

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **17 January 2023**

Public Authority: Surrey Heath Borough Council
Address: Surrey Heath House
Knoll Road
Camberley
Surrey
GU15 3HD

Decision (including any steps ordered)

1. The complainant requested from the Surrey Heath Borough Council information regarding a Building Control application. Surrey Heath Borough Council provided a link to the publicly available information on its planning portal but withheld the remainder under Regulations 13(1) and 12(5)(d) of the EIR.
2. The Commissioner's decision is that Surrey Heath Borough Council has correctly applied Regulation 13(1) of the EIR.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 5 May 2022 the complainant wrote to Surrey Heath Borough Council (the Council) and requested information in the following terms:

“Please provide a copy of the application documents and correspondence for Building Control application [redacted] which also impacts our property”.
5. The Council responded initially on 6 May 2022 by providing a link to its planning portal giving a summary of the Building Control history but not the information requested by the complainant.

6. The complainant pointed this out to the Council and at the same time said the Arbocultural Impact Assessment (AIA) was of particular interest.
7. Following a brief acknowledgment stating the request would be dealt with under the EIR, the Council responded on 27 May 2022. It stated that its Planning Department was not aware of any further AIA being submitted.
8. The complainant requested an internal review on 31 May 2022 and reminded the Council that although the AIA was of particular interest, his request was for all the Building Control application documents.
9. Following an internal review, the Council wrote to the complainant on 29 June 2022. It stated that the requested information, apart from that publicly available on its planning portal, was being withheld under Regulations 12(5)(d) and 13(1) of the EIR with the public interest balanced against disclosure. It also pointed out that further information was available to the complainant via the Party Wall Act proceedings as the proposed building work was linked to the adjoining wall of his property.

Scope of the case

10. The complainant contacted the Commissioner on 7 August 2022 to complain about the way his request for information had been handled. In particular, he was unhappy that the Council had withheld information likely to be contained in any structural design report obtained by the applicant concerning load bearing calculations which would directly affect the complainant's property.
11. On the 14 November 2022, the complainant confirmed to the Commissioner that he was happy for the scope of his complaint to be restricted to the Council's decision to withhold all the information connected with the Building Control application which was not publicly available.

Reasons for decision

Regulation 13 personal information

12. The Commissioner will firstly consider the application of Regulation 13 to the requested information.

13. 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) of the Data Protection Act 2018 is satisfied.
14. In this case, the relevant condition is contained in Regulation 13(2A)(a)¹ of the Data Protection Act 2018 ('DPA'). 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').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data, then regulation 13 of the EIR cannot apply.
16. 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?

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. Having considered the withheld information, the Commissioner is satisfied that it relates to the data subject. The names and address of

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

the data subject quite obviously is information that both relates to and identifies those concerned. There is also further detailed information in relation to the data subject's property. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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."

25. 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.
26. 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

27. 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.
28. 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

29. 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 question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. 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

31. 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.
32. 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. If the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Legitimate interests may be compelling or trivial,

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.”

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

33. In this case, the Commissioner notes that the complainant has valid reasons for requesting sight of the Building Control Plans (including load bearing calculations), as he is attempting to determine whether the Council has complied with various building regulations necessary for safety purposes/to prevent damage to his own property.
34. The Commissioner considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are conducted and that it is adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions.

Is disclosure necessary?

35. '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.
36. The Commissioner notes that it is also important to acknowledge that Regulation 13 of the EIR is different from other exceptions in that its consideration does not begin with an expectation of disclosure. As Regulation 13 is the point at which the EIR and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.
37. As disclosure under the EIR is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.
38. In this case, the Commissioner understands that while the Planning Permission documents have been published (as per normal procedure), the Building Control Plans have not been. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and he accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure.
39. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

40. 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.
41. 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.
42. 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.
43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
44. Whilst the Commissioner notes the complainant has concerns regarding the design and integrity of adjoining neighbour's extension and the impact on his property to which it connects, against these interests is the reasonable expectations of the data subject, who owns the neighbouring property, and their right to confidentiality to be maintained.
45. When submitting the application, the individual(s) submitting it would have expected the details, which they provided on the form, to be used to establish what the application was for, who made the application and whether the plans met the building regulation requirements.
46. The Commissioner notes that Planning Application documents are made public as a matter of course and as such, there is a general expectation

that the application and copies of the plans will be published and open for comment and/or objection by members of the public. There is no such requirement under the Building Regulations and as such, the Council does not therefore routinely publish the information in Building Control files or generally make them available to other parties.

47. The Council has explained that it believes it is not necessary to disclose the specific Building Control Plans and that the data subject would not expect their personal information to be disclosed under the EIR, stating "the information is deemed to be confidential to proceedings or sensitive to the third party whose information it relates and is therefore being withheld under Regulation 12(5)(d) whereby disclosure would adversely affect the confidentiality of proceedings in respect of an investigation into the planning application process and Regulation 13(1) and (2A) of the EIR whereby the requested information is personal data of an individual other than the requestor and to release it would contravene the UK GDPR data protection principle (a)".
48. On that basis, a Building Control applicant would have a reasonable expectation information constituting their personal data within a Building Control Application file would not be disclosed to the public.
49. The Commissioner recognises that some of the information held within the Building Control Plans is similar to that provided within the Planning Permission documents. However, as the Building Control Plans are more detailed, there is significantly more personal data included.
50. The Council has stated it carried out a public interest test to assess if the public interest in maintaining the exception outweighed the public interest in disclosure. The public interest in favour of releasing the information is the promotion of transparency and accountability of public authorities. This needs to be balanced against the Council's ability to undertake an unbiased and thorough investigation which are governed by formal rules. If information was to be released it may prejudice the Council's ability to complete the investigation process as opinion or information may be influenced.
51. The Council said it had taken into account the fact that the withheld information is linked by way of an adjoining wall to the complainant's property. However, it referenced the Party Wall Act survey which had been conducted and acknowledged it was independent of the Council. It said this survey would allow the complainant to raise any queries or concerns he may have.
52. Furthermore, the Council has confirmed to the complainant that it had received and considered the detailed load calculations provided by the applicant's surveyor. This was to assure the complainant that the

Council's building control department had considered all the relevant structural implications in relation to load bearing forces on the property.

53. The Commissioner has referenced his Decision Notice of 4th March 2021 (Cherwell District Council IC-61183-H2F1)³ that "the building control process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately."
54. The Commissioner notes that he has decided outcomes on similar cases⁴, some of which have then subsequently been considered at the First-tier Tribunal (Information Rights)⁵. Regardless of the similarities and those outcomes of the cases, he must consider each case on its own merits.
55. The Commissioner sees that there is a legitimate public interest in the building control process to determine that Building Regulations are being applied properly. At the same time, the Commissioner considers that the building control process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately. This in turn, in the Commissioner's view, creates a greater interest in protecting the integrity of the building consent process and that disclosure could damage the public trust in the Building Regulations process.
56. As disclosure under the EIR is to the world at large, the Commissioner must consider the detriment it might cause to the owner of the property. While disclosure may not cause any wider detriment to the data subjects, other than a general loss of privacy, the Commissioner

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2619414/ic-61183-h2f1.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259515/fs50713311.pdf>

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2364/Abbott,%20Michael%20John%20EA.2018.0158%20\(24.01.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2364/Abbott,%20Michael%20John%20EA.2018.0158%20(24.01.19).pdf)

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2620/Durham,%20B%20-%20EA2019-0346%20\(12.03.20\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2620/Durham,%20B%20-%20EA2019-0346%20(12.03.20).pdf)

- considers that the general expectation of privacy for a private citizen, carries a relatively strong weight.
57. The Commissioner has noted the complainant's concerns regarding the affect of the applicant's extension on his property as it has an adjoining wall. However, protection of the personal data of the data subjects outweighs any legitimate interest in disclosure, which is largely met by the assurances provided by the council to the complainant, and the other avenues available to the complainant to pursue his concerns.
 58. 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.
 59. 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.
 60. The Commissioner has therefore decided that the Council was entitled to withhold the requested information under Regulation 13(1) by way of Regulation 13(2A)(a) of the EIR.
 61. As the Commissioner is satisfied that the Council was entitled to withhold the requested information under Regulation 13(1) he has not gone on to consider the application of Regulation 12(5)(d) of the EIR.

Right of appeal

62. 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

63. 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.
64. 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

**Laura Tomkinson
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