

Freedom of Information Act 2000 (FOIA)s
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 25 November 2024

Public Authority: Guildford Borough Council
Address: Millmead House
Guildford
GU2 4BBX

Decision (including any steps ordered)

1. The complainant submitted two requests for a range of information relating to specific planning matters. Guildford Borough Council (the "Council") disclosed some information, confirmed that further information was not held and withheld other information under the exception for personal information (regulation 13).
2. The Commissioner's decision is that, in relation to Request 1, the Council disclosed all the relevant information it holds and complied with regulation 5(1), and that it was entitled to withhold some personal information under regulation 13. In relation to Request 2 he has decided that it disclosed all the relevant information it holds and that, in relation to the requested personal information, regulation 13(5)(a) of the EIR, and section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny does not apply. In relation to both requests the Commissioner finds that the Council disclosed information outside the time for compliance and breached regulation 5(2).
3. The Commissioner does not require further steps.

Background

4. This decision notice addresses two requests submitted by the complainant. Whilst the requests were submitted separately the Commissioner considers that they are linked as they both relate to the complainant's concerns about a specific planning matter.
5. The requests were also the subject of a decision notice issued by the Commissioner which directed the Council to issue new responses to the complainant¹. This decision notice addresses the complainant's subsequent concerns about the Council's new responses.

Requests and response

Request 1

6. On 3 October 2022 the complainant wrote to the Council and requested the following information:

"Information on [redacted] including:

- Site visits, diary entries and measurements (of roof height and window height etc) during the applications.
- Correspondence, advice given on the plans and the process including e-mails, letters, reports, faxes, file notes, notes of phone calls, videos, audio, digital recordings."

7. Details of the subsequent correspondence in relation to this request are set out in the aforementioned decision notice, issued on 3 May 2024².
8. Following the issuing of the Commissioner's decision notice, which directed the Council to issue a new response to the complainant, the Council responded to the complainant on 29 May 2024.
9. The Council's response disclosed information, confirmed further information was not held and confirmed that some personal information was being withheld under the exception in regulation 13.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029553/ic-295317-k2b2.pdf>

² Ibid.

10. On 10 July 2024 the complainant asked the Council to carry out an internal review.
11. Subsequent to this, the Commissioner tried to resolve the complainant's concerns informally by attempting to facilitate a meeting between the parties. As it was not possible to secure informal resolution the Commissioner elected to reach a decision in lieu of an internal review.

Request 2

12. On 5 April 2023, the complainant wrote to the Council and requested the following information:

"1. We have provided evidence of what we believe to be unethical actions on behalf of the Planning Department. We would like all information relating to action taken/ investigated following that evidence being provided in line with the Authority's code of conduct and governance standards. Please also provide the Authority's code of conduct, governance standards and complaints process/ procedure which we have been unable to find publicly and have requested from GBC several times.

2. We have been made aware that in the first quarter of 2023 [redacted] guildford.gov email account was not working properly. Please provide information regarding the operation and performance of this email account within the period January to April 2023 (inclusive).

3. On 8 March we requested information from planning services requesting details on procedure for statutory consultees (and clarifying what should happen when both ward councillors are uncontactable, either through illness or a breakdown in the councils email system). This has not been responded to so we would like this provided under FOI along with any internal correspondence related to that request."

13. The subsequent request chronology is set out in the Commissioner's previous decision notice³, which directed the Council to provide the complainant with a new response.
14. The Council issued its new response on 29 May 2024. The response directed the complainant to information on the Council's website, disclosed other information and confirmed that further information was

³ Ibid.

not held. The Council also withheld personal information under regulation 13.

15. The complainant subsequently raised a number of concerns about the Council's new response with the Commissioner. As set out under Request 1 above, the Commissioner will address these concerns in this decision notice.

Scope of the case

16. On 29 May 2024 the complainant contacted the Commissioner to complain about the way their requests for information had been handled.
17. In the Commissioner's view, the focus of the complainant's concerns and the rationale for their requests, was on the substantive planning issue, namely, their issues with a neighbour's property. As set out above, in the interests of resolving these matters quickly, addressing the complainant's substantive concerns, and using his resources as effectively as possible, the Commissioner made attempts to arrange a meeting between the parties. Whilst the Council agreed to a meeting, the complainant declined and asked the Commissioner to reach a decision in relation to their outstanding concerns.
18. This decision notice addresses the specific points raised by the complainant regarding the Council's handling of their requests.

Reasons for decision

Is the requested information environmental?

19. 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);
20. The Commissioner considers that the requests have measures and activities relating to planning decisions as their focus and that the information falls within the scope of regulation 2(1)(c). For procedural reasons, he has, therefore, assessed this case (except where indicated otherwise) under the EIR.

Regulation 13 – personal information

Request 1

21. The Council withheld personal information contained within correspondence associated with a specific planning application.
22. The complainant considers that the Council has wrongly applied the exception and has suggested that not all the withheld information constitutes personal information.
23. Regulation 13 of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than that of the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
24. 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').

25. 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.
26. 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?

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. The Council has stated that any communications between the Council (including either councillors or officers) and third party members of the public (e.g. planning applicants) who are private citizens is by definition personal data - even though the planning application itself is in the public domain. The Council has stated that the planning applicant in this case is a private citizen and has not given consent for the Council to pass their personal information, personal opinions or email communications to any third parties
32. The Commissioner accepts that the planning application in question relates to an individual and, specifically, their place of residence, and the information relates to activities which have been carried out (or not carried out) in relation to a property that they are considered to be responsible for.
33. Having considered the available evidence, the Commissioner is satisfied that the information relates to an individual or individuals. Furthermore, it is the Commissioner's opinion that if only names and addresses were to be redacted, the remaining information would still allow individuals residing at the relevant address to be identified, at the very least by the

individual making the request. In addition, the Commissioner considers that disclosing the information would reveal biographical information about the applicant, specifically regarding decisions taken in respect of their property.

34. The Commissioner is satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA.
35. As the Commissioner is satisfied that all of the withheld information is personal data, the next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles.
36. The Commissioner has focussed here on principle (a), which states:
"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
37. 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.
38. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is
39. 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.
40. 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.
41. The Commissioner understands that the complainant disagrees with a planning decision relating to a neighbour's property. The complainant has expressed concerns about the Council's involvement in this matter.
42. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

43. The Commissioner considers that the complainant is pursuing a legitimate interest in transparency regarding how the Council is acting in respect of a planning decision. He will, therefore, next consider the question of necessity.
44. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
45. In this case the Commissioner does not consider that the disclosure of the redacted personal information under the EIR is necessary to meet these legitimate interests. The Council's position is that it has already met the interest in transparency regarding this matter by disclosing the majority of the requested information to the complainant
46. As this alternative, less intrusive means of providing transparency to the complainant is available and has already been employed by the Council, the Commissioner considers that disclosure of additional personal information to the world at large under the EIR is not necessary and would not add anything to the substance of the complainant's stated concerns. The Commissioner is also mindful that there are remedies available to the complainant to challenge planning decisions which do not involve the disclosure of personal information or other disclosures under the EIR.
47. In this case, as disclosure of the information under the EIR is not necessary to meet the legitimate interests, there is therefore no legal basis for the Council to disclose this information and to do so would be in breach of principle (a). The Commissioner's decision is therefore that the Council is entitled to rely on regulation 13 of the EIR to withhold the personal information.

Request 2

48. The Council withheld information relating to potential disciplinary matters under regulation 13.
49. The complainant considers that the Council wrongly withheld the information under the exception for personal information.
50. Where, after consideration of a case, the Commissioner feels that a public authority is at risk of disclosing personal data without a lawful basis for doing so, he will consider whether it is appropriate for him to proactively apply the relevant sections of the EIR/FOIA.

51. In this case, having considered the nature of the requested information, which relates to potential disciplinary action in relation to a specific Council officer, the Commissioner has considered whether it was appropriate for the Council to confirm or deny whether the information was held.
52. Regulation 13(5)(a) of the EIR, and section 40(5B)(a)(i) of the FOIA, provides that the duty to confirm or deny whether information is held does not arise if it would contravene one of the principles relating to the processing of personal data (as set out in Article 5 of the General Data Protection Regulation - UK GDPR) to provide that confirmation or denial.
53. In order to rely on regulation 13(5) of the EIR, or section 40(5B) of the FOIA, and to refuse to confirm or deny whether there is information falling within the scope of the request, the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and,
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

54. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as: 'any information relating to an identified or identifiable living individual'.
55. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
56. 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.
57. In this case the request names a specific individual. Furthermore, the Commissioner is satisfied that by confirming whether or not a complaint or concerns were raised about a third party would reveal the personal data of that person; this is because it would confirm that a complaint was made about them and also any action that was, or was not, taken, as a result.
58. However, this does not automatically prevent the Council from refusing to confirm whether or not they hold the requested information; the Commissioner must go on to consider whether the disclosure of this personal information would contravene any of the data protection

principles. He regards principle (a) to be most relevant to the circumstances of this case.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

59. Article 5(1)(a) UK General Data Protection Regulation (GDPR) states that:

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

60. In the case of an EIR or FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or, as in this case, the Council can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e., it would meet one of the conditions of lawful processing listed in Article 6(1) of the GDPR), be fair and be transparent.

61. Article 6(1) of the 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.

62. The Commissioner considers that the lawful basis most applicable is basis (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.”⁴

63. The Commissioner accepts that there may be some legitimate interest in the Council being open and transparent about the information that it holds regarding complaints about conduct and how it handles such matters on a case by case basis; this will show whether it is acting

⁴ 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 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”

properly and fairly in each instance. The Commissioner also regards disclosure to be necessary in order to meet the wider public interest in transparency in relation to how it handles complaints about officers.

64. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, fundamental rights and freedoms. In doing so, the Commissioner must consider the impact of the confirmation or denial.
65. The Commissioner notes that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester might already know, or suspect, that the public authority holds the information. However, it is important to note that a disclosure under the EIR or FOIA is a disclosure to the public at large, and therefore to any person (and not just to the requester).
66. In this case the Commissioner recognises that the Council relied on regulation 13(1) to withhold the information, however, his concern here is to establish what the effects of confirmation or denial would be and, if necessary to correct the Council's position to minimise any further ill effects in light of this.
67. The Commissioner considers that an employee would have a very firm expectation that personnel issues and, in particular, disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be shared with their peers or disclosed to the wider public. The Commissioner considers that even confirming or deny whether information relating to such matters is held would reveal personal, biographical information and would be intrusive and likely to cause distress.
68. This approach was supported by the Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College* (E/2008/0038, 29 December 2008) in which it found that, "... there is a recognised expectation that the internal disciplinary matters of an individual will be private."
69. In this case, the Commissioner is satisfied that the individual would have no reasonable expectation that the Council would confirm or deny to the world at large under the EIR or the FOIA whether they were, or were not, subject to a disciplinary complaint / investigation. He is also of the view that disclosure of the confirmation or denial may cause that individual damage and distress.
70. The Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subject's fundamental rights

and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing, and disclosure of personal information in this instance would not be lawful.

71. The Commissioner, therefore, concludes that the Council should have cited 13(5)(a) of the EIR and/or section 40(5B)(a)(i) of the FOIA to neither confirm nor deny holding information within the scope of the request, as it could not do so without disclosing personal information relating to the individual to whom the request relates. He now applies this exception/exemption himself in order to prevent any further disclosure of personal information.

Regulation 5 – duty to provide environmental information

Request 1

72. Under regulation 5(1), authorities have a duty to provide environmental information that is held at the time a request is received. Regulation 5(2) requires authorities to disclose information within 20 working days.
73. The complainant raised concerns that some of the information disclosed by the Council fell outside the scope of the request and that other information was not provided in a legible format.
74. In relation to the disclosure of non-relevant information, this does not, in itself, identify a breach of regulation 5(1), except in cases where irrelevant information is provided in lieu of the relevant, requested information. In this case, though, the complainant has not raised direct concerns that what was requested was not disclosed so the Commissioner has not considered this further.
75. In relation to the legibility of the disclosed information, the Commissioner acknowledges that, were the information unreadable, this might raise concerns that the information had not technically been provided. However, he also acknowledges that, if this were the only form or format in which the information is held, it would be difficult to get around this.
76. The Commissioner has viewed the information in question and finds it to be legible. Where smaller font sizes appear he notes that, as it is electronic in form, it is possible for the information to be magnified for easier viewing.
77. The Commissioner has no evidence that the complainant asked for the information be provided in a specific form or format so he does not consider regulation 6 of the EIR to be relevant in this case.

78. Having considered the above the Commissioner has concluded that the Council has disclosed the relevant information that it holds and complied with regulation 5(1).

Request 2

79. The complainant has raised concerns that the Council failed to disclose all the relevant information that it holds in relation to this element of request 2:

"We have been made aware that in the first quarter of 2023 [redacted] guildford.gov email account was not working properly. Please provide information regarding the operation and performance of this email account within the period January to April 2023 (inclusive)."

80. The complainant also raised concerns about what they refer to as the "third part" of their request, which asked for "information on the workload and performance of the planning department in the period 2021, 2022, and 2023." Having referred to the original request, the Commissioner can find no reference to these matters so he has excluded this from his investigation.

81. In its response to the complainant of 29 May 2024 the Council stated:

"I can confirm that a ticket to the Council's IT helpdesk was raised on behalf of [redacted] in March 2023, and was promptly responded to. Apart from the attached scanned version of the ticket ("TM ICT Support Mar2023") the Council does not hold any further information on this matter."

82. The Commissioner approached the Council and asked it to address the complainant's concerns and to confirmed whether any additional information was held. The Council's position is that no further relevant information is held.

83. Where there is a dispute between a public authority and a complainant as to whether all requested information falling within the scope of a request has been provided, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide the matter based on the civil standard of on the balance of probabilities.

84. In this case the complainant believes further information should be held but has not provided any direct evidence which contradicts the Council's position or explained what possible additional information they believe would be held. The Commissioner is mindful that the focus of the request is on a specific, narrow timeframe and it seems plausible that the limited information provided accurately reflects this.

85. Having considered all of the available information the Commissioner is satisfied that, on the balance of probabilities, the Council has identified and disclosed all the information that it holds that is within the scope of the request.
86. However, in respect of both requests, as some information was not disclosed until the time of the Commissioner's investigation, the Commissioner finds that the Council breached regulation 5(2).

Other matters

87. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

Request handling

88. In investigating these matters it has occurred to the Commissioner that considerable time and resources for all parties might have been spared if the Council had initially provided clearer and more comprehensive responses to the requests.

89. The Commissioner considers that, going forward, the Council should ensure that adequate searches are carried out for information at the time a request is received and, where information is being withheld, that clear and comprehensive reasons are provided. The Commissioner considers that taking this approach will reduce the likelihood of subsequent complaints being made.

Right of appeal

90. 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

91. 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.
92. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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