

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

Decision notice

Date: 27 June 2022

Public Authority: Watford Borough Council
Address: Town Hall
Watford
WD17 3EX

Decision (including any steps ordered)

1. The complainant requested information from Watford Borough Council ("the Council") about planning applications relating to a specific address. The Council disclosed some information in response, but withheld the enforcement file relating to the property. Subsequently, during the course of the Commissioner's investigation, it disclosed the enforcement file. It redacted some information from one document within the enforcement file - "the uniform report" - on the basis that it was third party personal data. Its position was that no other information was held, falling within the scope of the request. Subsequently, it identified a small amount of information which it considered may be relevant to the request but had not been disclosed, specifically three photographs of the property.
2. The Commissioner's decision is that the Council should have considered the request under the EIR rather than FOIA. With regard to the uniform report, he is satisfied that some information was correctly redacted under the exception for third party personal data: regulation 13 of the EIR. However, since it failed to disclose the three photographs at the time of the request, the Council has breached regulation 5(2) of the EIR.
3. The Commissioner has decided that the photographs located by the Council fall within the scope of the request and should be considered for disclosure, as set out below. Apart from these photographs, he is satisfied that, on the balance of probabilities, the Council holds no further relevant information.

4. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Disclose to the complainant, or cite a valid EIR exception under which they may be withheld, the three photographs that it has located during the course of the Commissioner's investigation.
5. The Council must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 30 March 2021, the complainant wrote to the Council and requested information in the following terms:

"I am writing to file a freedom of information request in relation to all planning applications relating to [redacted], submitted on or after 2012. I require the following details:

Any and all communications in relation to this property, to include but not be limited to the following:

- Any internal notes/minutes/information explaining how the case officer was chosen
- Internal communications between planning department staff, or any other council staff
- Any communications between council staff/planning officers and any individuals objecting any planning applications
- Any communications between council staff/planning officers and any other members of the public relating to this property. Including, but not limited to: telephone calls, emails, postal letters, anything else
- Any site meetings that took place in relation to this property, including, date, location, names of all people present and anything else. Site meetings to include meetings with the neighbours
- Any details of how site visits were arranged-either at the address above or neighbours properties

- Any phone conversations between objectors and the council/planning staff
 - Any other communications in relation to this property
 - Any internal reports generated in relation to this property
 - Any communications relating to any decision notice for this property
 - Any and all information held on file about planning applications for this property on or after 2012”.
7. The Council responded on 14 April 2021. It provided some information within the scope of the request, advised the complainant that some of the information was available to them by other means and, for some of the documents, asked them to confirm whether they would like a copy.
8. The complainant requested an internal review on 15 April 2021 on the basis that they believed the Council held further information within the scope of the request, including about a site visit. They also asked the Council to produce information about the contact the case officer had had with the neighbours: “I would also request a written statement from [redacted] outlining the contact he has had with the neighbours”.
9. On 21 April 2021 the Council wrote to the complainant. It provided a statement from the case officer regarding contact with the neighbours and also stated it was withholding information regarding enforcement as it related to an ongoing case.
10. On 21 April 2021 the complainant queried the responses provided regarding their request of 30 March 2021. In addition to asking for information about which officer had responded to their request, the complainant clarified that they had expected their request to cover internal communications and commented:
- “To clarify my position further, I know and can prove that you still have not provided me with all the information you hold on this case-I know information is being withheld.”
11. On 19 May 2021 the Council responded again to the complainant. It provided information about its handling of the request, commenting:
- “As the case officer made contact with the neighbour via a telephone call which was recalled from memory this was additional information given to you to try and be helpful when we did not need to reveal it.

It is not council policy for officers to take written site notes when out on site visits, or make notes of phone conversations. We have not intentionally withheld any information from you that we have recorded electronically regarding the neighbours as you have stated below."

12. The complainant referred the matter to the Commissioner.

Scope of the case

13. The complainant contacted the Commissioner on 4 June 2021 to complain about the way his request for information had been handled.
14. On 2 September 2021, having been made aware of the complainant's complaint to the ICO, the Council explained its intention to disclose the enforcement file relating to the property, which it had previously said, in April 2021, it was withholding as it related to an ongoing case. The Council explained that it had redacted some information from one document within the enforcement file - the uniform report - and that it had redacted information from this report under the exemption at section 40(2) of FOIA: third party personal data. The enforcement file including the redacted uniform report was disclosed in September 2021.

15. The complainant responded on 2 September 2021:

"Thank you for your email and for the information... My main complaint was not about the enforcement file.

My complaint was about communications the case officer (not enforcement officer) had with the neighbours. I am certain that the case officer either withheld or destroyed information about his communications with the neighbours and or objectors to my planning application.

In Watford's response to me they say they only have evidence of 2 site visits, but in their emails to me they mention 3 site visits. I also know the case officer was in direct communication with the neighbours and I am certain there are emails between the parties that have not been disclosed to me, amongst other things."

16. The Council confirmed that "no documents have been withheld or destroyed". The Council subsequently identified a small amount of information which it considered may be relevant to the request but had not been disclosed, specifically three photographs of the property.
17. This decision notice covers whether the requested information is environmental. It also covers whether some information has correctly

been redacted as being third party personal data, and covers whether the Council holds any further recorded information falling within the scope of the request.

Reasons for decision

Regulation 2(1) – definition of environmental information

18. Regulation 2(1) of the EIR provides the following definition of environmental information:

“...any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements...”

19. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

20. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
21. The Commissioner notes that the requested information comprises information on planning applications.
22. The Commissioner is satisfied that the information being requested would relate to both measures and activities affecting the environment.
23. The Commissioner is therefore satisfied that the requested information falls within the definition at regulation 2(1)(c) and that the request therefore fell to be considered under the EIR.
24. The Commissioner notes that the Council cited section 40(2) FOIA as a reason for withholding some information contained in the uniform report. In light of his conclusion above, he has used his discretion to consider whether this information is exempt under the similar provision contained in the EIR: regulation 13. He has also considered other aspects of the handling of the request, explained in the Scope of the Case section above, in line with the provisions of the EIR.

Regulation 13 personal data

25. 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.
26. In this case the relevant condition is contained in regulation 13(2A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

¹

https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

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

27. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
28. 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?

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

"any information relating to an identified or identifiable living individual".

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
31. 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.
32. 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.
33. The withheld information in this case comprises the following information, redacted from the uniform report: the name and telephone number of a third party in a note about a phone call a Council employee had with that third party, the name and contact details of a third party who reported a concern to planning enforcement, the content of the email they sent about this concern which included identifiable details about the nature of their concern and a Council summary of the issues raised by the third party, which again included identifiable details about the nature of their concern.
34. Having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
35. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

36. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

37. Article 5(1)(a) of the GDPR states that:

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

38. 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.

39. 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.

40. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

41. Information relating to special category data is given special status in the UK GDPR.

42. Article 9 of the UK GDPR defines ‘special category’ as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.

43. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does not include special category data.

44. As none of the withheld information is special category data, the Commissioner has gone on to consider whether there is an Article 6 basis for disclosing the withheld information.

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

45. 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.

46. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”³.

47. 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.

48. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

49. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that

³ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the 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”.

such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

50. 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.
51. The Commissioner accepts that interest in transparency about how the Council handled this particular planning issue constitutes a legitimate interest in wanting to access the information and therefore this criterion is met.

Is disclosure necessary?

52. '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.
53. As the Commissioner has decided in this case that disclosure is necessary to meet the legitimate interest in disclosure, he has gone on to conduct the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

54. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
55. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

56. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
57. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
58. In this case the individuals concerned would have a reasonable expectation of privacy, they would not expect their contact with the Council to result in their personal data being disclosed to the world at large.
59. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
60. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

61. The Commissioner has therefore decided that the Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

Regulation 5(2) – duty to make environmental information available on request

62. Regulation 5(2) of the EIR provides that, on receipt of a request for information, a public authority must respond promptly and no later than twenty working days after the date it receives the request.
63. Following its disclosure of the redacted uniform report on 2 September 2021, the Council maintained that it held no further relevant information beyond what it had already disclosed to the complainant. After the Commissioner intervened, it identified a small amount of information which it considered may be relevant to the request but had not been disclosed, specifically three photographs of the property.
64. Specifically these are two photographs taken by the case officer on a site visit on 6 June 2019 in relation to planning application

19/00434/COU and one which he took on 17 January 2020 in relation to applications 19/01425/FULH and 19/01426/LDC.

65. The Commissioner has considered the wording of the request and notes that it included "any and all information held on file about planning applications for this property on or after 2012". He is satisfied that photographs taken on site would be captured by this.
66. The Commissioner has therefore ordered the Council to consider whether the photographs can be disclosed, in paragraph 4 of this notice.
67. In addition, since it did not identify and disclose all relevant information to the complainant within the twenty working day limit set out above, the Commissioner considers that the Council has breached regulation 5(2) of the EIR.

Regulation 12(4)(a) – information not held

68. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
69. The complaint under consideration in this part of the notice relates to the Council's assertion that no further information within the scope of the request is held, beyond that which it has already identified and either disclosed or withheld under regulation 13 and the three photographs that it located following the Commissioner's intervention referred to above.
70. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held, in cases which it has considered in the past.
71. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and 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 held.

The complainant's view

72. The complainant believes that the Council holds further information about site visits and communications with neighbours of the property. In relation to site visits this is because the Council have confirmed three visits were made but said that they only hold information about two of

them. The complainant also understands that the case officer was in direct communication with the neighbours so believes they also hold emails to and from the neighbours of the property.

The Council's view

73. The Council has explained that it is not council policy for officers to take written site notes when out on site visits, or make notes of phone conversations. It confirmed there is no business purpose nor statutory requirement for it to hold any information relating to site visits or verbal communication with any interested party. In relation to the absence of recorded information about site visits by the case officer from the Development Management Team it explained, "No notes were taken by the case officer because the visits did not suggest any discrepancies with the plans submitted and no undue harm to neighbouring amenity was identified, as noted in the officer report".
74. The Council believes that it has carried out appropriate searches likely to retrieve any relevant information. It used both the address of the property and the complainant's name to search the relevant electronic records, it explained that all information associated with a planning application would usually be held in the electronic case file but additional searches were carried out in case any documents had been misfiled. It also consulted with the relevant case officer, which led to the location of the three photographs referred to above.
75. The Council confirmed that no documents relating to any of the planning applications have been deleted or destroyed. It explained that under its internal document retention policy all emails are deleted after two years but that best practice requires officers to upload any emails relating to a planning application to the electronic case file so a copy is permanently available and remains within the planning file.

The Commissioner's decision

76. The Commissioner's remit is to establish whether, on the balance of probabilities, further information falling within the scope of the request is held.
77. He is satisfied by the Council's explanations as to how it has ensured that all information within the scope of the request has now been identified and as to why no further recorded information is held.
78. His decision is that, on the balance of probabilities, the Council is correct to state that it has identified all of the information it holds falling within the scope of the request, save for the three photographs referred to earlier in this notice.

Right of appeal

79. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.
81. 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

Ben Tomes
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