

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date: 5 September 2024**

**Public Authority: London Borough of Haringey**

**Address: Alexandra House**

**10 Station Road**

**Wood Green**

**N22 7TR**

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from London Borough of Haringey ("the Council") regarding letters of complaint lodged with the Council regarding specified properties and their listed status. The Council relied on section 40(2) of FOIA (third party personal information) to withhold the information, however it later considered that it should have handled the request under the EIR, so applied regulation 13 of the EIR.
2. The Commissioner's decision is that the Council has correctly relied on regulation 13 of the EIR to withhold the information.
3. The Commissioner has also decided that the Council breached regulation 14 of the EIR as it failed to deal with the request under the EIR.
4. The Commissioner does not require further steps to be taken.

#### **Request and response**

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5. On 14 December 2023, the complainant wrote to the Council and requested information in the following terms:

“Providing copies of the complaints lodged with the Council, after due redaction of personal identifiers”.

6. The Council responded to the request on 9 January 2024. It refused to disclose the requested information, citing section 40(2) of FOIA (personal information).
7. The complainant sought an internal review of the Council’s handling of the request on 2 February 2024. A response to this was provided on 23 February 2024. The reviewer upheld the original decision.
8. Following correspondence from the Commissioner, the Council responded with submissions and stated that it should have dealt with the request under the EIR. The Commissioner agrees with this.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 11 April 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under regulation 13 of the EIR.

### **Reasons for decision**

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#### **Regulation 13 - personal information**

11. Regulation 13 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.
12. In this case the relevant condition is contained in regulation 13(2A). 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’).
13. 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(2A) of the EIR cannot apply.

14. 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?**

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

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subject(s). This is because it both names them and provides information from which they can be identified as it relates to them.
20. The complainant considers that the withheld information could be redacted so as not to identify individuals. However, the Council’s argument is that this is not possible as the individuals can be identified from details throughout the withheld information.
21. Having viewed the withheld information, the Commissioner accepts that the Council is correct and that it would not be possible to disclose a redacted version of the information from which the data subjects could not be identified.
22. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of identifiable living individuals 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.
24. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

25. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

26. 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.

27. 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**

28. 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>1</sup>.

29. 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;

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<sup>1</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, section 40(8) the EIR (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. 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**

31. 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.
32. 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.
33. The complainant states that there is "strong public interest in disclosing information which would increase transparency in relation to the reasons behind planning decisions and the evidence used to make those decisions." They also state that the complaint letters may provide crucial evidence supporting an appeal, and their disclosure would promote fairness and accountability in the council's decision-making process.
34. The Commissioner is satisfied that there is a legitimate interest in understanding the actions which are taken, and decisions that are reached, in relation to planning matters, and that the principle of transparency and openness about the planning process is of relevance in this case. Given this, the Commissioner considers the legitimate interest to be broader than the complainant's own interest.

### **Is disclosure necessary?**

35. '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.
36. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

## **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

37. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
39. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. The Council has said that this is a matter that concerns a planning enforcement process, and it does not consider that the relevant individual, or individuals, would expect the details contained within the withheld information to be disclosed to the world at large in response to an information request. The Council says that it considers that there would be a breach of the relevant individual(s) right to privacy, should the requested information be placed into the public domain, and may have a negative impact and cause harm or distress to an individual as it may result in physical or verbal abuse towards the individuals.
42. The Council has also quoted its [Planning Enforcement Plan](#) which sets out (Para 4.2) that "All details provided by a complainant will always remain totally confidential, unless the information is required for use as evidence in court". Therefore any details which may identify a

complainant must be redacted and the Council states that to do so in this case would leave no unredacted information to provide.

43. In the Commissioner's view, a key issue is whether the individual(s) concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to an individual.
45. The Commissioner understands that there is an appeals process in relation to enforcement, however he agrees with the Council that the appellant will be able to proceed with the appeal in the absence of the withheld information. As the Council states, the appeal will turn on the planning merits and it is not necessary for the complainant to have the withheld information in order to proceed with a fair and unfettered appeal.
46. The Commissioner is satisfied that it would not be within the reasonable expectations of the individual(s) that the withheld information requested by the complainant would be made available to the "world at large" by way of a request made under the EIR. In such circumstances, the Commissioner considers that disclosure would be likely to cause harm or distress to an individual. The Council also states that disclosure of the withheld information would constitute an actionable breach of confidence given the statement in the Council's Planning Enforcement Plan which would give a complainant in a planning process the absolute expectation that their details would be kept confidential.
47. 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.
48. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to consider whether disclosure would be fair or transparent.

### **Procedural matters**

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49. As the Council failed to deal with the request under the EIR in the first instance, it did not comply with regulation 14 of the EIR.

## Right of appeal

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50. 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)

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Deirdre Collins**  
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