

**Environmental Information Regulations (EIR)
Freedom of Information Act (FOIA)**

Decision notice

Date: 19 January 2023

Public Authority: London Borough of Wandsworth
Address: The Town Hall
Wandsworth High Street
Wandsworth
SW18 2PU

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Wandsworth ("the Council") about correspondence sent by the Council to a freeholder company (the "named company") of three blocks of flats, regarding a planning matter. The Council initially handled the request under FOIA and disclosed some of the information requested but refused to provide an email chain citing the personal information exemption under section 40(2) of FOIA. The Council subsequently disclosed the email chain but with redactions, still citing section 40(2) of FOIA.
2. During the course of the Commissioner's investigation, the Council accepted that it should have cited the equivalent EIR exception for personal data (regulation 13(1) of the EIR) to redact the personal data of third parties from the email chain.
3. The Commissioner's decision is that the Council was correct to apply regulation 13(1) of EIR to the personal data of third parties from the email chain.
4. The Council breached the requirements of regulation 5(2) in that it did not initially disclose information within 20 working days and regulation 11(4) by failing to conduct an internal review within 40 working days.
5. The Commissioner requires no steps to be taken.

Request and response

6. On 24 January 2022, the complainant wrote to the public authority and made a request for information in the following terms:

"Thanks for your email.

same grey panels affixed to the front elevation for many years

The panels may LOOK the same, but they are not actually almost uninsurable pvc / polystyrene / pvc.

It is this which is most concerning.

The FACT that they were erected only partially and not through out; and without the planning permission; and in breach of Section 20 of the Landlord & Tenant Act speaks for itself.

The Lessees, who are all shareholders in the [named company], are now bearing the massive increased insurance costs. It is understood that [name redacted] who supplied the panels, manufactured by [name redacted] who have since withdrawn them as unfit for purpose, normally pay substantial commission as is normal in that industry [Double Glazing , conservatories etc etc] and as evidenced by the Grenfell Enquiry.

Thus there is a moral dilemma which I have little doubt will go before the courts.

I have asked for a copy of the communications sent to the Board of the [named company] Ltd, and which have been quoted by them on various occasions.

Failure to provide these will result in the matter being escalated to the Information Commissioner.

Thus I look forward to receiving these in due course.

Meanwhile "shutting the stable door after the horse has bolted" has never been good practice."

7. On 21 February 2022, the Council replied saying it needed more time to consult with third parties and said it would respond in a further 20 working days.
8. The Council responded on 21 March 2022 and disclosed some of the requested information, namely two letters from the Council to the [named company]. It withheld an email chain in its entirety citing the following exemption: section 40(2) FOIA – personal data.

9. The complainant requested an internal review on 22 March 2022.
10. After the Commissioner's intervention, on 10 June 2022, the Council provided an internal review to the complainant. It revised its position and disclosed the email chain but with redactions for personal data, again citing section 40(2) FOIA.

Scope of the case

11. On 16 June 2022, the complainant contacted the Commissioner as they were unsatisfied with the disclosure of "a heavily redacted copy of the communication chain" and wished the Council "to supply the unnecessarily redacted information." They were particularly interested in the redacted text in the body of the emails.
12. During the course of the Commissioner's investigation, the Council accepted that it should have handled the case under the EIR and cited the equivalent EIR exception for personal data (regulation 13(1)) to redact the personal data of third parties from the email chain.
13. The Commissioner understands that the request in this case was made in the context of an ongoing dispute involving the complainant. Given the context and wording of the request, the Commissioner recognises the possibility that the requested information may include information that would, if held, comprise personal data relating to the complainant.
14. Regulation 5(3) of the EIR states that personal data of the requester does not fall within the scope of the EIR. Therefore the Commissioner's decision relates only to the information that is not (or would not be, if it were held) the complainant's personal data. The Commissioner cannot comment on whether or not the Council holds such information.

Reasons for decision

Access regime

15. This reasoning covers first, whether the Council handled the request under the correct legislation and second whether the email chain could be redacted because it contained third party personal data.
16. The requested information concerns planning matters (and the enforcement of those matters). As such the Commissioner is satisfied that the information is environmental information under regulation

2(1)(c) of the EIR.¹ The Commissioner considers that planning matters (and the enforcement of those matters) are “measures” affecting the elements of the environment and therefore the EIR is the correct legislation to apply.

Regulation 13 - personal information of third parties

17. Initially the Council applied section 40(2) of FOIA to the email chain but during the Commissioner’s investigation it applied regulation 13 of the EIR to the names and contact details of a Council employee and the named company staff members.
18. 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.
19. 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”).
20. 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(1) of the EIR cannot apply.
21. 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?

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

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

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

¹ <https://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

24. 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.
25. 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.
26. In the circumstances of this case, having considered the unredacted information, the Commissioner is satisfied that the redacted information names and identifies a Council employee, and staff of the named company. He is satisfied that this information both relates to and identifies these individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA – as it is personal data relating to third parties.
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 UK 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” conditions 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.

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.

The Council employee

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the requested information relating to the Council employee under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sake, 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

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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) 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".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

38. The Council identified a legitimate interest in promoting greater transparency and public understanding of how the Council carries out its planning and planning enforcement powers.
39. In this case, the Commissioner notes that the complainant has raised a number of matters that he submits amount to reasonable grounds to conclude that the planning and planning enforcement was flawed. It is clear that the complainant has a clear personal interest in disclosure of the withheld information.
40. The Commissioner does therefore consider that there is a legitimate interest in disclosure of information which may hold the Council to account and promotes transparency in relation to its planning procedures. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the withheld information and has therefore gone on to consider the necessity test.

Is disclosure necessary?

41. '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.
42. The Commissioner has decided in this case that disclosure of the name and contact details of the Council employee to the world at large is not necessary to meet the legitimate interest in disclosure.
43. It is the Council's view that information already provided to the complainant addresses the legitimate interest identified and that the name and contact details of the Council employee are not required to do that. The Council told the Commissioner that:

"It is Council Policy that all officers below Assistant Director level are too junior to have their names disclosed in public. The Planning and Enforcement Office is below Assistant Director level....[and does] not expect their name to be disclosed to the public and the nature of their jobs would leave them vulnerable to actions from disgruntled persons subject to planning enforcement action."
44. In the Commissioner's opinion, disclosure would not materially further the complainant's or the public's understanding of the matter. The Commissioner accepts the Council's argument that it is not necessary for the Council to disclose information of junior officers. Disclosure of the

Council employee's name might lead to the individual being contacted inappropriately. The Commissioner notes that whilst the complainant may already know the name of the individual, this will be through their general correspondence with the Council in relation to the potential enforcement activities. The situation with a disclosure under the EIR is that that information is considered to be disclosed to the whole world, which is a far wider degree of disclosure than through general day to day business.

45. With regard to the Council's approach to handling personal data in relation to its officers, and noting that the content of the emails has been largely disclosed, the Commissioner does not consider it necessary for any further personal information details to be provided. The planning process itself provides applicants, and those objecting to planning proposals, recourse to challenge decisions made. Further, the complainant is able to contact the Head of Service directly in connection with this matter should they wish to do so. Disclosure of the name and specific contact details of the less senior officers involved is not necessary to assist either the complainant or any other interested party.
46. In this particular case, therefore, the Commissioner is satisfied that there was a less intrusive means of achieving the legitimate aims identified than disclosing the information under the EIR.
47. As the Commissioner has decided in this case that disclosure to the world at large is not necessary to meet the legitimate interest in disclosure, 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).
48. The Commissioner has therefore decided that the Council was entitled to withhold the names and contact details of the Council employee under regulation 13(1) of the EIR (personal information).

Staff of named company

Legitimate interests

49. As above, the Commissioner does consider that there is a legitimate interest in disclosure of information which may hold the Council to account and promotes transparency in relation to its planning procedures. The Commissioner recognises that the complainant's legitimate interest would be served by disclosure of the redacted information and has therefore gone on to consider the necessity test.

Is disclosure necessary?

50. The Commissioner notes that the information redacted in the email chain are the names and personal email addresses of the staff of the named company, as well as general greetings between the staff and the Council.
51. The Council argues that the redacted information provided to the complainant was sufficient for the purpose of promoting greater transparency and public understanding of the planning issue.
52. The Commissioner agrees with the Council. He accepts that in this case disclosure of the names and personal email addresses to the world at large is not necessary to meet the legitimate interest in disclosure. The legitimate public interest in disclosure has been met by the disclosure of most of the content of the emails.
53. The Commissioner notes that whilst the complainant may already know the name of the individuals, this will be through their general correspondence with the named company. The Commissioner also notes that while the names of the named company staff at issue can be found on the Companies House website, their email addresses – which are personal and not work contact details – cannot.
54. The Commissioner considers that to disclose this personal contact information to the public as a whole would not fall within the expectations of these individuals as it would mean that they could be contacted directly by any members of the public not related to their current or past dealings with the Council.
55. As the Commissioner has decided in this case that disclosure to the world at large is not necessary to meet the legitimate interest in disclosure, 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).
56. The Commissioner has therefore decided that the Council was entitled to withhold the names and contact details of the named company staff under regulation 13(1) of the EIR (personal information).

Regulation 5(2) – late response

57. Under the requirements of regulation 5(2) of the EIR, a public authority is generally obliged to respond to a request within 20 working days.
58. In response to the request of 24 January 2022 the Council initially responded on 21 February 2022 stating that it was delaying its response by 20 working days, saying it needed more time to consult with third

parties affected by the disclosure of the information. It subsequently responded on 21 March 2022 providing some information however withholding other information as outlined above.

59. Regulation 7(1) provides that where a request is particularly voluminous or complex, the public authority may extend the time for compliance for making the information available from 20 working days to 40 working days. However the public authority must advise the requester of this within the 20 day time limit.
60. As set out in the Commissioner's guidance,³ a public authority may only apply the extension under regulation 7(1) where it reasonably believes it will require additional time to locate and provide the information because;
- a. the requester has asked for a large amount of complex information; AND
 - b. it would not be practical to provide the information or make a decision about whether to refuse the request within 20 working days.
61. Neither of these conditions appear to apply in this case. Therefore the Commissioner finds that in failing to respond within 20 working days the Council breached regulation 5(2) of the EIR.

Regulation 11(4) – internal review

62. Under the requirements of regulation 11, a public authority is obliged to respond for a request for internal review within 40 working days.⁴

In failing to carry out an internal review within 40 working days the Council has also breached regulation 11 of the EIR.

³ <https://ico.org.uk/media/for-organisations/documents/1622/time-for-compliance-eir-guidance.pdf>

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/internal-reviews-under-the-environmental-information-regulations-eir/>

Right of appeal

63. 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

64. 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.

65. 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

**Sarah O’Cathain
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