



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER INFORMATION RIGHTS
ON APPEAL FROM Information Commissioner's Decision Notice No: FS50423448
Dated 10th October 2012**

Case No. Appeal No. EA/2012/0253

BETWEEN

Mr Tony O'Prey

Appellant

And

The Information Commissioner

Respondent

And

Department of the Environment for Northern Ireland

Second Respondent

Determined on the papers on 26th April 2013 at Field House

Date of Decision 22nd May 2013

BEFORE

Fiona Henderson (Judge)

And

John Randall

And

Dave Sivers

Subject matter: EIR r13(1) Personal data

Decision: The Appeal is refused.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50423448 dated 10th October 2012 which concluded that The Department of the Environment for Northern Ireland (DOENI) was correct to apply r 13(1) EIR to the information withheld¹.
2. The Appellant has corresponded with the planning authority and local Councillors in relation to some planning applications and building works in relation to land in the vicinity of his home. The Appellant wrote to DOENI on 30th November 2010 citing a planning enforcement file reference number and asking for:

“...photocopies of all letters contained in the above file.”

3. The Appellant was provided with a photocopy of the file from which the details of the individual(s) against whom DOENI was undertaking enforcement action for a breach of planning control legislation had been redacted. DOENI relied upon regulation 13(1) EIR². This decision was upheld upon review as notified to the Appellant on 7th October 2011.

The Appeal

4. The Appellant appealed against the Commissioner's decision to uphold DOENI's application of r13(1) on 29th October 2012 and DOENI were joined as a party by the Tribunal. The parties have consented to a paper determination and we are satisfied that it is in the interests of justice that we determine the case upon the papers.

Scope of the Appeal

5. In his grounds of Appeal, the Appellant refers to information issued by others in their letters to the Planning services which identified the Appellant and his wife and he argues breaches their rights under DPA. He has made a complaint to ICO.

¹ The commissioner also made findings in relation to the timescales employed by DOENI, these are not the subject of this appeal and are not considered further by this Tribunal.

² Personal data

This is not within the jurisdiction of this appeal and whether there has been a breach or not is not considered further by this Tribunal.

6. It would appear from their correspondence to the Commissioner that DOENI thought that Mr O'Prey was the person upon whose complaint the Planning Service initiated the enforcement process. This is disputed by Mr O'Prey. We are satisfied that this is not material to the issue to be considered in this case and make no determination upon this point.

Personal Data

7. There is no dispute that the information that has been withheld is personal data. We are also satisfied that it constitutes sensitive personal data pursuant to s2 DPA as it relates to:

(g) the commission or alleged commission by [the data subject] of any offence,

Namely, proposed enforcement action arising out of the investigation of an apparent breach of planning regulations.

8. Regulation 13(1) EIRs prohibits disclosure under the Regulations if disclosure would breach any of the data protection principles. The first data protection principle provides that:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

9. The Commissioner and DOENI argue that disclosure would be unfair as:

i) There is an expectation that planning information is made available as provided for on their website, however, an investigation into a breach of planning regulations does not fall within the information that the Council undertakes to disclose.

ii) DOENI does not disclose personal details of the person(s) under investigation for a breach or suspected breach of planning controls, without the express consent of the data subject. This is because the investigation may show that no breach has occurred and disclosure would therefore be unfair.

iii) Where DOENI issues a formal Enforcement Notice under the Planning (Northern Ireland) Order 1991, then the contents of the notice (which would include the name of the person upon whom the Notice is served) would become public information.

iv) No enforcement notice was issued in this case as DOENI accepted a retrospective planning application.

v) Consequently a data subject would have had a reasonable and legitimate expectation that their information would only be used for the purposes of the investigation and would not be disclosed into the public domain unless and until an enforcement notice was served.

10. Mr O'Prey argues that:

a) He can work out the personal data withheld in the disputed information and therefore disclosure would not be unfair or unwarranted. In so doing he relies upon knowledge of who the registered owner of the land is and the planning history.

b) Alternatively, in his letter of 10.12.12 he argues that the information lies in the public domain as it may have already been disclosed by a Councillor³, disclosure would therefore not be unfair or unwarranted.

11. The Tribunal notes that under s68 of The Planning (Northern Ireland) Order 1991, a copy of an enforcement notice shall be served:

2(a) on the owner and on the occupier of the land to which it relates; and

(b) on any other person having an estate in the land, being an estate, which, in the opinion of the Department, is materially affected by the notice.

³ In a letter dated 18.12.06

From this we are satisfied that enforcement action may be taken not just against the registered owner of land but against others. We note that whilst the identity of the registered owner is publicly available, this is for a fee from the land registry. Even if the Appellant believes he does know against whom the enforcement action was proposed, this is due either to research or local knowledge, which is a different level of dissemination to explicit confirmation by the Council through disclosure of the withheld personal information.

12. The Tribunal accepts the strength of the arguments advanced by the Commissioner and DOENI, but we are also satisfied that fairness cannot be assessed with sole regard to the data subject and that this requires consideration of the context in which disclosure is sought. We therefore go on to consider the conditions in Schedules 2 and 3.
13. The Schedule 3 condition which it appears that Mr O'Prey must be relying upon in support of his application is condition 6, namely that:

The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

14. This has a considerable overlap with the Schedule 2 condition that Mr O'Prey is arguing is applicable on the facts of this case which is set out at condition 6 namely that;

(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

15. The Appellant argues that he and his wife have been defamed by a Councillor in the context of the correspondence surrounding this planning issue and withholding

the disputed information has compromised their ability to bring a case of defamation.

16. Whilst it is outside the Tribunal's jurisdiction to determine whether in fact Mr O'Prey and his wife have been defamed, we do not in any case consider that disclosure of the disputed information would be necessary to enable him to take advice and to progress his case further. Disclosure under EIR is to the world at large and there are additional provisions for discovery of documents in the event that a legal case is mounted which fall outside the provisions of EIR.
17. Additionally Mr O'Prey argues in relation to Schedule 2 condition 6 that disclosure will confirm whether the Councillor's assertion was correct or whether the Council was misled and this upholds the legitimate interests of the electorate.
18. The Tribunal observes that the Council will know whether they have been misled by the Councillor and Mr O'Prey is at liberty to raise this with the Council.
19. We are satisfied that neither of these interests are sufficient to outweigh the importance that those who are suspected and investigated but who are not eventually proceeded against do not suffer unwarranted distress through disclosure of the fact that they have been so suspected and investigated. Disclosure would therefore be unfair, unwarranted and breach the first data protection principle.

Conclusion

20. For the reasons set out above, we refuse this appeal and uphold the Commissioner's decision.

Dated this 22nd day of May 2013

Fiona Henderson
Tribunal Judge