

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 December 2019

Public Authority: Historic England
Address: The Engine House
Fire Fly Avenue
Swindon
Wiltshire
SN2 2EH

Decision (including any steps ordered)

1. The complainant requested information from Historic England (HE) relating to a planning application. HE provided some information but withheld the rest under regulation 12(5)(b) of the EIR – adversely affect the course of justice.
 2. The Commissioner's decision is that the information held by HE is environmental in nature. However, since the requested information relates to the complainant's own property, the Commissioner pro-actively considered regulation 5(3) of the EIR. She determined that the withheld information is the personal data of the requester and, as such, under regulation 5(3), there is no duty to disclose the information under the EIR.
 3. The Commissioner does not require HE to take any steps.
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Request and response

4. On 20 March 2019, the complainant wrote to HE to request information, following a previous request made on 26 February 2019. Her request stated:

"I did not find amongst the attachment the documents referenced in your reply to Q6: 'We first became involved in application [redacted] on the 4th January 2019 when Reigate and Banstead Borough Council sought Historic England's advice regarding possible unauthorised works. We were formally consulted on this case on the 23rd January 2019, and provided the council with our response on the 19th February 2019. We were also formally consulted on application [redacted] on the 23rd January 2019, and provided our response on the 13th February 2019...'

If it is not too much trouble, might I ask you for copies of the correspondence between Reigate and Banstead BC and Historic England which you confirm are in your possession ie: dated 04/01/19, 23/01/19, 19/02/19 (pertaining to [redacted]) and then 23/01/19, 13/02/19 and 13/02/19 (pertaining to [redacted]) and copy of notes and photos taken during and following the named site visit on 07/02/19."

5. On 22 March 2019, HE responded and stated that it was withholding the information she had requested under regulation 12(5)(b) of the EIR (adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature).
6. The complainant requested an internal review on 30 March 2019. She queried whether her request had been handled under the correct legislation, and in any event, refuted the application of regulation 12(5)(b). HE sent her the outcome of its internal review on 18 April 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 28 May 2019 to complain about the way her request for information had been handled.
8. This decision considers first whether the request fell to be considered under the EIR.

9. The decision also covers whether the information is excepted from the duty to disclose environmental information and covers a provision not cited by the public authority. The Commissioner has discretion to consider provisions not relied upon by the public authority. In this case given the likelihood that the information in question was the personal data of the requester, the Commissioner considered it necessary to consider regulation 5(3).

Reasons for decision

Regulation 2(1) – is the information environmental?

10. 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..."

11. 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, since 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.

12. 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.
13. The Commissioner notes that the requested information comprises correspondence, photographs and site notes relating to the relevant property. It relates to changes that have been made to the property, which is a Grade II listed building, and changes which are being proposed.
14. The Commissioner is satisfied that the information relates to planning applications and to the issue as to whether the local authority would be granting permission, including retrospectively.
15. The Commissioner is therefore satisfied that the information is "on" these planning measures and also on associated activities. She has considered whether the measures and activities affect, or are likely to affect, the elements and factors of the environment.
16. The complainant has argued that the information would not be environmental in nature, since the alterations were made or proposed to only the interior of the property.
17. However, in view of the nature of the changes, and proposed changes, to the property that were recorded and discussed, the Commissioner is satisfied that these may potentially affect the elements and factors of the environment.
18. The Commissioner has considered the definition at regulation 2(1). She is satisfied that the information, if held, would relate to measures and/or activities affecting, or likely to affect, the elements and factors of the environment. She agrees that it would be information "on" these measures and/or activities, and would therefore fall within the definition of environmental information at regulation 2(1)(c) of the EIR.
19. The Commissioner is satisfied that the Council considered the request under the correct access regime.

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

Regulation 5 – duty to make environmental information available on request

20. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request
21. However, regulation 5(3) of the EIR states that, to the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
22. Section 3(2) of the Data Protection Act 2018 (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.
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. The Commissioner has considered the withheld information in this case.
27. She notes that the information all relates to the complainant's own property. The property is clearly identified in the information either from photographs or by its address.
28. It is the Commissioner's well-established view that a requester's address constitutes personal data relating to them and could be combined with other information to reveal their identity.
29. The Commissioner has, therefore, determined that the withheld information in this case comprises the personal data of the requester.
30. Under the EIR, therefore, there is no duty for HE to consider the withheld information in this case for disclosure, and nor has the Commissioner been required to consider HE's application of regulation 12(5)(b) to the information.

Other matters

31. The Commissioner cannot require a public authority to take action under the DPA via an EIR decision notice. However in view of her decision that the withheld information comprises the personal data of the complainant, HE should consider providing a response to the complainant under the DPA in respect of the information she requested.

Right of appeal

32. 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

33. 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.
34. 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

**Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF**