13(1) of the EIR – third party personal data. In addition, LBRUT relied on Regulation 12(5)(b) – the EIR exception for the course of justice - for some of the redactions and said that the public interest favoured maintaining this exception.
13. The Commissioner notes that, on 21 March 2023, the complainant had also requested a copy of LBRUT’s EIR internal review procedure and target date for its completion. A URL¹ was provided on 9 May 2023, ie post the internal review result.

Scope of the case

14. The complainant contacted the Commissioner on 25 May 2023 to complain about the way his requests for information had been handled. He provided a list of concerns summarised in a list labelled a) to f), some of which the Commissioner dealt with in writing at the outset of his investigation, clarifying why they would not be within the scope of this investigation. The complainant did not complain further about this, other than to try to include the Commissioner’s assessment of his Data Protection Act 2018 (‘DPA’) concerns, which he had not included within his original summarised list. In relation to the DPA concerns, the Commissioner explained how the complainant could make a separate complaint under the DPA to his office; he has, therefore, not considered this element any further here.

¹ https://www.richmond.gov.uk/council/have_your_say/complaints/foi_complaints

15. It is important to note that the Commissioner will normally only consider and investigate complaints about issues raised at the time of the internal review, this is because these will be the only factors that a public authority will have reconsidered itself. In this case, the only issue raised at internal review was the withholding of information about the internal dimensions of the outbuilding and the floorplan. However, the Commissioner has exercised his discretion and has also included the complainant's following concerns:
 - LBRUT's failure to provide a timely response to both information requests made on 20 December 2022;
 - The complainant considers that LBRUT "failed to maintain a suitable procedure for internal reviews under the EIR regime".
 - That LBRUT wrongly withheld information in reliance on Regulations 12(5)(b) (subsequently withdrawn by LBRUT as set out in paragraph 18 below) and 13(1) of the EIR.
16. On 28 June 2023, the Commissioner clearly set out in writing to the complainant those aspects which would be considered as part of his formal investigation (as set out above).
17. This 'Scope' section is lengthy by necessity as there was a significant amount of activity by both parties during the Commissioner's investigation. For ease of reference, the Commissioner has listed all the actions associated with the 'red line' (ie the red outline on the disclosed plan) issue together – this means that some of the following dates for other actions which occurred during the investigation pre-date some of the dates associated with the 'red line' and measurements correspondence.
18. During the course of the Commissioner's investigation, on 20 July 2023, LBRUT again reconsidered its position and advised that it no longer wished to rely on Regulation 12(5)(b) for any of the redactions. LBRUT also now determined that the previously withheld external measurements were not caught by Regulation 13(1) of the EIR and subsequently it provided a revised disclosure to the complainant with the external measurements in a partially redacted diagram.
19. On 21 July 2023, the complainant queried the definitive external measurements. He also disputed the extent of the 'red line' shown on the disclosed plan as he wanted to know whether the redactions were concealing the extent of the line.
20. Consequently, LBRUT disclosed several iterations of this plan, all of which the complainant remained dissatisfied with. This exchange continued up to 22 August 2023 when LBRUT, at the Commissioner's request, provided the complainant with a definitive explanation

regarding the red line issue. Although the complainant appeared to remain dissatisfied, the Commissioner considers that he has been provided with the actual external measurements in the form that LBRUT holds that information; LBRUT is not required to create new plans within the remit of the EIR.

21. On 24 August 2023, the complainant wrote to the Commissioner to advise that he had been supplied with the overall **total internal** floor measurements of the outbuilding by LBRUT in an email, a copy of which was included.
22. The Commissioner made further enquiries in relation to the overall internal measurements with LBRUT. In reply, on 11 September 2023, LBRUT clarified the following:
 - The overall internal measurements of the outbuilding were provided to the complainant by LBRUT in response to his building regulations enquiries about the specified address.
 - Compliance with building regulation is dealt with separately from planning enforcement matters as a matter of law and therefore as a matter of practicality.
 - This disclosure [of the overall internal measurements] was within the context of a building regulations matter and not in response to an FOI/EIR request. As such any disclosure would be to the complainant personally and not to the public at large. There remains no lawful basis to disclose internal measurements of an outbuilding forming part of a private, domestic, dwelling house to the public at large, particularly where the internal measurements are not relevant to the planning enforcement action.
23. In the interests of expediency and bringing his investigation to a close, the Commissioner has chosen to include LBRUT's response above in this notice rather than updating the complainant separately.
24. Returning to the other matters raised during the investigation, having been notified that LBRUT was now only relying on Regulation 13(1) of the EIR, the complainant told the Commissioner on 8 August 2023, that he could not provide his view without sight of LBRUT's Regulation 13(1) submissions to the Commissioner.
25. On 11 August 2023, LBRUT notified both the complainant and the Commissioner that it had located further information in scope of the request, specifically a series of emails from November 2022 between the owner of the specified property and an LBRUT Planning Officer about measuring the outbuilding. LBRUT disclosed this information to the complainant with redactions under Regulation 13(1) of the EIR for personal data. The external measurements of the outbuilding (and

nearby decking) are clearly cited within these emails and were not redacted.

26. Again, the Commissioner sought the complainant's view on the above disclosure. The complainant maintained that he could not provide his view without having access to LBRUT's Regulation 13(1) rationale, as submitted to the Commissioner. The complainant asked for the decision notice to be 'stayed' while he submitted an information request to the Commissioner for the relevant LBRUT submissions.
27. The Commissioner subsequently responded to the complainant's information request on 11 September 2023, providing some of the requested information.
28. On 20 September 2023, the complainant provided his view on LBRUT's disclosures and its reliance on Regulation 13(1), which the Commissioner has taken into account in reaching his decision in this case. Whilst the complainant raised concerns about what he considers could and should be disclosed under the Building Control regime, these are not matters which are within the Commissioner's remit; he can only consider what should be disclosed under the applicable statutory regime, in this case the EIR.
29. The complainant also considered that LBRUT's submissions to the Commissioner only focus on the planning enforcement request and not the building control enforcement request. However, the Commissioner is satisfied that LBRUT has made it expressly clear that it had handled the two requests jointly from the outset and he has assessed its responses from that standpoint.
30. It became clear at this point that the complainant was only concerned with the withheld internal measurements for the outbuilding and LBRUT's reliance on Regulation 13(1) of the EIR to refuse to provide them. Therefore, the Commissioner has only examined this aspect of the withheld information.
31. The Commissioner has first considered whether the request should have been handled under the EIR. He has examined LBRUT's reliance on Regulation 13(1) of the EIR for the remaining redactions in relation only to the internal dimensions of the outbuilding and the floorplan.
32. The Commissioner has also considered the delay in this case and the internal review procedure issues raised by the complainant (as set out under paragraph 15 above).

Reasons for decision

Is the requested information environmental?

33. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).
34. As the information relates to planning and building control enforcement for an outdoor structure, the Commissioner believes that the requested information is likely to be information on the state of the elements of the environment 2(a) land and 2(c) with the planning and building enforcement actions being 'measures'. For procedural reasons, he has therefore assessed this case under the EIR. He will next consider LBRUT's reliance on Regulation 13(1) of the EIR.

Regulation 13 – Personal data

35. 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.
36. 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 UK General Data Protection Regulation ('UK GDPR').
37. 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.
38. 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?

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

"any information relating to an identified or identifiable living individual."

40. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
41. 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.
42. 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.

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

43. LBRUT has argued that the internal measurements of the outbuilding at the specified property are the personal data of the property occupier being "identifying information relating to their private domestic life".
44. The complainant has argued that LBRUT has not taken steps to ascertain whether there are any non-owners resident at the specified address. However, the Commissioner considers that, in this case, it is immaterial whether the person or people residing at the address own or rent that property. Further, in the disclosed emails from November 2022, the person residing at the named address clearly states (17 November 2022) that the property was bought.
45. In the circumstances of this case, the complainant clearly already knows who the person residing by his property is, or he would readily be able to ascertain it. Details of that person's private property clearly relate to their personal life and this information is linked to them personally. Therefore, having considered the withheld information, the Commissioner is satisfied that the internal measurements and floor plan of the outbuilding constitute private information relating to an individual's private address. He therefore finds that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
46. 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.
47. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

48. 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".

49. 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.
50. 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

51. 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.

52. 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.

53. 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

54. 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 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”.

55. 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.
56. The complainant said:
- "There is a legitimate public interest in the building control process to determine that Building Regulations are being applied properly".
57. He also argued that:
- "In many cases there may be a direct link between a private interest and a wider legitimate interest in disclosure. For example, an individual's request to a Council regarding its enforcement processes in a particular case, may inform public debate about standards at the Council more generally, as well as satisfying any personal interest that the requester may have."
58. LBRUT recognised that there is a legitimate interest in relation to public understanding of how it carried out its planning enforcement action "following a complaint about the erection of a structure in the garden of the property".
59. In relation to the legitimate interests, the Commissioner notes that the complainant and LBRUT have specified different planning related regimes, both of which are caught by the complainant's jointly considered requests.
60. Further, the complainant provided a series of emails between himself and LBRUT's Building Control team from November and December 2022, in which he was provided with the overall internal measurements and was informed that the outbuilding was actually exempt from Building Regulations.
61. The Commissioner would like to highlight that the complainant is aware of the individual external measurements of the building, and through correspondence with LBRUT outside the EIR regime, he has secured the overall internal measurements. From this, it seems obvious to the Commissioner that the specific dimensions internally must necessarily be less than the external dimensions, and they could be estimated to some degree of accuracy from the known exterior values. He does not accept that there is a valid legitimate interest in knowing what they are precisely and why such knowledge is necessary.
62. Furthermore, the Commissioner does not agree that there is a legitimate interest under the Building Regulations (as submitted by the

complainant), given LBRUT has explained that the erection of the outbuilding was not actually caught by these regulations.

63. However, the Commissioner does accept that LBRUT's submission regarding planning enforcement action as a result of a complaint does constitute a relevant legitimate interest, although limited, in the disclosure of the withheld information. He also acknowledges that the complainant appears to have a private interest in securing the precise internal measurements of the outbuilding, albeit he has not explained why and this is not obvious.

Is disclosure necessary?

64. '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.

65. LBRUT has withheld the precise internal measurements of the outbuilding and floorplan and has argued that disclosure is not necessary because the outbuilding has already been considered by planning enforcement. It said:

"The data has been processed in a transparent manner.

The Council has disclosed all information relevant to the planning enforcement complaint without unnecessarily disclosing personal information of the person against whom the complaint was made.

The complainant has been given the overall internal measurements in private correspondence with the building regulations enforcement department. It is not necessary to provide further information."

66. The Commissioner is aware that the homeowner has been consulted and has not given his consent to any further disclosure under the EIR, which would mean a disclosure of his personal information to the world at large.
67. The Commissioner does not consider that disclosing the specific internal measurements adds anything of note to the legitimate interests identified in this case. The external measurements have been provided, LBRUT has deemed the outbuilding exempt from Building Regulations and compliant, and the complainant has been able to raise his concerns directly with LBRUT and secure the overall internal measurements via that route. Enforcement action has been considered by LBRUT and no

action was deemed necessary. Therefore, the Commissioner cannot see any reason why it is 'necessary' to disclose the actual individual internal measurements under the EIR as any possible redress has already been properly considered by the appropriate body, ie LBRUT itself. Additionally, even if the individual measurements were to be released under the EIR, the complainant would have no means of determining their accuracy if, as he suggests, LBRUT did not itself obtain them.

68. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

69. The Commissioner has therefore decided that LBRUT was entitled to withhold the information under Regulation 13(1), by way of Regulation 13(2A)(a).

Procedural matters

Regulation 5(2) - Duty to make available environmental information on request

70. The complainant has also raised a concern regarding the length of time LBRUT took to provide its combined response to his two requests under the EIR and to disclose the non-excepted environmental information it held.
71. Under Regulation 5(2) of the EIR a public authority is required to provide a response within 20 working days. Under regulation 7 of the EIR, a public authority can extend the time for response by a further 20 working days (so allowing them 40 working days in total) to respond to complex or voluminous requests.
72. The Commissioner notes that LBRUT wrote to the complainant on 17 January 2023 to extend the deadline for its response by up to a further 20 working days (in accordance with Regulation 7 of the EIR). However, it did not explain why the extension was necessary.
73. In this case, it took LBRUT 44 working days to provide its substantive response. It was therefore not compliant with the timeframe set out in the EIR.

74. In addition, as LBRUT located further emails in scope of the request which it did not provide to the complainant until 11 August 2023, it further breached Regulation 5(2).
75. The Commissioner therefore considers LBRUT breached its obligations under Regulation 5(2) of the EIR in this case, as it took more than 40 working days to provide the complainant with the non-excepted environmental information held falling within the scope of the request.

Regulation 11 – Representations and reconsideration

76. As part of his grounds of complaint, the complainant raised the following concern with the Commissioner:

“...I would point out that the Council has not maintained a published procedure in relation to requests for an internal review under the EIR regime. The Council’s website page provided through the Council’s e-mail of 9 May 2023 does not refer at all to the EIR regime (but only to complaints about the handling of requests for information under the Freedom of Information Act or the Data Protection Act). It therefore appears that the Council had no published procedure in relation to internal reviews under the EIR regime at the time of my request for a review”.

77. LBRUT provided the following response during the Commissioner’s investigation:

“When handling EIRs the Council follows the same procedure as handling FOI. Details of how a requestor can complain or request a review and the timeliness in which the Council works are set out in each Council response to an FOI or EIR. The Council is currently reviewing and updating its policies and website to specifically refer to EIR and aims to complete this by the end of September 2023.”

78. The Commissioner has examined the information available at the URL provide by LBRUT (see footnote 1 in this notice). Currently, the page is headed “Complaints about Freedom of Information and Environmental Regulations” which demonstrates that LBRUT has an internal review procedure for both legislative regimes. The Commissioner accepts, however, that he is unable to access the page that was available at the time of the request. He is satisfied that an internal review procedure exists for both statutory regimes and that LBRUT is working on updating its policies and website to include specific references to the EIR.
79. As set out in paragraph 13 of this notice, the complainant also asked LBRUT to provide the target date to complete its internal review. Regulation 11 of the EIR does not stipulate that a public authority must provide a complainant with the target date for completion of the internal

review. The Commissioner is therefore satisfied that there has been no related breach.

Right of appeal

80. 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

81. 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.

82. 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

**Carolyn Howes
Senior Case Officer
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Wycliffe House
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SK9 5AF**