

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 September 2023

Public Authority: London Borough of Haringey
Address: 4th Floor,
Alexandra House,
10 Station Road
Wood Green
London
N22 7TR

Decision (including any steps ordered)

1. The complainant contacted the London Borough of Haringey (the 'Council') and requested all correspondence referring to them and the land behind their property following a letter from the Council in relation to an extension of the boundary at the rear of their property. The Council initially applied section 40(1) (requesters own personal information) and section 42 (Legal Professional Privilege) of the Freedom of Information Act 2000 ('FOIA') to the request. During the course of the Commissioner's investigation the Council reconsidered the request under the Environmental Information Regulations 2004 (the 'EIR') and confirmed it was relying on regulation 5(3) in respect of the complainant's own personal data. It also cited regulation 12(4)(e) (internal communications) for the bulk of the withheld information, and cited regulation 13 (third party personal information) for some limited information.
2. The Commissioner's decision is that:
 - the Council is entitled to rely on regulations 5(3) and 13(1) of the EIR.

- the Council correctly applied regulation 12(4)(e) to all but one email.
 - the Council breached regulation 11(4) (representations and reconsideration) as it failed to meet the required timescales in providing its internal review.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
- Disclose the email referred to in paragraph ... of this notice, minus redactions of personal data.
 - Disclose the minutes it has confirmed should be disclosed, but it has not yet disclosed, minus redactions of personal data.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 20 September 2022, the complainant wrote to the Council and requested the following information:
- “Please send me copies of all correspondence (including emails and records of telephone conversations) referring to me or the land behind my property [redacted] both to and from [redacted] (Haringey’s Principal Parks Development Manager).”
6. The Council responded on 17 October 2022. It stated that personal information is exempt from disclosure under section 40(1) FOIA and informed the complainant if they wanted to access their personal information they would need to make a Subject Access Request (SAR) under the Data Protection Act 2018. It added that it also considered that some information within the scope of their request would be exempt from disclosure as it is subject to Legal Professional Privilege (LPP).
7. Following an internal review the Council wrote to the complainant on 20 January 2023. It upheld its original response and added that the information relates to Litigation Privilege as there may be a real prospect or likelihood of litigation with regards to the alleged encroachments in the future.

Scope of the case

8. The complainant contacted the Commissioner on 3 February 2023 to complain about the way their request for information had been handled. They were not satisfied with the Council's reliance on section 42 FOIA as they did not believe that there is any real prospect or likelihood of litigation in this matter.
9. As stated in paragraph 1 of this notice, during the course of the Commissioner's investigation, the Council reconsidered the request under the EIR and cited regulations 5(3), 12(4)(e) and 13 to refuse the request. It also confirmed that it was now prepared to disclose copies of minutes, minus some limited redactions of names of members of the public and the addresses of some residents whose properties border Parkland Walk, on the basis of regulation 13. To date, however, the Council has not disclosed this information to the complainant.
10. The scope of the Commissioner's investigation is to consider whether the Council has correctly applied the exceptions cited.

Reasons for decision

Is the requested information environmental?

11. 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);
12. As the information relates to the land behind the complainant's property (Parkland Walk) and its use, the Commissioner considers that the requested information constitutes information on the elements of the environment (a) in conjunction with 'measures' (c) of the EIR. He is therefore satisfied that the Council was correct to reconsider the request under the EIR.

Regulation 5(3) – the complainant's own personal data

13. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester.
14. The Commissioner has first considered whether any of the requested information is the personal data of the complainant. If it is, the EIR does not require the Council to disclose this information.
15. Section 3(2) of the Data Protection Act 2018 (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 this case, the complainant has requested information referring to them, or the land behind their property.
20. Based on the above, it is clear that the information referring to the complainant by name and in relation to their property would be biographically significant to the complainant and therefore constitute their own personal data. The Commissioner is therefore satisfied that the Council was entitled to refuse this information in reliance on regulation 5(3) of the EIR.

Regulation 13 – third party personal data

21. Under regulation 13(1) of the EIR, information is exempt from disclosure if it is the personal data of someone other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
22. In this case the relevant condition is contained in regulation (2A)(a)¹. This applies where disclosing 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 General Data Protection Regulation (GDPR).
23. First, the Commissioner must determine whether the withheld information is personal information as defined by the DPA. If it's not personal information, then regulation 13(1) of the EIR cannot apply.
24. 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?

25. As explained in paragraphs 15 to 18 of this notice, section 3(2) of the DPA provides the definition of personal data. The same provision is relevant when determining the personal data of third parties and the same rules apply here - the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. The Commissioner has had sight of the withheld information, and can confirm that it includes the names of members of the public and specific

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

property addresses of other residents whose boundaries adjoin Parkland Walk.

27. The Commissioner considers that the information clearly relates to these individuals and is therefore satisfied that it constitutes their personal information.
28. However, the fact that information constitutes third party personal data does not automatically exclude it from disclosure under the EIR. The public authority is required to determine whether disclosure would contravene any of the DP principles.
29. 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.
30. The Commissioner's view is that public authorities should consider lawfulness first. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

31. 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.
32. The Commissioner considers that the lawful basis most applicable is Article 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".

33. Accordingly, 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.
34. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. These may be the requester's own interests or the interests of third parties, and may include 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.
36. The Council has not confirmed whether it considers there to be any legitimate interest in the disclosure of the information.
37. However, as specified in paragraph 35 of this notice, the Commissioner recognises that a wide range of interests may be legitimate interests, including the requester's own interests whether compelling or trivial and does not dispute that the complainant has their own legitimate interest in this information.

However, section 40(8) of FOIA (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 UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Is disclosure necessary?

38. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest or absolute necessity. '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.
39. The Commissioner is mindful that the Council has indicated that it will disclose the substance of the minutes. In the Commissioner's opinion the substance of the minutes is more important than the names of members of the public and the addresses of other residents whose properties border Parkland Walk. He therefore considers that disclosure of the substance of the minutes is sufficient to meet the legitimate interest of the complainant.
40. The Commissioner is not persuaded that it is necessary for the Council to disclose the names and addresses referred to in the minutes as he does not consider that the disclosure of this information would assist the public's understanding of the matter.
41. In light of the above the Commissioner finds that the necessity test is not met, therefore the Council would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the Council is entitled to rely on the exception at regulation 13 of the EIR in respect of the withheld personal data.

Regulation 12(4)(e) – internal communications

42. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
43. However, regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the disputed information.

44. The Commissioner's guidance on regulation 12(4)(e)³ defines the concept of communications as 'broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others'.
45. The information which has been withheld under regulation 12(4)(e) comprises internal email exchanges between officers discussing the approach to take regarding the issue of alleged encroachment on public land (Parkland Walk).
46. Having viewed the withheld information the Commissioner is satisfied that all but one email chain constitutes internal communications and therefore regulation 12(4)(e) applies to the bulk of this information. However, the information under item 8 of the Council's table provided to the Commissioner includes the name of an individual outside of the Council on the email recipient list. On this basis, the Commissioner finds that this information does not constitute an internal communication and that regulation 12(4)(e) is not engaged in respect of this information.
47. In respect of all other information refused under this exception, the Commissioner has gone on to consider the public interest test required by regulation 12(1)(b) of the EIR.
48. The Commissioner's guidance for public authorities confirms that public interest arguments should focus on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception which is to protect a public authority's need for a 'private thinking space'. This needs to be weighed against the competing public interest factors in favour of disclosure. The Commissioner has considered the relevant factors below.

Public interest test

Factors in favour of disclosure

49. The Council has acknowledged the general public interest in transparency in its decision-making processes.

Factors in favour of maintaining the exception

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

50. The Council has argued that its officers require a safe space to discuss and deliberate upon proposals which are being formulated. It has added, that public disclosure of such communications would undermine the safe space and would discourage officers from communicating in a free and frank manner. It further argued that it needs to protect the internal deliberation and decision-making processes.
51. The Council considers that disclosure of the information would not inform the public debate on the particular environmental issue that the information is concerned with. It added that the alleged encroachment situation relates to a cohort of residents who in the main, have been silent or accepting of the situation. The Council has argued that this demonstrates there does not appear to be a strong public interest in the disclosure of the information.
52. The Council considers that the balance of the public interest is in favour of maintaining the exception to protect the safe space for deliberation within its organisation.

The Commissioner's conclusion

53. The Commissioner is mindful that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions, and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
54. The Commissioner has carefully considered the arguments both for, and against disclosure and accepts there is a public interest in disclosure insofar as this would promote transparency and accountability of decisions being taken regarding the encroachment of public land.
55. However, as specified in paragraph 48 of this notice, the Commissioner recognises that authorities will need a safe space to develop ideas, debate issues and reach decisions away from external interference and distraction, and that this will apply to decisions regarding the alleged encroachment of public land, (in this case, Parkland Walk).
56. The Commissioner also considers that the Council's officers should be able to ask questions and make comments freely without fear that their comments and processes would be disclosed to the world at large at a later date.
57. The Commissioner recognises that the need for a safe space is strongest when an issue is still live. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008).

58. In this case, the issue is on-going which makes the need for a 'safe space' to consider the matter and possible action going forward stronger than if the matter had been resolved at the time of the request.
59. The Commissioner is also mindful that the disclosure of this type of information has the potential to result in a 'chilling affect' as officers of the Council would be less willing to discuss the matter of encroachment on public land openly if this information were to be disclosed. This in turn would be likely to result in less well considered decisions in respect of alleged encroachment.
60. The Commissioner has therefore concluded that in all the circumstances of the case, the balance of public interest is weighted in favour of maintaining the exception. It follows therefore, that the Council was entitled to rely on regulation 12(4)(e) to withhold the information.

Procedural matters

Regulation 11 – Representations and reconsideration

61. Regulation 11 of the EIR, concerns representations and reconsideration and regulation 11(4) states that a public authority:

 "...shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."
62. The Commissioner notes that the complainant submitted their request for an internal review on 18 October 2022. However, the Council did not provide the outcome of its internal review until 20 January 2023, which is in excess of the stated deadline. The Commissioner has therefore recorded a breach of regulation 11(4) of the EIR.

Other matters

Correct access regime

63. In this case, although the Council recognised that part of the request included the complainant's own personal data, the complainant was advised that if they wanted to access their personal information they would need to make a separate Subject Access Request under the Data Protection Act 2018 (DPA).
64. The Commissioner acknowledges that he cannot require a public authority to take action under the DPA via an EIR decision notice,

however, in view of his decision that some of the requested information is the personal data of the complainant, the Council should consider providing a response to the complainant under the DPA in respect of this information.

65. The Commissioner would however point out, that this does not necessarily mean that the complainant is entitled to receive this information. There are a number of reasons why a data controller may be entitled to withhold information from disclosure under a SAR – this includes where the information is also the personal data of a third party.

Right of appeal

66. 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

67. 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.
68. 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 Dickenson
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