IN THE FIRST-TIER TRIBUNAL **Case No. EA/2017/0124**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Monetary Penalty Notice dated 22 May 2017

Dated:

Appellant: Basildon Borough Council

Respondent: Information Commissioner

Heard at: Field House, London

Date of hearing: 5 and 6 December 2017

Date of decision: 12 January 2018

Date of Promulgation: 12 January 2018

Before

Angus Hamilton

Judge

and

Steve Shaw

and

Pieter De Waal

Subject matter: s 55A Data Protection Act 1998 (DPA)

Cases considered:

R (on the application of Robertson) v Wakefield MDC [2001] EWHC Admin 915; [2002] 2 WLR 889
Vidal-Hall v Google Inc. [2015] EWCA Civ 311; [2015] 3 WLR 409.
Tele2 Sverige AB v Post- och telestyrelsen (C-203/15), [2017] 2 WLR 1289

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Commissioner's decision to issue a monetary penalty notice in this matter but reduces the amount of the penalty to £75,000.

REASONS FOR DECISION

Introduction

1 The Appellant ('Basildon') appeals against a monetary penalty notice ('MPN') issued by the Respondent ('the Commissioner') on 22 May 2017 under section 55A of the Data Protection Act 1998 ('DPA').

2 The Notice was based on an alleged contravention by Basildon of the seventh data protection principle ('DPP7') from Schedule 1 DPA. The Notice imposed a penalty of £150,000 for that contravention.

3 S.55A of the DPA provides:

(1)The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that -

(a)there has been a serious contravention of section 4(4) by the data controller,

(b)the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c)subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the data controller –

(a)knew or ought to have known —

(i)that there was a risk that the contravention would occur,

and

(ii)that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b)failed to take reasonable steps to prevent the contravention.

4 DPP 7 provides:

Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

Background

5 The Tribunal considered that the chronology of relevant events was largely correctly set out in the Commissioner's Response to the Grounds of Appeal and has adopted that chronology here:

6 Basildon is a local planning authority which is required to make decisions on planning applications. This involves its planning department uploading planning applications to its website in order to facilitate public awareness and input. At the relevant time for the purposes of this appeal, Basildon's established approach was set out in its data protection policy for planning applications, which included the following:

For Planning Statements/Supporting Statements, check and redact any personal information e.g. family details, medical conditions, ages etc.

7 Basildon received an application in June 2015 for the variation of conditions attached to a grant of planning permission for land in the green belt. The application was accompanied by a planning statement that explained why the variation was being sought. That statement included details about the applicant's family, including disability requirements,

mental health issues, the names of all family members, their age and the location of the site. Thus, the application contained not only personal data within the DPA but also sensitive personal data as defined by the DPA.

8 On 16 July 2015, the application and planning statement were uploaded to Basildon's online planning portal without any redactions. The unredacted planning statement was removed from the online planning portal on 4 September 2015 and Basildon reported the matter to the Commissioner on 8 September as a data protection breach.

9 The Commissioner then undertook an investigation of the matter and concluded that Basildon's publication of the planning statement in unredacted form was not deliberate. The error occurred because of inadequacies in Basildon's procedures for ensuring that planning documentation was uploaded to its planning portal in line with its policy as referred to above.

10 This led first to the issuing of a 'Notice of Intent' to deliver a MPN. In response Basildon submitted detailed representations which are very similar to the Grounds of Appeal. The Commissioner then confirmed her decision to issue the MPN.

11 In particular, the Commissioner found the inadequacies to be as follows:

a. Basildon had in place no adequate procedure governing the redaction of statements by planning technicians. For example, the importance of identifying and redacting sensitive personal data does not appear to have been conveyed through Basildon's procedures.

b. Basildon did not provide any (or any adequate) training to planning technicians on the redaction of statements.

c. Basildon had in place no guidance or procedures for a second

planning technician or senior officer to check statements for unredacted data (and specifically sensitive personal data) before they were returned to the administrator to be uploaded to the online planning portal.

d. Basildon had in place no guidance for the administrator to check statements for unredacted data before they were uploaded to the online planning portal.

12 The Commissioner decided that those inadequacies constituted a contravention of DPP 7 and further decided that the statutory conditions for issuing a monetary penalty ('MPN') under section 55A DPA were satisfied because:

a. The contravention was serious: **(paragraphs 30-34 of the MPN).**

b. The contravention was of a kind likely to cause substantial damage or substantial distress: **(paragraphs 30-37 of the MPN).**

c. Basildon ought to have known that there was a risk that the contravention would occur and that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent the contravention: **(paragraphs 38-47 of the MPN).**

13 The Commissioner concluded that, in all the circumstances, it was appropriate to issue a monetary penalty and that an amount of £150,000 was appropriate and proportionate: **(paragraphs 48-56 of the Notice).**

14 Basildon now appeals to the First Tier Tribunal against the MPN. Basildon argues that (i) it did not contravene DPP7; (ii) alternatively, if it did, the conditions for issuing a monetary penalty under section 55A DPA

were not met, and (iii) alternatively, if the Commissioner was entitled to impose a monetary penalty, the amount of this penalty was too high. This matter was heard before the First Tier Tribunal in London on 5 and 6 December. The hearing was dealt with on a 'submissions only' basis Basildon having helpfully previously submitted written statements and supporting documents from their witnesses in advance of that hearing.

Submissions from the Appellant

15 The core submission from Basildon, and the one which relates to the first appeal issue (that it did not contravene DPP7) was that they were, as a local planning authority, required, by statute and regulation, to make personal data, including sensitive personal data, submitted to them as part of planning applications, available for public inspection as part of the process of public scrutiny of the planning process. This meant that the publication of the personal data and sensitive personal data in this case was in accordance with DPP1.

16 DPP 1 provides:

> *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.*

17 Basildon contended that the Schedule 2 and 3 conditions in this case were met because the processing of personal data here by way of publication flowed from legal obligations imposed on the local authority.

18 Thus, although Basildon had a policy of scrutinising planning applications for the presence of personal data and of redacting such personal data and although that policy had not been properly followed in this case this was not, Basildon submitted, a relevant consideration as the ultimate publication of the personal data was entirely in accordance with the DPA and was legitimised by DPP 1.

19 In relation to the issue as to whether the processing was 'fair', Basildon sought principally to rely on the warning on the planning application form that reads:

> *Please note that the information provided on this application form and in supporting documents may be published on the Authority's website. If you require any further clarification, please contact the Authority's planning department.*

20 DPP7, as quoted above, provides that '*appropriate … organisational measures shall be taken against unauthorised or unlawful processing of personal data'.* Basildon contended, based on the argument in the preceding paragraph, that since there was no possibility of a lack of scrutiny of planning applications leading to *'unauthorised or unlawful processing of personal data',* then such scrutiny was unnecessary and the lack of scrutiny could not constitute a breach of DPP 7. Basildon's policy of checking for and removing personal data from planning applications was consequently unnecessary – at least as far as this particular case was concerned. Basildon described the policy as 'misconceived' in its submissions whilst accepting that there would be some exceptional cases where personal data in a planning application should not be made public.

21 Basildon expanded on the submission summarised above as follows:

Article 40 of Town and Country Planning (Development Management Procedure) (England) Order 2015 ('the 2015 Order') requires every local planning authority to keep a register of every application for planning permission relating to their area, which must contain a copy of each application along with any accompanying plans and drawings.

Once the planning application was put into the planning register, it had to be made publicly available for inspection by anyone who wanted to do so

- Section 69(8) of the 1990 [Town and Country Planning] Act provides:

> *The register must be kept available for inspection by the public at all reasonable hours*

The 2015 Order also provides that 'an application for planning permission' must be made in writing to the local planning authority on a form published by the Secretary of State or a form substantially to that same effect and, by article 7(1)(b), that the application must: 'include the particulars specified or referred to in the form'.

The form is a standard form. The particulars that are required to be included within a 'planning application' include those at part 6: 'Please state why you wish the condition(s) to be removed or changed.

Accordingly, a 'planning application' can only be valid if the application explains why the applicant wishes to have the conditions removed or changed.

Accordingly, the Council submits it is under a statutory duty to make information which is included within a planning application publicly accessible. That accessibility is expressly recognised to be enhanced by making the register available online. Article 40(14) of the 2015 Order provides:

> *'Where the register kept by a local planning register authority under this article is kept using electronic storage, the authority may make the register available for inspection by the public on a website maintained by the authority for that purpose'.*

22 In this case the 'why' information was set out in a letter from the applicant's agent dated 3 June 2015 which accompanied the standard planning application form. It was this letter, principally, that contained the personal data and sensitive personal data that was then published by

Basildon. The Tribunal would mention at this point that the Commissioner did submit, although not in a particularly vigorous fashion, that the agent's letter was not part of the planning application. The Tribunal had no difficulty in rejecting this particular submission since the agent's letter quite provided an answer to a question on the standard application which was too lengthy to fit into the 'box' on the standard application form.

23 Basildon submitted that the personal data in this case effectively had to be made available for public scrutiny as without it a member of the public would not understand why the application was being made and would consequently be hampered in making any representations in relation to the application.

24 In relation to the second appeal submission that - *the conditions for issuing a monetary penalty under section 55A DPA were not met* – Basildon submitted that if there was a contravention of s.4(4) of the DPA then it was not *of 'a kind likely to cause substantial damage or substantial distress'* (DPA s. 55A (1) and (3)).

25 In support of this submission Basildon highlighted the fact that the applicant for planning permission in this case had previously appealed to the Planning Inspectorate putting a large amount of personal data in the public domain in that process. Basildon also relied on the warnings in the application process that data may be published and suggested that the applicant, when contacted, had not expressed any distress. Basildon also analysed the sensitive personal data published (which, since this judgement will be publicly available, are not reproduced here) and submitted that it was not of a type where a disclosure was likely to cause any, let alone substantial, damage or distress.

26 In relation to the third appeal submission (the level of the monetary penalty), Basildon contended that it should be much lower citing the following points:

(i) The sensitive personal data disclosed was [sic], *as set out above, relatively limited;*

(ii) There are no other instances of Basildon's system not operating as intended;

(iii) There is no evidence of any actual damage or distress to the applicant for planning permission;

(iv) Basildon self-reported to the Commissioner and has taken steps to review its data protection policies, an exercise it has requested the Commissioner to help it with in view of the issues canvassed above.

Submissions from the Commissioner

27 In response to the first appeal submission the Commissioner asserted that the 2015 Order (a domestic statutory instrument) is incapable of overriding or excluding the rights and duties set out in the DPA, which implements Directive 95/46/EC ('the Directive'):

> *The latter is an EU Directive concerned with fundamental rights – see Article 1.1: "In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data".*
>
> *Thus, if there were a conflict between the 2015 Order ("publish in full") and the Directive ("do not process unfairly"), the latter would prevail…..*
>
> *The DPA implements and must be construed so far as possible as to give effect to the Directive. See for example the discussion of the Marleasing principle in the data protection context in R (on the application of Robertson) v Wakefield MDC [2001] EWHC Admin 915; [2002] 2 WLR 889 at paragraph 17, and Vidal-Hall v Google Inc. [2015] EWCA Civ 311; [2015] 3 WLR 409.*

It follows that:

a. *The DPA must itself be construed so as to give effect to the fundamental rights conferred by the Directive. Indeed, if the DPA cannot be construed in that way, a Court is required to take more stringent action. In Vidal-Hall, the Court held that section 13(2) DPA could not be interpreted in a Directive-compliant manner: Parliament had deliberately chosen wording that failed properly to implement the Directive. Therefore, the Court of Appeal had to strike down section 13(2) altogether, in order to achieve compliance with the Charter of Fundamental Rights of the European Union (see paragraphs 95-105).*

b. *Where a domestic statutory instrument conflicts with EU law, the latter prevails: in the data protection context, see for example Robertson (cited above, concerning the sale of electoral register information) and also Tele2 Sverige AB v Post- och telestyrelsen (C-203/15), [2017] 2 WLR 1289 (striking down of legal regimes mandating the blanket retention of communications data).*

Therefore, in the present case, article 40 of the 2015 Order must be construed in a way that complies with the DPA. Where the inclusion of personal data in a public register would contravene the DPA, it should be omitted from that register.

28 In response to the second appeal submission (that the statutory conditions under s.55A DPA were not met) the Commissioner responded as follows:

Basildon relies on the difficult balance between competing interests in privacy on the one hand and transparency and public consultation on the other.

This takes its case no further. It did not in fact undertake any such balancing exercise in respect of the publication of this particular planning statement. It has not adequately explained (a) why sensitive personal data needed to be published online on the facts of this case, and (b) why less intrusive measures (such as providing any interested parties with the gist of the sensitive personal data upon request) would not have sufficed for the purposes of public engagement and consultation in respect of this planning application.

Basildon says that, in light of what had previously been published in a decision of the Planning Inspectorate, there can have been no reasonable expectation of sensitive personal data being redacted by Basildon in this case.

The Commissioner has already considered this point. The point is relevant, but by no means decisive here. The Planning Inspectorate is a different public authority, discharging a judicial function. Its decision concerning this planning application was approximately a decade old. It is not clear whether it remained in the public domain in 2015. In any event, the planning statement uploaded by Basildon contained personal data and sensitive personal data that did not appear in the Planning Inspectorate's decision.

Basildon says that applicants for planning permission were warned that information they submit <u>may</u> be published on Basildon's website (emphasis added).

The Commissioner again accepts that this point is relevant, but

does not materially assist Basildon here: applicants were warned about the possibility of their information being published; they were not told that everything they submitted would be published, regardless of its sensitivity. In practice, Basildon – in common with other local authorities – followed a practice of redacting planning documentation on appropriate grounds. Applicants could reasonably expect Basildon to apply its own policy. Its failure to do so was likely to cause substantial distress in the context of online disclosure of sensitive personal data about the applicant and her family (including children).

29 In relation to the third appeal submission (the level of the monetary penalty) the Commissioner considered that she had already taken the raised points of mitigation into account and that the £150,000 penalty was 'appropriate and proportionate'.

The Tribunal's Decision

30 In relation to the first appeal submission the Tribunal considered that Basildon's submission was manifestly ill-founded and that the issue was a matter of settled law conveyed in decisions that were binding on the First Tier Tribunal. The authorities cited by the Commissioner unequivocally stated that domestic legislation had to be read restrictively in the light of obligations imposed by EU Directives. Indeed, where domestic legislation clashes directly with EU legislative obligations then the domestic legislation will be struck down. The Tribunal was somewhat surprised, given this situation, that Basildon sought to argue the point contained in the first appeal submission.

31 In addition, although the Tribunal understood some of the logic behind Basildon's contention that there could have been no breach of DPP 1 in this case and that, therefore, the measures to check that there was no such breach were unnecessary (and thus there could have been no breach of DPP 7), the Tribunal felt that this focus on DPP 1, and the

argument that it had not been breached, was something of a distraction. The MPN issued in this case was not for a breach of DPP 1 but for a breach of DPP 7 – the obligation to have in place appropriate technical and organisational measures to ensure that there is no unauthorised or unlawful processing of personal data. The bald and unavoidable fact of this case is that Basildon *did* have a procedure for checking what personal data contained within planning applications should go up online but, on their own admission, it was completely overlooked on this occasion. That failure was clear *prima facie* evidence of inadequate measures - in contravention of DPP 7. The failure in this particular case was compounded by a lack of training and guidance and a lack of 'safety net' procedures to catch incorrect decision making by an initial decision taker. All these points were established during the Commissioner's investigation and were not significantly challenged by Basildon. The Tribunal thought that it was of significance that Basildon was quite unable to identify the member of staff who examined the planning application in this particular case and who passed it on to be published, unredacted, online. The Tribunal considered this to be evidence of inadequate procedures. In the Tribunal's view these systemic failures meant that there was a significant increase in the risk of the same error being repeated.

32 In relation to the second appeal submission the Tribunal considered that Basildon had focussed again far too much on the individual case that triggered the Commissioner's investigation. A breach of DPP 7 inarguably relates to ongoing systemic failures creating ongoing risks of the processing of personal data in breach of the DPA. S.55A itself refers to contraventions *of a kind likely to cause substantial damage or substantial distress* and not to substantial distress or damage actually caused. The inadequate procedures at Basildon for checking planning applications meant that there was an ongoing risk of the online publication of people's sensitive personal data – as evidenced by the facts of the case that triggered the investigation. Even in relation to the triggering case the Tribunal was not impressed by some of Basildon's submissions – for

example, the Planning Inspectorate case referred to was over a decade old at the relevant time and related, at least in part, to different sensitive personal data; only one person out of a group of 17 was spoken to by a member of Basildon's staff after the online publication and she did not appear to have any of her own sensitive personal data published – in the Tribunal's analysis that person was not in a position to comment on damage or distress caused to others.

33 For these reasons the Tribunal had no hesitation in concluding that the statutory conditions under s.55A DPA were met – that is that the contravention of DPP 7 in this case was such that there was an ongoing risk of the unjustified publication of sensitive personal data and that, in turn, was likely to cause substantial damage or substantial distress. Adopting the same analysis, the Tribunal also unhesitatingly concluded that Basildon ought to have known that its lack of adequate systems and procedures meant that there was a risk of the processing of personal data in contravention of the DPA and that such a contravention would be of a kind likely to cause substantial damage or substantial distress. It is inarguable that Basildon failed to take reasonable steps to prevent the breach of DPP 7 and, indeed, Basildon did not at any point contend that it had taken such reasonable steps before the triggering incident had been reported to the Commissioner.

34 In relation to the level of the monetary penalty the Tribunal acknowledged the mitigating points that the Commissioner had taken into account but felt that some of them had not been given sufficient weight:

a) Although Basildon's procedures for checking planning applications for personal data, and for making rational and DPA-compliant decisions in relation to that personal data, were inadequate the Council did at least have some procedures in place and this distinguishes them from a body with no such procedures at all.

b) The Tribunal also noted that it only had evidence before it that Basildon's inadequate procedures had directly affected a relatively small group of 17 people.

c) The personal data in the triggering case had only been online for a relatively short period and Basildon had self-reported the matter to the Commissioner promptly.

d) The planning application form does inform applicants of the possibility of the publication of the information provided in the application and does provide a telephone number for further advice on what this might mean in practice.

35 Additionally the Tribunal took into account the following points that did not appear to have been considered by the Commissioner:

a) The PARSOL Planning and Building Control Information Online Guidance notes (which provides advice to, amongst others, planning authorities on the online publication of planning applications and which was developed in collaboration with the Commissioner and published in August 2006) is poorly drafted and clearly needs urgent revision. It contains some sections which could easily be read as advising that planning authorities may simply post unredacted planning applications online. Other provisions of the Guidance do indicate that the DPA must be taken into account but the Guidance is clearly ambiguous, if not misleading.

b) The Tribunal in this judgement has been critical of the way in which Basildon focused on the single triggering incident in many of its submissions rather than on the systemic failures implicit in a breach of DPP 7. However in the Tribunal's view the Commissioner also fell into this error in the preliminary analysis set out in the Monetary Penalty Decision Record which led to the

recommendation of a £150,000 penalty, For example, all of the aggravating features noted by the panel relate to the individuals involved in the triggering incident rather than to the wider risks flowing from the systemic DPP 7 breach. It is correct that much of this analysis had been corrected to look at the wider issues in the MPN itself but the monetary penalty adopted is the same as the one recommended in the Decision Record and there is no indication that the monetary penalty was reviewed in light of the altered analysis.

35 For these reasons the Tribunal felt that it was appropriate to reduce the monetary penalty to £75,000.

36 The Tribunal also noted (though the point did not influence its decision-making) that unlike fines imposed in the criminal justice system there is no independent body such as the Sentencing Council providing a definitive list of relevant aggravating and mitigating factors and a matrix of appropriate fines. The Tribunal noted that the Commissioner is seeking to establish her own 'database' of penalties and pertinent factors to be taken into account and this is referred to in the Decision Record, though it might be argued that that it is not entirely appropriate for the investigator and enforcer of MPNs to be the body that also effectively sets the level of the penalties.

37 The Tribunal's decision was unanimous.

Signed:

Angus Hamilton DJ(MC)
Tribunal Judge Date: 12 January 2018