



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0158

**Decided without a hearing
On 10 January 2019**

Before

JUDGE BUCKLEY

JEAN NELSON AND PAUL TAYLOR

Between

MICHAEL JOHN ABBOTT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50713311 of 26 July 2018 which held that the request was for personal data and Bassetlaw District Council ('the Council') was correct to withhold the information in accordance with regulation 13 of the Environmental Information Regulations (EIR) with the exception of a single document.

Factual background to the appeal

2. The complainant believes that a neighbouring property ['the property'] has been built in a way that does not comply with the planning approval granted. He has complained to the Council's Enforcement Department and the Local Government Ombudsman ('LGO') but his complaints were rejected.

Request, Decision Notice and appeal

3. The Appellant made the request which is the subject of this appeal on 7 March 2017:

Can you confirm that the attached document supplied by Enforcement is everything you hold regarding the planning permission for [the property] please.

If any documents are being withheld can you identify what they [are] and the grounds for not releasing them.

Can you also provide me with the full file from Building Control on the same development please.

4. The Council replied to the request on 4 April 2017, stating that planning permission files were public documents and providing a link to the documents on the Council's public access website. The Council refused to provide the file from Building Control, i.e. the Building Regulations file, relying on regulation 13 EIR.
5. The Appellant requested a review on 6 April 2017 and the decision was upheld on review on 27 April 2017, additionally relying on s 40(2) of FOIA.
6. In a decision notice dated 26 July 2018 the Commissioner concluded that the withheld information was environmental and therefore the request fell to be considered under EIR. The Building Control file was personal data and disclosure would contravene the First Data Protection Principle because disclosure would be unfair to the owners of the property. In assessing fairness the Commissioner took account of the reasonable expectations of the individual that information of the type requested would not be disclosed. Disclosure would cause some level of distress because of an unexpected loss of privacy. The Commissioner considered the legitimate interests of the Appellant and concluded that there was no pressing social need which would make disclosure fair.
7. The Commissioner concluded that one document on the file was not personal data and should be disclosed.
8. The Grounds of Appeal in summary are:
 - 8.1. The issues of personal privacy have been overplayed:
 - 8.1.1. There is no purpose in concealing approvals which would have to be revealed to a prospective purchaser.
 - 8.1.2. The internal works are already in the public domain.

- 8.1.3. Revealing the Building Control information on the exterior of the property and the site and access cannot adversely affect the privacy of the owners.
- 8.1.4. The documents could be redacted to remove names.
- 8.1.5. The owners have not been asked for their view.
- 8.2. The legitimate public interest has been discounted:
 - 8.2.1. Information showing whether a property meets required standards should be in the public domain, to hold the Local Authority to account. There is no oversight of the Local Authority, who have the sole responsibility in law. The LGO has very limited powers.
 - 8.2.2. There is a need for transparency because of the potential impact on neighbours of inappropriate development, failures to comply or approval being given inappropriately.
 - 8.2.3. The legitimate public interest in protecting the integrity of the process would be served by disclosing the information.
- 8.3. The purpose of the refusal to release the information is to conceal wrongdoing, incompetence and fraud potentially fraud or personal gain.
- 8.4. There is a pressing social need: the planning control system is not working. The Commissioner failed to take account of the planning White Paper issued on 24 July 2018.
- 8.5. The Building Control File is not personal data.
- 9. The Commissioner's response states:
 - 9.1. The information requested is personal data. It relates to a living person: the property owners. It has biographical significance for them.
 - 9.2. The need for the information to be disclosed is only pressing for the Appellant. There is no pressing social need.
 - 9.3. It is not necessary to ask the owners for their opinion.
 - 9.4. The Council's conduct and planning law are outside the remit of the Commissioner and the tribunal. There is no reason to believe that the Council is attempting to mislead the Commissioner.

Legal framework

- 10. The relevant provisions of the EIR are regulations 5(1), 12(1) to (3) and 13(1) and (2):

Regulation 5 Duty to make available environmental information on request

- (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 12 Exceptions to the duty to disclose environmental information

- (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –
 - (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 13 Personal data

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.
- (2) The first condition is –
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or

11. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA'); this was the relevant Act in force at the time of the request, it now having been superceded by the Data Protection Act 2018. The definition in s1(1) is:

Data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

12. The first data protection principle is the one of relevance in this appeal. This 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..." (See para.1 Sch 1 DPA).

13. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para.s 6 Sch. 2 DPA)

14. The case law on section 6(1) has established that it requires the following three questions to be answered:

- 14.1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- 14.2. Is the processing involved necessary for the purposes of those interests?
- 14.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The Task of the Tribunal

15. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

16. The issues we have to determine are:

16.1. Was the withheld information personal data?

16.2. Would disclosing the information be fair?

16.3. If so, are the conditions in 6(1) met i.e.

16.3.1. Is the data controller or the third party or parties to whom the data is disclosed pursuing a legitimate interest or interests?

16.3.2. Is the processing involved necessary for the purposes of those interests?

16.3.3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

Evidence and submissions

17. We have read and were referred to an open and a closed bundle of documents, which we have taken account of where relevant.

Discussion and conclusions

18. We have noted that one document has now been disclosed in accordance with the Decision Notice, and our conclusions below do not apply to that document.

19. We conclude that the information requested was personal data. The withheld information in the Building Control file consists of information about building works proposed by the owners of the property and submitted to the Council for inspection and certification under the Building Regulations. It relates to those individuals because it is about their plans in relation to their property. It includes information that is obviously personal in nature (names, addresses and telephone numbers etc.). We find that all the other information (including information such as measurements, technical details, results of tests and certificates) also relates to those individuals. We find that this information about the owners' property is biographical in a significant sense. Further, taken with the other information held on the file, it is clearly possible to identify the owners from this information. We find that all of the information falls within the definition of "personal data" and redaction of names would therefore not remove the "personal data".

20. We conclude that disclosure would not be fair and would be in breach of the first data protection principle. The owners would have had a legitimate expectation that the documents on the Building Control file would not be made public. The owners have never been informed that the file would be made public, and there is a

statement on the Council's website that indicates the opposite. Whilst planning application documents are made public as a matter of course, Building Control documents are not. Taking this into account and the nature of the detailed information on the file about the owner's property, we find that the owners would have a strong expectation of privacy. The fact that the owners have not been asked for their view is not relevant. The detailed information on the file is not already in the public domain, and we do not accept that the fact that some of the detailed information relates to the exterior of the property means that it cannot adversely affect the owner's privacy. It is not information that would be apparent to someone observing the property from outside. Further, the fact that some information may need to be revealed to a prospective purchaser, does not affect an expectation that it would not be published to the world at large. Disclosure in the course of sale would be expected by the data subjects to whom the property relates; i.e. a disclosure which they have initiated through sale of their property. We find that disclosure would cause an unexpected loss of privacy relating to the owner's private property and that this is likely to cause some distress.

21. Having found that disclosure would not be fair it is not necessary also to consider 6(1). However for completeness we have considered whether disclosure is necessary for the legitimate interests of the Appellant. A pressing social need for disclosure might satisfy this condition. We are not satisfied that there is a pressing social need for disclosure either of this Building Control file, or any need for Building Control files to generally be made public. We accept that there is a general public interest in the correct application of the Building Regulations and in the integrity of the process but we do not accept that disclosure of this file is necessary for that interest. There is already a process in place to ensure that Building Regulations are complied with, and we do not accept the Appellant's argument that there is no confidence whatsoever in this process. Further there is no evidence before us which could establish that the Council has the intention to mislead the tribunal or the Commissioner, or was attempting to conceal wrongdoing, incompetence, fraud or personal gain.
22. We accept that there is a general public interest in transparency in relation to planning decisions because of the potential impact on neighbours of inappropriate development, failures to comply or approval being given inappropriately. However, we do not accept that it is necessary for this interest that the Building Control file be made public. Planning application files are made public for this reason. Objections are allowed for this reason. The disclosure of Building Control files, which relate to technical compliance with the Building Control Regulations, is not necessary for this purpose.
23. We note the Appellant's reference to the White Paper published on 24 July 2018. We assume that this is a reference to the National Planning Policy Framework published on that date. That document does not make any reference to the Building Control process and we fail to see its relevance to the issues before the tribunal in this case.

24. The Appellant has a personal legitimate interest in whether or not his neighbour has complied with the planning conditions, but the Council's enforcement department is the appropriate forum for this issue, and further, having reviewed the Building Control file, there is nothing on it in our view which would be necessary for him to pursue that interest.
25. For those reasons the tribunal concludes that it would not be fair to disclose the information. In the circumstances it is not necessary to consider section 6(1), but we would have concluded for the reasons set out above that disclosure was not necessary to pursue a legitimate interest and that the prejudice to the owners' privacy outlined above would mean that disclosure was unwarranted.
26. This appeal is dismissed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 21 January 2019

Promulgation Date: 24 January 2019