

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 February 2024

Public Authority: London Borough of Ealing
Address: Perceval House
14/16 Uxbridge Road
Ealing
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested an unredacted planning application and correspondences from the London Borough of Ealing ('the Council').
2. The Commissioner's decision is that the Council has correctly relied on regulation 13(1) of the EIR to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 26 June 2023 the complainant wrote to the Council and requested information in the following terms:

"REQUEST FOR PART 1 OR PART 2 STATUTORY REGISTER (ARTICLE 40 OF 2015 STATUTORY INSTRUMENT NO. SI 595) DOCUMENTS AND OTHER CONTACT INFORMATION/CORRESPONDENCE/FILE NOTE

Please supply an un-redacted copy of the planning application form dated 26th April 2023

NB. ARTICLE 40 (NO MENTION OF REDACTION) and in the DATA PROTECTION [EXCLUSIONS FOR DOCUMENTS REQUIRED BY STATUTE]

Please supply a copy of the file notes or e-mails or letters and the replies thereto from Ealing Council Planning Department (Case Officer [name redacted]) contacting the applicant or agent(s) in May or June

2023 informing them that Ealing Council officers would not be supporting the planning application and to include the e-mail or letter officially withdrawing the said application.”

5. The Council responded on 26 July 2023. It stated that the requested information was being withheld under regulation 13, but that a redacted version for the final part of the request was available on an online portal application file.
6. Following an internal review the Council wrote to the complainant on 7 November 2023. It stated that it was upholding its original position.

Scope of the case

7. The complainant contacted the Commissioner on 22 September 2023 to complain about the way their request for information had been handled. The complainant maintained their complaint following the Council's internal review being provided.
8. During the course of the Commissioner's investigation, the Council has now provided the complainant with the unredacted information for the second part of the request, but maintained that the withheld information in the planning application was still exempt under regulation 13 of the EIR.
9. This request relates to planning papers that the complainant has confirmed are not on the Council's website. The complainant has explained to the Commissioner that the Council should allow members of the public to view the requested information as they are bound by the Town and County Planning Act 1990.
10. The Commissioner's investigation can only consider the regulations under the EIR for this matter, as his regulatory powers permit. He will consider whether the Council was entitled to rely on regulation 13 when refusing to provide the withheld information.

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 requested information is related to a planning application, the Commissioner considers that the requested information is information on the measures of the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 13 - personal data

13. Regulation 13(1) 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.
14. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR')

15. 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(1) cannot apply.
16. 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?

17. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The withheld information in this case comprises details of individuals who have been named in the documents, their telephone numbers and email addresses.
22. The Commissioner is satisfied that the contact details and names of individual(s) constitute personal data.
23. In light of the above, the Commissioner is satisfied that the withheld information falls within the definition of personal data as set out in the DPA.
24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".
27. 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.
28. 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

29. 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"².
30. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, 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.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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".

However, section 40(8) 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 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 (disapplying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, 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.
33. 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.
34. The complainant has advised that they have various interests in these particular planning matters. In the circumstances of this case, the complainant is a researcher and a founder of a movement that had concerns over substantial development in various areas. The complainant has supported residents in the area relevant to this request with their objections to the planned development, which may affect neighbouring houses and has drafted a petition to preserve an original building within the area.
35. The complainant has explained to the Commissioner that they have an interest in planning and covenant matters such as these and has spent many hours helping residents wishing to protect this part of the estate.
36. The Commissioner is satisfied in this case that the complainant has a legitimate interest in knowing the full details of the planning application which was made to the Council.

Is disclosure necessary?

37. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. Having considered the legitimate interests and reviewing the withheld information, the Commissioner is satisfied that there is a less intrusive way of achieving the legitimate interests set out by the complainant. The planning application in question is already in the public domain and having seen the withheld information, the Commissioner is satisfied that the third party personal data does not fall into the legitimate interests outlined by the complainant.

39. The withheld information does not provide the complainant with any additional information regarding the reason for the application, other than what is already in the public domain. This demonstrates that there is no pressing social need for third party personal data to be disclosed.
40. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly to the withheld information.

Other matters

41. The Commissioner notes that the time taken for the Council to respond to the internal review request exceeded 40 working days.
42. As explained in the ICO's guidance³, internal reviews should usually be completed within 20 working days. However there may be circumstances where public authorities require more time to complete an internal review, for example to address complex issues, consult with third parties or consider substantial amounts of information.
43. In these circumstances, this should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary. In the circumstances of this case, the Council took over 40 working days to complete the internal review which is considered to be poor practice.

³ [Request handling, Freedom of Information – Frequently Asked Questions | ICO](#)

Right of appeal

44. 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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
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