

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

Date: 23 December 2021

Public Authority: London Borough of Barnet
Address: Hendon Town Hall
The Burroughs
London
NW4 4BG

Decision (including any steps ordered)

1. The complainant has requested contact details of solicitors acting on behalf of London Borough of Barnet in legal proceedings under the Proceeds of Crime Act 2002.
2. The Commissioner's decision is that London Borough of Barnet correctly relied on EIR Regulation 13 (personal data) to withhold requested information from the complainant.
3. The Commissioner does not require the public authority to take steps to ensure compliance with the legislation.

Background

4. London Borough of Barnet ("the public authority"), as the local planning authority, serves enforcement notices for breaches of planning control, such as unlawful use or unlawful development.

5. Once an enforcement notice is served, there is a right of appeal, and these are determined by the Planning Inspectorate¹ (PINS) on behalf of the Minister of State for Housing and Local Government. If PINS upholds the requirements of the notice or the notice is not appealed, then any further breach of that notice is a criminal offence.
6. The public authority explains that court fines for breaches of notices have not always served as an adequate deterrent against continual breaches. The Proceeds of Crime Act 2002² (POCA) can be utilised when someone fails to comply with the terms of an enforcement notice and financially benefits from their unlawful activity.
7. If a local authority is considering the use of POCA, the confiscation proceedings flow from a successful conviction of the defendant in either the Magistrates' or Crown Court for failure to comply with the provisions of an extant enforcement notice.
8. Due to the specialist nature of those types of offences involving forensic accounting and financial information these types of cases are brought by the public authority's Corporate Anti-Fraud team (CAFT) who evaluate the evidence and the prospect of a conviction and then consider whether the defendant has available assets that can be made the subject of a confiscation order.
9. On 17 December 2019 the complainant requested information from the public authority by saying, amongst other things, as follows.
 - "7) Details of the outcome of the section 179 Prosecution. Whether the defendant pleaded guilty/not guilty or was found guilty/not guilty or other outcome as the case may be.
 - 7) Details of the fine or other sentence passed on the defendant.
 - 8) Whether an order was made under Part 2 of the Proceeds of Crime Act 2002 (POCA).
 - 9) Details of the POCA order made, i.e., what was the monetary or other extent of the POCA order".

¹ <https://www.gov.uk/government/organisations/planning-inspectorate>

² <https://www.legislation.gov.uk/ukpga/2002/29/contents>

10. In reply the public authority provided the complainant with, amongst other things, a spreadsheet. The spreadsheet indicated what penalties (in its column "G") had been imposed on defendants.

Request and response

11. On 17 December 2019, the complainant requested further information from the public authority by saying as follows.
 - Would it be possible for you to supply me with the contact details of the solicitors acting for the defendants against whom POCA orders were made and identified in column G of the supplied spreadsheet supplied?
12. On 23 January 2020, the public authority responded. It refused to provide the requested information. It cited the following reason as its basis for doing so:
 - EIR Regulation 13 (Personal data).
13. The complainant requested an internal review, the public authority sent him the outcome of its internal review on 20 March 2020. It upheld its position.

Scope of the case

14. The complainant contacted the Commissioner on 30 March 2020 to complain about the way his request for information had been handled.
15. During the course³ of the Commissioner's investigation the public authority released the requested details of solicitors' firms but continue to withhold the requested information about individual sole practising solicitors acting for defendants and maintained its reliance on regulation 13 to do so.
16. The Commissioner considers he has to determine whether the public authority correctly relied on regulation 13 to withhold requested information from the complainant.

³ On 7 October 2021.

Reasons for decision

Is the information 'environmental information'?

17. Regulation 2(1) of the EIR defines environmental information as any information in any 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;

(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)'

18. The complainant is seeking information that comprises of "the contact details of the solicitors acting for the defendants against whom POCA orders were made".

19. Information on measures and activities designed to protect elements of the environment is also environmental information by virtue of regulation 2(1)(c).
20. The Commissioner echoes the observations of the Court of Appeal in *R v The Knightland Foundation & Friedman*⁴ where it said "We understand the concern of the Enforcement Team that the respondents were in clear breach of planning control and that, despite being in breach of the Enforcement Notice, continued to take on residents after time for compliance had ended. We understand the importance of maintaining planning controls. It may well be that the respondents are fortunate that they will not face prosecution for what appears to be a clear breach of the Enforcement Notice". That is, POCA is a statutory means of ensuring compliance with planning decisions, planning decisions being matters that of course are likely to affect the environment. The Commissioner is therefore satisfied that the public authority utilised the correct regime to handle the complainant's request for information.

Regulation 13 personal data

21. 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.
22. 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 General Data Protection Regulation ('GDPR').
23. 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.
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

⁴ <https://www.bailii.org/ew/cases/EWCA/Crim/2018/1860.html>

Is the information personal data?

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

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

27. 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.

28. 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.

29. In the circumstances of this case, the Commissioner is satisfied that the withheld information, being the names of individual solicitors, relates to an identifiable individual. This requested information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

30. 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 data protection principles.

31. The most relevant data protection principle in this case is principle (a).

32. 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.

33. 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.

34. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

35. 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.

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

- "processing is necessary for the purpose 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".

37. In considering the application of Article 6(1)(f) of the 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 disclosure;

iii. Balancing test

Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

38. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii).

Legitimate interest

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 complainant has informed the Commissioner that his interest in being provided with the withheld information "lies in knowing who to instruct with experience in the field".

42. Whilst the bar for establishing a legitimate interest is relatively quite low, the Commissioner cannot discern a genuine legitimate interest in the complainant or the public knowing the name of a third party's defendant's solicitor representing him or her in legal proceedings.
43. The Commissioner considers the complainant's stated interest to be so tenuous, so as not to amount to a legitimate interest. Knowing the name of a particular solicitor, in a particular type of court matter, does not in itself realistically advance a person's knowledge as to whom he or she should instruct in their own proceedings.
44. Further, there is also no legitimate interest in the public generally knowing the name of a defendant's legal representative certainly when the defendant in the proceedings is an ordinary member of the public . A person can of course choose whom he or she wishes to employ or engage in their own personal affairs, and it is not a matter of a genuine legitimate interest to the public or the complainant.
45. Due to the matters stated above, disclosure of this withheld information under the EIR would not be lawful and the public authority correctly relied on regulation 13 to withhold this information.
46. The Commissioner is of the view that even if he had considered there to be a legitimate interest, he would not have considered it to be necessary to release the withheld information to meet that interest. A person wishing or needing help to choose a solicitor could seek the advice of the Law Society or indeed conduct a general internet search. Therefore disclosure would not be necessary to meet the legitimate interest, there being other methods available.

Right of appeal

47. 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

48. 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.
49. 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

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