

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 April 2022

Public Authority: Oxford City Council
Address: St Aldates Chambers
St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested building control inspection reports and building plans relating to a specific application.
2. The Commissioner's decision is that Oxford City Council (the Council) has not demonstrated that regulation 13(1), regulation 12(5)(c) or regulation 12(5)(e) of the EIR are engaged, and therefore cannot rely on any of these exceptions to refuse to disclose the requested information.
3. Furthermore, the Commissioner has found there to be a breach of regulation 5(2) as the Council failed to respond to the request within 20 working days, and a breach of regulation 11(4) as the Council failed to provide its internal review decision within 40 working days from receipt of the complainant's representations.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information, with the exception of names and mobile telephone numbers throughout the inspection note documents, which should be redacted.
5. The public authority must take these steps 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 12 July 2020, the complainant wrote to the Council and requested information in the following terms:

“I am writing on behalf of Friends of Quarry to make a FOI request to view the Building Control inspection reports and building plans under application 07/00438/MULFP. This application relates to the planning application 06/00023/FUL at 1 Quarry High Street.”
7. The Council responded on 12 October 2020 and refused to provide the requested information, citing regulation 12(5)(c) of the EIR (disclosure would adversely affect intellectual property rights).
8. Following an internal review the Council wrote to the complainant on 4 February 2021. It stated that it wished to rely on regulation 13(1)(third party personal information) to withhold the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 4 May 2021 to complain about the way their request for information had been handled. In particular, they questioned the Council's application of regulation 13(1), due to the development being a commercial one owned by a company building new homes, rather than works being carried out on someone's private residence.
10. In correspondence to the Commissioner, the complainant also wished to clarify that they were not seeking the information to determine whether the Council had complied with safety regulations, as implied by the Council's internal review response on 4 February 2021. They were, in fact, seeking disclosure of the requested information to uncover the harm caused to the local conservation area by planning breaches resulting in the development, as built, being significantly different to the approved plans.
11. The complainant further wished to clarify that they are not seeking access to all building control documents relating to the case, rather just the documents/drawings which would illustrate the detailed structure (height, width, slab levels and location) as would be provided to the builders.
12. The Commissioner wrote to the Council and requested a copy of the withheld information, along with detailed explanations for the parts of the EIR which it wished to rely on to withhold the information.

13. During the course of the Commissioner's investigation the Council clarified that it was maintaining its reliance on both regulation 12(5)(c), as set out in its initial response to the complainant, as well as regulation 13(1) as set out in its internal review response. The Council also added regulation 12(5)(e) to the exceptions it was citing to refuse to disclose the requested information. The Council provided a copy of the withheld information to the Commissioner along with explanations of its application of each exception. The Council stated that it was applying section 12(5)(c) and 12(5)(e) to all information which it holds within the scope of the request, whilst its reliance on section 13(1) was applicable to 13 particular pages out of a 117 page file of plans and drawings.
14. The Commissioner considers the scope of his investigation, along with the following analysis, is to determine if the Council was entitled to rely on the exceptions which it has cited to withhold the requested information.

Reasons for decision

Regulation 2(1) of the EIR – is the information environmental?

15. 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...”
16. 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, as 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.

17. 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.
18. The requested information in this case relates to building control documents for the approved planning application for the "demolition of existing workshop building and outbuildings. Retention of existing shop and one bedroom flat. Erection of 2-storey workshop building, with music room and office. Erection of 6 x 1 bedroom dwellings in a 3-storey terrace. Alterations to the existing access and formation of 9 car parking spaces".
19. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), as it is information on measures such as policies, plans and activities which are likely to affect environmental elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b). The Commissioner is therefore satisfied that the Council handled the request under the correct access regime.

Regulation 12(5)(c) – intellectual property rights

20. Regulation 12(5)(c) states:

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(c) intellectual property rights"

21. As stated in the Commissioner's guidance on regulation 12(5)(c)², Intellectual property (IP) rights arise when owners are granted exclusive

¹ <https://ico.org.uk/for-organisations/regulation-2-1-what-is-environmental-information/>

² https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

rights to certain intangible assets. As a general rule, IP rights belong to the author or creator of the asset.

22. Just because information is disclosed under the EIR, it does not mean that its owner has relinquished any IP rights they may have held over that information and they can, in theory, still bring actions for breach of copyright. However, there will be some situations in which a disclosure under the EIR would prevent the holder of the IP rights from enforcing those rights effectively. It is these situations that the exception is designed to guard against.
23. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:
 - the material is protected by IP rights;
 - the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
 - the identified harm is a consequence of the infringement or loss of control over the use of the information; and
 - the potential harm or loss could not be prevented by enforcing the IP rights.

Is the material protected by IP rights?

24. In determining if the exception at regulation 12(5)(c) is engaged the Commissioner considers that the onus is on the public authority to identify the specific IP right that would be adversely affected, and its owner. The Commissioner considers that there are three main forms of IP rights: copyright, database rights, and copyright in databases.
25. The Council stated in its submissions to the Commissioner that it was applying regulation 12(5)(c) to all building control plans submitted in relation to this case, as these documents "are submitted by either architects, developers or applicants who hold the copyright on them".
26. Having reviewed the documents, the Commissioner notes that only some of the plans and drawings carry a copyright marking. The Commissioner further notes that at the time of receiving the request for information the Council contacted two of the document owners to ask permission to share the documents in response to the request, which they explicitly declined. The Commissioner is therefore satisfied that the material in question is protected by IP rights.

Would the IP rights holder suffer harm?

27. It is not sufficient for the Council to just state that there would be an infringement of IP rights, as this would not engage the "would adversely affect" test required by the exception. The Council must be able to demonstrate that there would be real harm suffered by the owner of the IP right, for example, monetary loss.
28. The Commissioner's published guidance states that if the IP right holder is a third party, it must be clearly demonstrated that the harm is caused to that third party as a consequence of no longer being able to control the use of their information, and not to the Council, for the exception to be engaged.
29. In the Council's initial response to the request it gave an explanation of its application of regulation 12(5)(c) and stated "it would not be in the Council's interest to release the documents without such permission [from the IP right holder] because it could damage the reputation of the Building Control service, a service that is subject to competition, which could mean that the Council would lose business to its competitors". The Council further stated, "In this instance by disclosing copyright information without consent from the owner, could put the Council at risk of reputational damage or legal action".
30. The Commissioner cannot see that the Council has identified any harm that would be caused to the IP rights holders, rather than the Council itself.

The Commissioner's decision

31. As the Council has failed to identify any harm that would be caused to the IP rights holders as a consequence of disclosure of the requested information, the Commissioner has not gone on to consider if the identified harm is a consequence of the infringement or loss of control over the use of the information, or if the potential harm or loss could not be prevented by enforcing the IP rights. The Commissioner's decision is that the Council has failed to demonstrate that regulation 12(5)(c) is engaged.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

32. Regulation 12(5)(e) states:

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”

33. The Commissioner’s published guidance³ on regulation 12(5)(e) sets out that the exception should be broken down into a four-stage test, and that all four elements of the test are required in order for the exception to be engaged:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

34. For information to be commercial in nature it needs to relate to a commercial activity. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.

35. For information to be industrial in nature it is generally understood to be about the processing of raw materials and the manufacture of goods in factories, as opposed to their sale or purchase.

36. The Commissioner is satisfied that the planning documents provided to the Building Control department are commercial in nature. This is because they are the product of the architect or structural engineer providing their professional services, for which they can charge and gain a profit.

Is confidentiality provided by law?

37. The Commissioner considers that confidentiality provided by law includes confidentiality imposed on any person by the common law duty of confidence, by a contractual obligation, or by statute. It covers information obtained from a third party, information jointly created or

³ <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

agreed with a third party, and it also covers information which a public authority creates itself.

38. From the submissions provided by the Council, the Commissioner understands that the Council is relying on the common law duty of confidence in its application of regulation 12(5)(e). The Council stated "The information that is provided to the Council's Building Control department has an obligation of confidence (borne out by this being common practice across local authority building control practices)".
39. When relying on the common law of confidence the Commissioner's guidance sets out that there are two key issues to consider:
 - Does the information have the necessary quality of confidence?
 - Was the information shared in circumstances creating an obligation of confidence?
40. Drawings and plans provided to the Building Control department are not considered to be trivial nor are they generally placed into the public domain, so the Commissioner is satisfied that they do carry the necessary quality of confidence.
41. The Commissioner is further satisfied that the documents would have been shared with the Council in circumstances creating an implied obligation of confidence, due to this being the standard established practice between architects/developers when receiving information of this nature.

Is the confidentiality protecting a legitimate economic interest?

42. It is not enough to say that disclosure of information might cause some harm to an economic interest. A public authority must demonstrate that disclosure would cause harm. Furthermore, if the information was provided to the public authority by a third party, it is the interests of the third party that are relevant rather than those of the public authority.
43. In its submissions to the Commissioner the Council stated the following:

"The Council's Building Control department is operating within a commercial environment and release of these plans would result in harm to the Building Control practice in an already overcrowded and competitive market with privately run Approved Inspectors. Should clients consider that their plans and structural surveys will not be protected or as confidential when using a Local Authority Building Control service this would adversely affect the Council's ability to attract clients within this particular commercial setting.

The Council has already lost some commercial business to Approved Inspectors and it is felt that releasing the information given in confidence will be another marketing strategy by Approved Inspectors to draw business away from Local Authorities. At the current time the Council cannot be seen to release information that would adversely affect its ability to secure business and fees.”

44. The Commissioner cannot see that the Council has identified any harm that would be caused to the economic interests of the third parties who provided the information to them, rather than the Council’s own economic interests.
45. The exception is designed to preserve the duty of confidence protecting the commercial or industrial information in question. The Council owes each developer a duty of confidence when plans are submitted. In order to engage this exception, it is the person to whom the duty of confidence is owed who must suffer an adverse effect from disclosure. The Council has not demonstrated that any of the developers owe it a duty of confidence. The fact that the Council might itself suffer harm would be relevant in considering the balance of the public interest but it does not imply that disclosure would harm those to whom the duty of confidence is owed.

The Commissioner’s decision

46. As the Council has not identified harm that would be caused to the third party’s economic interests by disclosure of the requested information, the Commissioner has not gone on to consider if confidentiality would be adversely affected by disclosure. The Commissioner’s decision is that the Council has failed to demonstrate that regulation 12(5)(e) is engaged.

Regulation 13 – Personal data

47. 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.
48. In this case, the relevant condition is contained in regulation 13(2A)(a). This applies where 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”).
49. 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.

50. 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?

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

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

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

53. 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 or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

54. 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.

55. In its representations to the Commissioner the Council made the following comments:

“Building Control plans by their nature document intricate details of a properties [sic] layout and are therefore considered to be personal data of those people that own the property, for instance release of these plans could potentially show weak points for access to the building; internal layout to enable ease of access moving around the property and locations of potential children’s bedrooms etc.”

Also;

“It is felt that the data, in relation to property ownership and family life of the owners and future owners of the properties to be compromised by releasing these plans.”

And;

“It is our view that the internal layout is information in relation to the occupiers of the property and therefore pertains to personal data of those occupiers.”

56. The Commissioner has reviewed the documents relating to building control application 07/00438/MULFP, particularly the pages which the Council listed as containing personal data, and notes that they are

building plans which contain business details relating to the architects and structural engineers involved with the development. The Commissioner has checked the names and contact details of the corporations named on the building control documents and they are all available within the public domain.

57. The Commissioner's guidance⁴ on personal data sets out information about companies. It states that "Information concerning a 'legal' rather than a 'natural' person is not personal data. Consequently, information about a limited company or another legal entity, which might have a legal personality separate to its owners or directors, does not constitute personal data and does not fall within the scope of the UK GDPR".
58. During his investigation, the Council confirmed to the Commissioner that the buildings in question are still owned by the company responsible for the development rather than being owned by individuals, and so far there have been no individuals occupying the properties, so the withheld information cannot be considered to be personal data on this basis.
59. Furthermore, it is the Commissioner's view that a public authority cannot rely on the basis that information might belong to an individual at a point in the future. The Council must apply the legislation according to the status of the information at the time of the request.
60. The Commissioner is also aware that it is standard practice for letting agents or estate agents to publish internal layouts and room measurements, alongside detailed descriptions of the property, when advertising properties for sale or rent both online and in hard copy.

The Commissioner's decision

It is the Commissioner's decision that the requested information is not personal information, with the exception of names and mobile telephone numbers throughout the inspection note documents, therefore he has not gone on to consider if any of the DP principles would be breached. The Council has not demonstrated that regulation 13(1) of the EIR is engaged, and cannot rely on it to withhold the requested information.

⁴ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-is-personal-data/#pd7>

Right of appeal

61. 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

62. 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.
63. 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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