

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

Date: 26 May 2022

Public Authority: Lambeth London Borough Council
Address: Lambeth Town Hall
Brixton Hill
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested information about works carried out by Lambeth London Borough Council ('the Council') in respect of a specific residential property.
2. The Council refused to provide information requested in two parts, citing section 13 of the EIR (personal data) as its basis for doing so. The Council advised it does not hold information within scope of a third part of the request.
3. The Commissioner's decision is as follows:
 - The Council is entitled to withhold information within scope of parts 1 and 7 of the request of 16 February 2021 under regulation 13 of the EIR as it is personal data and disclosure would be unlawful.
 - Regulation 12(4)(a) is engaged with regard to part 3 because, on the balance of probabilities, the Council does not hold the specific information requested.
4. The Commissioner does not require the Council to take any remedial steps.

Background

5. Section 20 major works notices are issued in accordance with section 20 of the Landlord and Tenant Act 1985, where, by law, leaseholders must be consulted before a landlord carries out works above a certain value.
6. A leaseholder's contribution to the cost of any major works will be capped at £250 if the landlord, or their agent, fails to follow set consultation procedures before commencing the work.
7. The section 20 procedure is broken down into stages –
 - Notice of intention – a notice is served setting out the proposed works and why they are required, and inviting comments from the leaseholders.
 - Statement of estimates – once estimates for the works have been obtained, a notice must be served to all leaseholders detailing the costs and inviting any comments.
 - Notice of reasons – once the contract is awarded, the landlord must notify the leaseholders if they did not choose the cheapest estimate or a contractor nominated by the leaseholders. It must explain why they chose that particular option.

Request and response

8. On 16 February 2021, the complainant submitted a request to the Council in the following terms:

“The following are in respect of [redacted] only:

[1] Provide copies of the s20 notices.

[2] Provide the contract specification as submitted to (i) the tenants, and (ii) each of the prospective tenderers.

[3] Provide copies of each tender as submitted by each of the tenderers.

[4] Provide details of the Council's procedures for assessing and controlling the costs, including supervising the project?

[5] Provide the name of the person who carried out the site inspection visits in the format “Job title and the initials of the post holders first and last name.”

[6] How many queries or complaints were received in respect of the works? And how many of these queries or complaints from tenants were responded to or otherwise dealt with?

[7] Is the person identified above employed by the Council and if not them by whom are they employed? How many inspection visits did they make during the works period?

[8] Did the tender for 16 St Johns Crescent form part of a larger tendering exercise? If so, provide details of the other properties included in the tender an subsequent contract.”

9. This was a narrowed version of a request the complainant had submitted to the Council on 13 January 2021. The Council had refused that request as it considered the cost of complying with it would exceed the appropriate limit. The Commissioner considered the complainant’s resulting complaint about that matter under reference IC-102631-G3H3.
10. On 16 March 2021 the Council provided a response to the narrowed request of 16 February 2021. It withheld information within scope of part 1 of the request, relied on section 43(2) of FOIA to withhold information within scope of part 3, addressed parts 4, 7 and 8, advised it does not hold information within scope of part 6 and disclosed information within scope of parts 2 and 5.
11. The complainant requested an internal review on 19 March 2021 with regard to parts 1, 3, 4, 6 and 7 of the request and the Council provided one on 20 April 2021. It maintained its position.
12. However, as a result of the Commissioner’s decision in IC-102631-G3H3 on 19 April 2022 the Council provided a fresh response to the request of 13 January 2021. This included a fresh response to the eight part request of 16 February 2021. The current complaint originally concerned the Council’s response to four of those eight parts, as follows:

“The following are in respect of [redacted] only:

[1] Provide copies of the s20 notices.

[3] Provide copies of each tender as submitted by each of the tenderers.

[4] Provide details of the Council’s procedures for assessing and controlling the costs, including supervising the project?

[7] Is the person identified above employed by the Council and if not them by whom are they employed? How many inspection visits did they make during the works period?”

13. The Council withheld the information requested in part 1 under regulation 13. With regard to part 3, the Council advised that it does not hold 'individual tenders' as the contract formed part of a long-term procurement contract which was tendered and awarded in 2013. The Council addressed part 4. The Council also partly addressed part 7 but withheld the individual's name under regulation 13.

Scope of the case

14. The complainant had first contacted the Commissioner on 26 April 2021 to complain about the way four parts of their request for information of 16 February 2021 had been handled.
15. However, in correspondence to the Commissioner on 20 April 2022 the complainant confirmed that they considered the Council had now satisfactorily addressed part 4 of their request and that they now required copies of the repair logs. This is a new request, and the complainant would need to submit that request to the Council.
16. The Commissioner's investigation has focussed on whether the Council is entitled to rely on regulation 13 to withhold information within scope of parts 1 and 7 of the request of 16 February 2021. He has also considered whether the Council holds recorded information within scope of part 3 of that request.

Reasons for decision

Regulation 13 - personal data

17. 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.
18. In this case the relevant condition is contained in regulation 13(2A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

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

19. 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.
20. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosing that data would breach any of the DP principles.

Is the information personal data?

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

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. In this case the complainant is seeking the section 20 notice(s) associated with a specific property and the name of the individual supervising particular works to that property. (With regard to another element of that part of the request, the Council had previously advised the complainant in its response of 16 March 2021 that the Project Manager is employed by the Council and that a consultant also managed the project.)
26. In the circumstances of this case and having considered the section 20 notices that the Council has provided to him, the Commissioner is satisfied that the information relates to the leaseholders of the property in question and the individual who supervised particular project works. He 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.
27. 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.

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

Would disclosure contravene principle (a)?

29. 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”

30. 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.

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

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

32. 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.

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

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

² Article 6(1) goes on to state that:-

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

However, 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”.

34. 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.
35. 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

36. 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.
37. 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.
38. In this case, the complainant appears to be pursuing their own personal interest in charges imposed on a specific leaseholder's property in respect of work carried out. That is a legitimate interest for them to have but they have not brought to the Commissioner's attention any wider public interest in this matter. The Commissioner notes, however, that there is a general interest in public authorities being transparent and open.

Is disclosure necessary?

39. '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.

40. In its submission to the Commissioner the Council has stated that it considers that disclosure – of either the section 20 notices or the Project Manager's name - is not necessary as it would not increase the public's understanding of the section 20 process.
41. The Commissioner agrees with the Council. He notes that in their original request of 13 January 2021 (considered under IC-102631-G3H3) the complainant had also requested information about the Council's section 20 major work notices generally, for a period of three years. This suggests that that they have a general interest in that matter. The Commissioner therefore does not consider that disclosing the section 20 notices associated with one specific leaseholder's property and addressed to specific individuals, or the name of Project Manager for specific works is necessary. Disclosure would not materially further the complainant's or the public's understanding of the matter. And, as noted, the Commissioner is not aware of any wider public interest or concerns that would make disclosing this information necessary.
42. The Commissioner considers that the general interest in transparency has been met through the relevant information the Council has disclosed in response to this request and the complainant's earlier request.
43. The Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure. As such, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

44. The Commissioner has therefore decided that the Council was entitled to withhold the information requested in parts 1 and 7 of the request under regulation 13(1), by way of regulation 13(2A)(a).

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

45. Regulation 12(4)(a) of the EIR says 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.
46. In part 3 of their request the complainant has requested the individual tenders that the Council received for work to the property in question. In its response of 16 March 2021 the Council had said this information was exempt because it was commercially sensitive ie it suggested it held the requested information. In its fresh response of 19 April 2022 the Council confirmed that it does not hold individual tenders against that property and explained why that was the case.

47. The complainant considers that the Council's two responses cannot both be factually correct and, in their view, the earlier response sounds more plausible. The complainant disputes that the Council does not hold individual tenders for work on a specific property.
48. As it did in its response of 19 April 2022, in its submission to the Commissioner of 20 May 2022 the Council has explained that the long term qualifying contracts for capital works to the entire Borough were agreed in 2013 under EU procurement rules. The tenders were not specific to individual properties but set against a schedule of rates. All leaseholders at the time were consulted prior to the procurement of these contracts. The contractors bid for work for three areas of the borough: the north, central and south areas. The contracts were agreed for a period of five years with a further two-year extension if required and agreed by the Council. The Council took up the additional two years.
49. At the time of the contract's procurement the north area was won by Breyers, the central by Mears, and the south contract by Keepmoat. As stated above, the contracts were tendered against a list of schedule items and not against specific properties.
50. The works to any property would be made up from items of the schedules which are included in the leaseholder's agreement. The exception would be cases where an item/schedule for a specific piece of work is not listed. In that case the contractor would be asked to provide a cost, which the contract administrator will then assess.
51. As noted, the complainant has requested the tenders for work on a specific property. The Council's reference to commercially sensitive information in an earlier response led the complainant to believe that it held the individual tender information he has requested. It has caused them to doubt the position that the Council has confirmed now that it has reconsidered the request.
52. However, the Commissioner sees no reason to doubt the situation that the Council has described; namely that three contractors successfully bid for the capital works contracts for three areas of the Borough. The contracts are not specific to individual properties but are based on an agreed schedule of work items. As such the Council, on the balance of probabilities, does not hold the information requested in part 3 of the request.
53. The Commissioner makes the observation that, while the circumstances at the time of any request for the 2013 tenders and contracts would be a consideration, he would be likely to find that these were exempt from disclosure under section 43(2) of FOIA, or the EIR equivalent as appropriate.

Right of appeal

54. 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

55. 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.
56. 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

Cressida Woodall
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