



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2012/0076

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FER0422241

Dated: 8th March 2012

BETWEEN

MARTIN & KAREN SHARPLES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Determined on the papers at Field House on 8th August 2012

Date of decision 26th September 2012

BEFORE:

Fiona Henderson (Judge)

Roger Creedon

And

Dave Sivers

Subject matter:

EIRs - Regulation 5(2) – disclosure as soon as possible and no later than 20 working days

after the date of receipt of request

Regulation 7(1) – impractical to comply with request within 20 working days

Regulation 9(1) – advice and assistance

Regulation 13 – personal data

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below, the Tribunal allows the appeal in part and directs that the withheld information (redacted so as to remove the names and addresses of the householders and the location maps) be disclosed within 35 days of the date of this Decision.

Dated this 26th day of September 2012

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Background

1. On 19th June 2011 the Appellants requested information relating to roof conversions to residential properties in a cul-de-sac in Bolton that required planning/building control applications to Bolton Metropolitan Borough Council. The Council provided some information and refused the rest of the request in relation to the building control records and site visit notes relying upon regulation 13 EIR (personal data). They refused to provide the planning records relying upon regulation 6(1)(b) EIR (that this information was accessible and publically available). During the currency of the Commissioner's investigation, but before the issue of the decision Notice, the site visit notes¹ were disclosed by the Council to the Appellants.

¹ With identifying details redacted.

2. This appeal is against the Information Commissioner's Decision FER0422241 dated 8th March 2012 which found that regulation 13 EIR had been properly relied upon to withhold the disputed information.

The appeal to the Tribunal

3. The Appellants have appealed the decision in relation to the Commissioner's application of regulation 13 EIR as well as having raised certain procedural issues relating to the decision notice.

Procedural Issues

4. The Appellants raise the issue that the Annex to the Decision Notice which summarized the information request did not reflect that the Appellants had indicated in their original request that they were happy for information to be redacted to conform with the DPA. Whilst it is correct that the information request is not recorded in full, the purpose of the Annex is as an aide to comprehension by a reader. It does not form part of the Commissioner's decision and such an omission is not a material factual error, as we are satisfied that the Commissioner has considered the issue of redaction and anonymity in his Decision Notice. This ground must therefore fail.
5. In their initial response the Council indicated that the Appellants' three requests had been logged and "aggregated" as a single request for "cost calculation purposes". In consequence the Appellants withdrew their third request so as to avoid the potential of falling within regulation 12 FOIA. In fact the requests were considered under EIR which does not have an equivalent costs provision. The Appellants appeal on the grounds that the Decision Notice did not reflect that they had withdrawn their third request, because of the Council's erroneous reference to these regulations.
6. The Commissioner concluded that there was no breach of EIR on this point as the decision to deal with the requests in one response is not proscribed by EIR and no decision was made under the costs regulations. In the section "Other matters" of the Decision Notice the Commissioner does note that reference to

aggregation and cost calculation purposes was inappropriate and that this might have caused confusion. We are satisfied that this is not capable of founding a ground of appeal. This section does not form part of the Commissioner's Decision. The Appellants withdrew their third request prior to any conclusion being drawn by the Council as to the applicability of s12 FOIA. Consequently the third information request was not before the Commissioner and no decision had been made by the public authority to challenge under s50 FOIA. For this reason this ground fails.

7. The information request was received by the Council by email outside office hours. The Council did not consider this to be the date of receipt as no-one was there to process the request, and they considered the date of receipt to be the following working day (Monday 20th June). The Commissioner upheld this in his Decision. The Commissioner now accepts that this was an error.
8. Regulation 5(2) EIR states that:
“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request”.
The Commissioner now accepts that the date of receipt may be a date when an office is closed e.g. a weekend, and therefore accepts that the period under regulation 5(2) would commence on Monday 20th June 2011. We are satisfied therefore that the Council did not respond to the Appellant within the time required and regulation 5(2) was breached. This ground of appeal therefore succeeds.
9. The Commissioner concluded that regulation 7(1) EIR was complied with (it was impractical to comply with the request within 20 working days). The Commissioner did not ask for an explanation of why the response took so long and why it was necessary to invoke regulation 7(1). The Commissioner argues that he reasonably gave weight to the fact that, at the time of requesting an extension of time for responding, the Council had already spent in excess of

18 hours interrogating the various sources of information (electronic, paper and microfiche)². He drew parallels with the FOIA fees regulations³. The Commissioner further argues that it was reasonable for him to accept what he was told from the Council concerning the practicality of complying with the requests.

10. The Tribunal has considered the Council's internal correspondence as provided in the open bundle and is satisfied that once the information was requested it took the relevant department five hours to retrieve and involved three hours of discussion within that department (divided between two staff members). The Tribunal considers it significant that the Council did not request the information from those concerned until day 17 of a 20 day cycle and is satisfied that this delay, and not the volume or complexity of the request, caused an extension to be sought. Whilst we acknowledge that some general discussion upon the appropriate regime and potential exemptions will occur prior to the retrieval of information, there is no material that satisfies us that these deliberations could reasonably have taken 3 weeks. We are satisfied that this ground is made out and that there was a breach of regulation 7(1) EIR.

11. The Appellants argue that the Commissioner failed to find that regulation 5(1) EIR was breached in relation to the site visit notes, which were not supplied until 165 days after the date of the request (during the currency of the Commissioner's investigation). We note the terms of paragraph 53 of the Decision Notice and are satisfied that finding a breach of regulation 5(1), with reference to the provision of "further information during Commissioner's investigation", relates to the site visit notes. This breach is therefore already the subject of a finding by the Commissioner and this ground fails.

12. The Appellants raised in their submissions that the Council had failed to provide appropriate advice and assistance as required by regulation 9 EIR in

² We presume he has taken this from the Council's email dated 20th July at 08.23

³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004

relation to accessing information that was already publicly available. The Commissioner did not deal with this in the Decision Notice despite it having been raised in the complaint. Although the Appellants raised this as a ground of appeal at a late stage before the Tribunal, the Commissioner has not objected to our consideration of this matter so we give leave to amend the grounds of appeal to include this issue pursuant to rule 5 (Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009).

13. In determining the advice and assistance that it would be reasonable to expect the authority to provide, the Council's response to the request and its subsequent letter of 25th August 2011 told the Appellants only that:

- copies of plans submitted to the Planning Department are publicly available to view by appointment in Bolton Central Library
- Documents from 2007 to the present day are available to view on line and the link was given.

14. We have regard to the steps that the Council believed were appropriate for it to take. We note that in the letter of 12th October 2011 the Council maintained that in the letter of the 25th August they had: *“provided the individual planning application references for each premises and directed you to the library service, where the documents are held, with an explanation that they would be able print off information and post it to you for a fee”*.

15. We have seen the letter of 25th August and it is apparent that this assistance was not included. In light of the Council's own expectations that this assistance had been given, we consider this evidence that it would have been reasonable for them to provide this assistance. We are therefore satisfied that their failure to do this constitutes a breach of regulation 9(1). This ground of appeal therefore succeeds.

Regulation 13 EIR

16. The Tribunal agrees with the Commissioner's contention that the question for the Tribunal in relation to the disputed information is whether the information

with names redacted is properly anonymised, such that upon disclosure it no longer remains personal data.

17. It was not disputed that the properties were physically different and by physical inspection it would be possible to attribute addresses to the withheld information. The current owner of the address could be determined by reference to the land registry and the occupants by reference to the electoral register.

18. Whilst the Appellants accept that they would be in a position to link the withheld information to individuals (because of their local knowledge) they disputed that this meant the information constituted personal data in relation to the world at large because there were too many steps to go through. However, we note the Council's reliance (before the Commissioner) upon the ability of the public to make a visual inspection using Google Earth which would not require a site visit.

19. The Appellants further argued that the original applicants might no longer be alive. However, we are satisfied that the data relates to the current owners and occupants (i.e it is about the way that their home is constructed) as well as the original applicants if they are still living. We are satisfied that a living individual can be identified from the information and that the withheld information relates to them.

First Data Protection Principle:

20. It is not argued that disclosure within the proper application of EIR would be unlawful.

21. The Commissioner argues that disclosure would contravene the first data protection principle; it would be unfair as the data subjects would not have had a reasonable expectation that this information would be disclosed. Those seeking to make building alterations do not have to use the Council to certify compliance with building regulations, but can choose an independent expert to fulfil this requirement who would not be required to disclose information

under EIR. The Commissioner argues that the public have sufficient knowledge to distinguish between planning and building regulation certification and that those using the Council would be treated differently⁴.

22. The Tribunal accepts the Appellants' arguments that the Council does not undertake to keep this information confidential, and that the type of information provided is similar to that routinely made public by way of planning applications. Individuals wishing to carry out certain types of work on their property are required to obtain building regulations approval and planning permission. The Appellants argue that applicant is unlikely to distinguish between the two processes, one of which is public, whilst the other is not.

23. The Tribunal also considers the redacted withheld information to be of low sensitivity:

- It is similar to the sort of information routinely provided to Estate Agents,
- It is similar to the sort of information routinely provided in planning applications,
- It is discernible to a surveyor when the house is changing hands
- Some of this information is visible to the naked eye
- Much of the information constitutes confirmation of normal practice of construction to a fixed standard.

24. Whilst the Appellants recognise that there would be distress and detriment to the householder if a certificate of building compliance were subsequently challenged, we consider this to be an aspect of the Appellants' arguments in relation to the legitimate interests of those to whom the information is disclosed. This consequence would be likely to ensue in any event at the point of a house changing hands following a survey.

⁴ All properties in the cul de sac used the Council in this case.

25. The Commissioner's arguments amount to an assertion of intrusion and detriment due to the loss of privacy and inequality of position between those who use the Council's building control department and those who do not. In light of our findings as to the low inherent sensitivity of the withheld information we do not consider that this has great weight or that disclosure would be unwarranted.
26. The Council has disclosed a table of statistics and additional information is available by inspection of the exterior with the naked eye, or through planning records. This goes more towards detailing the proposed changes to properties and not compliance. We do not consider that this is sufficient to meet the legitimate public interest in transparency, in particular in being assured that:
- The Council has properly assessed compliance or otherwise
 - The Regulations are adhered to.
27. We are satisfied that, balancing the legitimate interests of those to whom the information would be disclosed with those of the data subjects, disclosure would be neither unfair nor unwarranted.

Conclusion

28. The Commissioner erred in failing to find that there were additional breaches of regulations namely: regulations 5(2) EIR, 7(1) EIR and 9(1) EIR. Further we are satisfied that the Commissioner erred in holding that disclosure would breach the first data protection principle and that the redacted information was properly withheld pursuant to regulation 13 EIR. For the reasons set out above, the Tribunal allows the appeal in part and orders the Council to disclose the information (redacted as to address or identity) within 35 days of the date of this decision.

Dated this 26th day of September 2012

Fiona Henderson

Judge