

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 April 2023

Public Authority: Hart District Council

Address: Civic Offices
Fleet
GU51 4AE

Decision (including any steps ordered)

1. The complainant requested information relating to approved custom and self-build plots for a particular period. Hart District Council (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 7 December 2022, the complainant wrote to the Council and requested information in the following terms:

"I would like the planning references to all approved custom and self build plots approved since 1-10-2018 or any information you are allowed to give me on those approvals."
5. The Council responded on 19 December 2022. It refused to provide the requested information citing section 21 of the Freedom of Information Act 2000 (FOIA) stating that the information was already in the public domain and provided the complainant with a link to the Council's website <https://publicaccess.hart.gov.uk/online-applications/>

6. The complainant was not happy with this response, arguing that it was not specific enough, and asked for the links to the planning references requested.
7. On internal review dated 26 January 2023, the Council changed its position and applied regulation 13 of the EIR to withhold the information.
8. During his investigation, the Council provided the Commissioner with a copy of the withheld information.

Reasons for decision

9. The requested information relates to activities affecting or likely to affect the state of elements of the environment. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(a) of the EIR¹. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 13 personal data

10. 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.
11. 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').
12. 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.

¹ <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

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

13. 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?

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. The Commissioner is satisfied, in the circumstances of this case, that the withheld information relates to third parties, namely the addresses of the plots that are the subject of this request (and in some cases the names of the applicants as well).
19. The Commissioner is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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”.

23. 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.
24. 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

25. 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.
26. 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.
27. 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;

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 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.

28. 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

29. The Commissioner commenced his investigation by searching on the Council's planning application search tool <https://publicaccess.hart.gov.uk/online-applications/> using the words custom and self-build which revealed several planning applications. The planning applications contain the address of the property in question and in some cases the documents which can be viewed contain the names of the property owners.
30. The Commissioner asked the Council to confirm whether all of the information requested by the complainant could be found using the search tool in this way and was, therefore, already in the public domain.

The Council's position

31. The Council explained that not all of the information requested would be found using the search tool because custom and self-build information is not information that an applicant for planning permission is legally required to disclose when completing a planning application. Therefore, unless the words custom or self-build are used by an applicant in their planning application (or it is specified in a Planning Obligation under section 106 of the Town and Country Planning Act 1990) it would not be evident that an application was a custom and self-build application.
32. The Council confirmed to the Commissioner that none of the withheld information contained custom or self-build in the planning application wording and so would not be picked up by a search of those keywords.
33. The Commissioner notes that the Self-Build and Custom Housebuilding Act 2015 requires each relevant local authority to keep a register of individuals or groups who are seeking to acquire plots of land for their own self-build and custom building. This data is released each year on the government website:
<https://www.gov.uk/government/publications/self-build-and-custom-housebuilding-data-2016-2016-17-2017-18-and-2018-19/data-release-self-build-and-custom-housebuilding-data-2016-to-2020-21>

34. The Commissioner also notes that relevant authorities are encouraged (but not legally required) to publish in their Authority Monitoring Report headline data on the demand for self-build and custom housebuilding revealed by their register and other sources.
35. The Council does hold a self-build and custom register and explained that, in addition to self-build information gathered at the planning application stage (where the information is made available by the applicant as part of their application), in order to provide more accurate overall headline data on custom and self-build permissions in its Authority Monitoring Report, the Council emails applicants after permission has been granted to ask whether it is a custom or self-build project. The withheld information has been compiled as a result of responses to such emails. The Council's latest Authority Monitoring Report can be found at:
https://www.hart.gov.uk/sites/default/files/2022-12/amr_2020-21.pdf
36. Therefore, the Commissioner understands that the withheld information in this case relates to permissions granted to custom or self-build projects where the applicants have not mentioned in their applications for planning permission that it is a custom or self-build project (and so whilst the planning application can be viewed on the Council's website, and is therefore in the public domain, it is not evident from the published documents that the project is custom or self-build). Instead (after permission has been granted) the applicants have confirmed separately to the Council that their project is custom or self-build to assist the Council in compiling more accurate custom and self-build figures for its Authority Monitoring Report.

The complainant's position

37. The Commissioner acknowledges that the complainant considers that there is a wider public interest in disclosure, as the complainant believes that the Council may not have met its legal obligations as regards custom and self-build requirements.
38. The Commissioner notes that the complainant has already obtained some custom and self-build planning application references via a third party and the complainant is unhappy that the Council made these references available to a third party, but is now refusing to provide similar information to the complainant.
39. The Commissioner also notes the complainant's assertion that a person (whose planning reference was provided to the complainant by a third party) was not contacted by the Council after permission was granted to ask whether the project was custom or self-build, however, that person's planning reference appears in the list obtained by the

complainant from the third party as being self-build. The complainant therefore questions the accuracy of the Council's self-build figures.

40. Whilst these matters are noted, the Commissioner must deal with matters raised on a case by case basis and the scope of this Decision Notice is to determine whether the Council has correctly applied the EIR to the specific request made on 7 December 2022. Furthermore, the Council has explained to the Commissioner the circumstances in which the information was given to the third party.
41. The Commissioner recognises that there is a legitimate public interest in determining that the criteria for the custom and self-build process are being applied properly and relevant requirements are being met by the Council.
42. At the same time, the Commissioner considers that the custom and self-build process has been introduced with the specific aim of entrusting the Council to apply the requirements so that the overall demand for self-build and custom housebuilding can be monitored locally and nationally. This in turn, in the Commissioner's view, creates a greater interest in protecting the integrity of the custom and self-build process and that disclosure could damage the public engagement with that process.
43. 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.
44. The Commissioner is satisfied that the individuals concerned (who have not mentioned that their project is custom or self-build in their planning application) would have the reasonable expectation that their personal data would not be disclosed to the wider world in response to an EIR request. The information is not required on a planning application and was provided in confidence to the Council after planning permission was granted for the purpose of compiling a more accurate picture of custom and self-build numbers for the Council's Annual Monitoring Report.
45. Furthermore, the Council's planning privacy policy <https://www.hart.gov.uk/privacy/place-privacy/planning-policy-privacy> explains that the purpose of holding self-build information is in order to comply with its statutory duty to have a self-build register, entry upon which is voluntary.
46. The Commissioner is of the view that if the withheld information were disclosed it could discourage people from voluntarily providing information to the Council about their custom or self-build projects which would prevent the Council from compiling an accurate number of self-build projects for its Annual Monitoring Report, which as well as distorting the picture of local demand would also affect the bigger picture of national demand.

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 separately consider whether disclosure would be fair or transparent.

Conclusion

49. 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).

Other matters

50. Given the relatively small number of evident self-build or custom applications on the Council's website during the period requested, the Commissioner is disappointed that the Council did not simply provide the complainant with the links to those applications, or advise the complainant to use keywords to find those applications. Whilst this would not have revealed all of the applications in scope of the request, it may have prevented the escalation of this case to the Commissioner.

Right of appeal

51. 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

52. 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.

53. 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

Michael Lea
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