

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 May 2025

Public Authority: The Royal Borough of Kingston Upon Thames
Address: Guildhall 2
High Street
Kingston upon Thames
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested information from the Royal Borough of Kingston Upon Thames ("the Council") relating to three planning applications.
2. The Commissioner's decision is that the Council is not entitled to rely on regulation 12(4)(b) (manifestly unreasonable) of the EIR to refuse to provide email correspondence held within the email inboxes of three planning officers that falls within the scope of the request.
3. However, the Commissioner finds that the Council is entitled to rely on regulation 13(1) (personal data of a third party) and regulation 5(3) (personal data of the requester) to withhold information relating to three planning enforcement cases.
4. He also finds that on the balance of probabilities, the Council does not hold further information within the scope of the request which has not already been provided the complainant, withheld under an exception, or is available within the public domain.
5. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - In respect of the information which the Council withheld under regulation 12(4)(b) of the EIR, the Council must provide the complainant with a fresh response which does not rely on regulation 12(4)(b)

6. The Council must take these steps within 30 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

7. On 29 July 2024, the complainant wrote to the Council and requested information in the following terms:

"Following from below complaint confirmation report dated Jun.25,2024, to which we have received no reply we would appreciate if you could please provide us with the following:

In relation to 22/03716/HOU and 23/00982/HOU:

Full documentation, internal and external communications with all implicated parties, site visit reports, appendices, schedules, photo evidence and compliance of plans vs actual works (signed by qualified authority or subcontractor(s)) towards required processes for the works and satisfaction of all the conditions you approved and imposed. Kindly provide us copies of all of these which clearly evidence implementation of required processes and satisfaction of all conditions during and after completion of works and in accordance with approved plans and all other relevant material.

In relation to 22/00885/NMA:

Full documentation, internal and external communications with all parties, site visit reports, appendices, schedules and compliance of plans vs actual works (signed by qualified authority or subcontractor(s)) towards required processes for the works and satisfaction of all the conditions you approved and imposed as well as building control/building Regs and Completion Certificate and all other relevant material."

8. The Council responded on 27 August 2024 and refused to provide the requested information citing section 21 (information accessible to the applicant by other means) of FOIA and regulation 12(4)(e) (internal communications) of the EIR as its basis for doing so.
9. On 13 September 2024 the complainant requested an internal review. The Council provided the complainant with the outcome of its internal review on 9 October 2024 in which it amended its position. It stated that it was now relying on regulation 12(4)(b) (manifestly unreasonable) and

regulation 12(4)(e) of the EIR to refuse to provide the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 17 October 2024 to complain about the way their request for information had been handled.
11. During the course of the Commissioner's investigation, on 28 February 2025, the Council provided the complainant with a further response to the request. It refused to provide any email correspondence held within the email inboxes of three planning officers that falls within the scope of the request citing regulation 12(4)(b) of the EIR as its basis for doing so.
12. The Council provided the complainant with some non-email documentation that falls within the scope of the request. However, it redacted some information from that documentation citing regulation 13 (personal data) of the EIR as its basis for doing so. It also refused to provide some non-email documentation stating that the information is already available within the public domain on its planning portal.
13. On 3 March 2025, the complainant wrote to the Commissioner to complain about the Council's response of 28 February 2025 to their request. They queried whether the Council was correct to handle their request under the EIR rather than FOIA.
14. The complainant also stated that they consider the Council to hold further information, including non-email documentation, that falls within the scope of the request but has not been disclosed to them and is not available within the public domain. They also believe the Council to have incorrectly applied regulation 12(4)(b) of the EIR to their request.
15. The Council subsequently located further information within the scope of the request relating to three planning enforcement cases which are linked to the planning applications referred to in the request. However, it informed the Commissioner that it is withholding the information under regulation 13(1) (personal data of a third party), regulation 12(5)(d) (confidentiality of proceedings) and regulation 12(5)(f) (interests of the person who provided the information) of the EIR.
16. Therefore, in this notice the Commissioner will firstly consider whether the Council was correct to handle the request under the EIR rather than under FOIA. If the Commissioner determines that the Council was correct to handle the request under the EIR, he will then consider whether the Council is entitled to rely on regulation 12(4)(b) to refuse to

provide any email correspondence held within the email inboxes of three planning officers that falls within the scope of the request.

17. Having reviewed the information which the Council is withholding under regulation 13(1), regulation 12(5)(d) and regulation 12(5)(f) which relates to three planning enforcement cases, the Commissioner notes that some of the withheld information does not fall within the scope of the request. This is because the information post dates the request and so it was not held by the Council when the request was made. Therefore, the Commissioner will consider whether the Council is entitled to rely on regulation 13(1), regulation 12(5)(d) and regulation 12(5)(f) to withhold the information relating to the three planning enforcement cases that was held at the time of the request.
18. Finally, the Commissioner will consider whether the Council holds any information that falls within the scope of the request which has not already been disclosed to the complainant, withheld under an exception or available within the public domain.

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 is satisfied that the requested information is environmental. He considers that as the requested information relates to planning applications, it would fall within regulation 2(1)(c) "activities affecting or likely to affect the elements and factors referred to in (a) and (b)" of the EIR. Therefore, the Commissioner considers that the Council was correct to handle the request under the EIR rather than FOIA.

Regulation 12(4)(b) – manifestly unreasonable

21. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. In this case, the Council considers that providing any email correspondence held within the email inboxes of three planning officers that falls with the request would impose a significant and disproportionate burden on its resources, in terms of time and cost. Therefore, it is relying on regulation 12(4)(b) of the EIR to withhold that information.
22. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. This is set at £450 for public authorities such as the Council.
23. The Fees Regulations state that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
- determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it;
 - and extracting the information from a document containing it.

24. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.
25. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend as is the case here. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.
26. Although it cannot be taken into account under FOIA, under the EIR, the burden of considering whether any exceptions are applicable to the information can also be taken into account in determining whether Regulation 12(4)(b) can be applied.

The Council's position

27. In its submissions to the Commissioner, the Council stated that it is likely to hold email correspondence that falls within the scope of the request within the email inboxes of the three planning officers who handled the planning applications referred to in the request. However, it explained that in order to provide such information it would firstly need to restore the planning officers' email inboxes from its archive system as the officers no longer work at the Council. It stated that a search of each inbox would then need to be conducted using a broad selection of dates and search terms to increase the chances that all emails relating to the planning applications are located. The Council estimates that these processes would take approximately 3 hours, 1 hour per inbox.
28. The Council explained that once it had identified any emails held within the email inboxes of the three planning officers that may fall within the scope of the request, those emails would need to be manually reviewed to determine whether they fall within the scope of the request. It stated that it would also need to consider whether any exceptions such as regulation 13(1) or regulation 12(5)(e) (commercial information) applied to the information, and if necessary, carry out redactions and consultations with other teams and third parties.
29. The Council estimates that these processes would take approximately 4 hours per planning application. This estimate is based on an assumption that on average 100 emails would have been received each day during the relevant time period. Therefore, in total the Council has calculated that it would take 15 hours to provide any email correspondence held within the email inboxes of the three planning officers that fall within the scope of the request.

The Commissioner's position

30. The Commissioner notes that the Council has estimated that it would take approximately 15 hours to provide any email correspondence held within the email accounts of three planning officers that falls within the scope of the request. Clearly, this estimate does not exceed the appropriate limit as defined in the Fees Regulations.
31. Furthermore, the Commissioner does not consider the estimate provided by the Council to be reasonable. Whilst the Council has stated that it would need to review any emails received during the relevant time period, it has not specified how long it considers that time period to be. Additionally, the Council has not explained why it has assumed that an average of 100 emails would have been received each day. This estimate does not appear to be based on any searches or a sampling exercise.
32. Therefore, as the Council has not provided a reasonable estimate that exceeds the appropriate limit, the Commissioner considers that it has failed to demonstrate that providing any email correspondence held within the email accounts would impose a significant burden on its resources. The Commissioner's decision is therefore that the Council is not entitled to rely on regulation 12(4)(b) of the EIR to refuse to provide such information.

Regulation 5(3) – personal data of the requester

33. Regulation 5(3) of the EIR provides that where a request for information constitutes the personal data of which the applicant is the data subject, that information is exempt from the duty to disclose provided for under regulation 5(1).
34. Section 3(2) of the Data Protection Act 2018 defines personal data as "any information relating to an identified or identifiable living individual."
35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. The Commissioner has viewed the information which the Council has withheld under regulation 13(1), regulation 12(5)(d) and regulation 12(5)(f) of the EIR which relates to three planning enforcement cases. He notes that the Council has withheld some correspondence between the complainant and the Council, and the complainant and another individual who submitted a complaint to the Council which led to the creation of one of the enforcement cases ("the individual"). The Commissioner is satisfied that the information relates to the complainant and would identify them and so in his view, the information constitutes the complainant's personal data as defined in section 3(2) of the DPA.

37. Therefore, the Commissioner considers that the Council is entitled to rely on regulation 5(3) of the EIR to withhold the correspondence between the complainant and the Council and the complainant and the individual. He will now go to consider whether the Council is entitled to rely on regulation 13(1) to withhold the remainder of the withheld information which relates to the three planning enforcement cases.

Regulation 13(1) – third party personal data

38. 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.
39. In this case the relevant condition is contained in regulation 13(2A)(a). 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").
40. As outlined earlier in this notice, section 3(2) of the Data Protection Act 2018 defines personal data as "any information relating to an identified or identifiable living individual." The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable
41. Having viewed the withheld information relating to the three planning enforcement cases, the Commissioner notes that Council has relied on regulation 13(1) to withhold correspondence between the Council's planning enforcement team and the individual. He is satisfied that this information relates to the individual as it concerns the complaint they submitted to the Council. He is also satisfied that the information would identify the individual as it contains their name, contact details and details of their complaint which could subsequently be used to identify them. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
42. The Council has also relied on regulation 13(1) to withhold correspondence between the Council's planning enforcement team and the owner of the property that is the subject of the three planning enforcement cases ("the property owner"). He is satisfied the correspondence relates to the property owner and would identify them as it contains their name, contact details and information about their property. Therefore, the Commissioner considers the correspondence to fall within the definition of 'personal data' in section 3(2) of the DPA.

43. The Commissioner notes that the Council has withheld some internal Council emails relating to the three planning enforcement cases and some correspondence between the Council and the property owner's architect. He considers this information to relate to the property owner as it concerns both the planning enforcement cases of which they are the subject, and their property.
44. The Commissioner is also satisfied that the property owner would be identifiable from the correspondence. As he understands it, the complainant submitted the initial complaints which led to the creation of the three planning enforcement cases with one of those complaints being submitted jointly with the individual. Therefore, the Commissioner considers that the complainant and the individual would be able to identify the property owner as clearly they will know which property they complained about and could identify the owner of that property. This is the case even where the withheld correspondence does not contain the name or address of the property owner.
45. As the internal Council emails and the correspondence between the Council and the property owner's architect both relate to and would identify the property owner, the Commissioner considers that the information falls within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure of the withheld information breach principle (a)?

46. The next step is to consider whether disclosure of the third party personal data outlined above would be in breach of any of the data protection principles. 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."
47. 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.
48. When considering whether the disclosure of personal information would be lawful, 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.
49. The Commissioner accepts that the complainant is pursuing a legitimate interest in this case. As explained above, the complainant submitted the initial complaints which led to the creation of the three enforcement cases. Therefore, the Commissioner considers that it is reasonable for

the complainant to want to know how the Council handled their complaints and the subsequent enforcement cases.

50. The Commissioner also considers that a wider legitimate interest is being pursued in this case as disclosure of the withheld information would ensure that the Council's planning and planning enforcement processes are open and transparent. He is satisfied that the disclosure of the withheld information is necessary to some extent to meet the legitimate interests identified.
51. However, the Commissioner considers that the individual would have a strong and reasonable expectation that correspondence between themselves and the Council's enforcement team would remain confidential given that the information relates to a complaint they submitted. In the Commissioner's view, the disclosure of such information would likely cause distress to the individual as it would likely result in them being identified by the property owner.
52. The Commissioner also considers that the property owner has a strong and reasonable expectation that correspondence between themselves and the Council's planning enforcement team would remain confidential. They would also reasonably expect information about the three enforcement cases that relate to them and their property to remain confidential given that two of the planning enforcement cases were closed following the submission of a retrospective planning application and the third remains open. The Commissioner accepts that the disclosure such information would likely be distressing to the property owner.
53. Therefore, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of both the property owner and the individual. Therefore, he considers that there is no legal basis for the Council to disclose the withheld correspondence and to do so would be in breach of principle (a).
54. The Commissioner's decision is that the Council is entitled to rely on regulation 13(1) of the EIR to refuse to provide the remainder of the withheld information which relates to the three planning enforcement cases.
55. As the Council is entitled to rely on regulation 13(1) and regulation 5(3) of the EIR to refuse to provide the withheld information relating to the planning enforcement cases, the Commissioner has not gone on to consider the Council's application of regulation 12(5)(d) and regulation 12(5)(f) of the EIR. He will now consider whether the Council holds any information that falls within the scope of the request which has not

already been disclosed to the complainant, withheld under an exception or available within the public domain.

Regulation 5(1) – duty to make environmental information available

56. The task for the Commissioner where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request is to determine whether, on the balance of probabilities, the public authority holds any information relevant to the request which it has not already disclosed to the complainant.
57. In making this determination, the Commissioner will consider the complainant's evidence and argument and the actions taken by the public authority to check whether the information is held and he will consider any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held.
58. The Commissioner is not expected to prove categorically whether the information is held; he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities. Applying the civil test of the balance of probabilities is in line with the approach taken by the Information Tribunal when it considered the issue of whether information is held.

The Council's position

59. In its submissions to the Commissioner, the Council explained that when searching for information within the scope of the request it consulted a planning system expert to gain an understanding of where information within the scope of the request may be held. It stated that information within the scope of the request is held within its planning system, specifically its IDOX Electronic Document and Records Management System which holds documentation relating to all planning applications. The system contains both information which is available to the public on its planning portal and sensitive information which is held by the Council for internal use.
60. The Council explained that it has conducted searches of its IDOX system and that any information located by those searches that falls within the scope of the request has either been disclosed to the complainant, redacted under regulation 13 of the EIR or is available within the public domain on its planning portal. It stated that whilst planning officers may have kept personal notes about the planning applications referred to in the request, those notes would have been transcribed into formal reports and uploaded to its IDOX system. Therefore, it considers that

such information would have been located by its searches of the IDOX system.

61. The Council stated that information within the scope of the request is also held within its planning enforcement records. It explained that it has conducted a search of its planning enforcement records and located information relating to three separate planning enforcement cases. As those planning enforcement cases relate to the planning applications referred to in the request, the Council considers the information to fall within the scope of the request. However, the Council withheld this information under regulation 12(5)(d), regulation 12(5)(f) and regulation 13 of the EIR. As outlined earlier in this notice, the Commissioner has determined that the Council is entitled to withhold this information under regulation 13(1) of the EIR.
62. The Council also explained that information within the scope of the request is likely to be held within the email inboxes of three planning officers. However, as explained above, the Council has withheld that information under regulation 12(4)(b) of the EIR.

The Commissioner's position

63. Based on the explanations provided by the Council, the Commissioner is satisfied that the Council has conducted reasonable searches for information within the scope of the request. He notes that when conducting its searches the Council consulted an expert in its planning systems who advised where information within the scope of the request would be held and that the Council subsequently carried out searches of those areas.
64. Therefore, the Commissioner's decision is that on the balance of probabilities, the Council does not hold any further information within the scope of the request which has not already been disclosed to the complainant, withheld under an exception or is available within the public domain.

Other matters

65. Whilst the Commissioner cannot require a public authority to take action under the DPA via an EIR decision notice, in view of his decision that the some of the withheld information is the personal data of the complainant, the Council should consider providing a response to the complainant under the DPA, even if the Council determines that the withheld information is exempt under the DPA.

66. The Commissioner is concerned about the Council's handling of the request in this case. Whilst a public authority can amend its position when responding to a request for information, in this case the Council amended its position multiple times. Furthermore, whilst the Council has now conducted reasonable searches for information within the scope of the request, the Council did not initially do so, conducting additional searches during the Commissioner's investigation. These searches located a substantial amount of information within the scope of the request.
67. The Commissioner is disappointed with the quality of the Council's submissions. Whilst the Council has provided the Commissioner with submissions to support its position, the submissions did not include the level of detail he expects. The Commissioner had to write to the Council multiple times to obtain further information and to clarify the Council's position before he could make his decision in this case.
68. In the future, the Council should have a clear position at the earliest opportunity and should provide the Commissioner with sufficient information in the first instance so that he can make his decision. The Commissioner will log his concerns.

Right of appeal

69. 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

70. 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.
71. 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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