



Neutral citation number: N/A

Case Reference: EA/2021/0289

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

**Determined, by consent, on written evidence and submissions
Considered on the papers on 30 March 2022.**

Decision given on: 27 April 2022

Before

**TRIBUNAL JUDGE Stephen Cragg QC
TRIBUNAL MEMBER Rosalind Tatam
TRIBUNAL MEMBER Emma Yates**

Between

John Watson

Appellant

And

The Information Commissioner

Respondent

Decision: The appeal is Allowed.

Substituted Decision Notice: see below

REASONS

MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered an open bundle of evidence and documents comprising pages 1 to 60 and a closed bundle.

INTRODUCTION

3. On 4 December 2020, the Appellant wrote to the Leeds City Council and requested information in the following terms:-

“This application is on protected green belt land which up to now we believed was for agricultural purposes only. The application has been granted on the balance of probability due to submitted evidence, we would like to see all the evidence submitted including that for and against this application to provide us with the opportunity to scrutinise it.”

4. The requested information related to an application for a Certificate of Lawful Existing Use or Development on private, protected green belt land, which had been granted by the Council.
5. The Council responded on 11 December 2020. It stated that the requested information contains personal data and applied regulation 13 of the Environmental Information Regulations 2004 (EIR) (which relates to personal data of a third party). Following an internal review the Council wrote to the Appellant on 21 January 2021. It stated that it upheld its original position.

THE STATUTORY FRAMEWORK

6. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) of the Data Protection Act 2018 is satisfied.
7. In this case the relevant condition is contained in regulation 13(2A)(a) EIR which applies where the disclosure of the information to a member of the public would

contravene any of the data protection principles relating to the processing of personal data as set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).

8. Thus, the first step is to decide whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA).
9. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.
10. If the information is personal data then the relevant data protection principles in this case are to be found, first, in Article 5(1) of the UK GDPR. Materially, Article 5(1)(a) reads:-

Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’).

11. Further, by Article 6(1) UK GDPR:-

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...

12. In relation to the tests to be applied at this last stage the principles are set out in *Goldsmith International Business School v IC and the Home Office* [2014] UKUT 0563 (AAC) and explained as follows:-

33. In making his submissions Mr Knight referred me to four authorities, being (in date order) decisions of the Information Tribunal, the Divisional Court, the Supreme Court and the Upper Tribunal respectively. These were: (1) *Corporate Officer of the House of Commons v Information Commissioner and Others* (EA/2007/0060-0063, 0122-0123 and 10131) (abbreviated here to “*Corporate Officer (Information Tribunal)*”); (2) *Corporate Officer of the House of Commons v Information Commissioner and Others* [2008]

EWHC 1084 (Admin) (“*Corporate Officer (Divisional Court)*”); (3) *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55 (“*South Lanarkshire*”); and finally (4) *Farrand v Information Commissioner* [2014] UKUT 310 (AAC) (“*Farrand*”). The last, of course, was decided after the Tribunal had given its decision on the present appeal.

34. Mr Knight helpfully set out eight principles or, as I prefer to call them, eight propositions, derived from this case law. I set them out below, including references to the relevant passages in the various decisions as authority for these propositions as (a) I endorse them; (b) they assist in resolving the present appeal; and (c) this taxonomy may well prove a useful roadmap for the Commissioner and other First-tier Tribunals when seeking to chart a path through the thicket of issues thrown up by Condition 6(1) of Schedule 2 in other cases...

35. *Proposition 1*: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:

“(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?”

(ii) Is the processing involved necessary for the purposes of those interests?”

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?”

Authority: South Lanarkshire at [18].

36. *Proposition 2*: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Authority: Corporate Officer (Information Tribunal) at [58], *South Lanarkshire* at [18] and *Farrand* at [29].

37. *Proposition 3*: “Necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

Authority: Corporate Officer (Divisional Court) at [43] and *Farrand* at [26]-[27].

38. *Proposition 4*: Accordingly the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

Authority: Corporate Officer (Divisional Court) at [43], *South Lanarkshire* at [27] and *Farrand* at [26].

39. *Proposition 5*: The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question.

Authority: Corporate Officer (Information Tribunal) at [60]-[61] and *South Lanarkshire* at [27].

40. *Proposition 6*: Where *no* Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

Authority: South Lanarkshire at [27].

41. *Proposition 7*: Where Article 8 privacy rights *are* in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posted by stage (iii).

Authority: Corporate Officer (Information Tribunal) at [60]-[61] and South Lanarkshire at [25].

42. *Proposition 8:* The Supreme Court in *South Lanarkshire* did not purport to suggest a test which is any different to that adopted by the Information Tribunal in *Corporate Officer (Information Tribunal)*.

Authority: South Lanarkshire at [19]-[20] and Farrand at [26].

THE DECISION NOTICE

13. The decision notice is dated 14 September 2021 (IC-85154-GF8F1). Applying the legal tests set out above, the Commissioner decided that the withheld information was personal data. In relation to a legitimate interest and whether disclosure is ‘necessary’ to meet that interest the Commissioner concluded that:-

29. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason: to determine how a decision was made regarding the development of land near to their property.

30. The Commissioner considers that there is a legitimate interest in the disclosure of this information, i.e transparency about how the Council considers planning applications. There is also a general legitimate interest in the Council being accountable for its functions.

...

32. The Commissioner accepts that the complainant would have no other means of getting the requested information and that, therefore, disclosure by the Council would be necessary to satisfy the complainant’s legitimate interests in this case.

14. Having reached that stage the Commissioner had to balance the legitimate interests and the data subject’s interests and/or fundamental rights and freedoms. In doing this the Commissioner set out a number of points made by the Council as follows:-

38. The Council has explained that as the application that was submitted was a “Certificate of Lawful Existing Use or Development”, it does not constitute what might be referred to as a ‘standard’ planning application and as such, the information that is required to be placed in the public domain, differs somewhat.

39. ...

40. The Council has provided the Commissioner with copies of the withheld information, along with a link to the documents which are required to be placed in the public domain for these types of planning permission.

41. Within the documents, available on the Council's website, the Commissioner can see that it states "Lawful development certificates for existing or proposed development in pursuant of Sections 191 and 192 of the Town and Country Planning Act 1990 are determined based on a legal test and a matter of fact. For that reason these types of application are not subject to consultation. If the local planning authority is satisfied that the legal tests have been met it will grant a lawful development certificate." It goes on to state, "...If granted by the Local Planning Authority, the certificate means that enforcement action cannot be taken against the development referred to in the certificate".

42. The Council explained that it appreciates why the complainant would wish to scrutinise the evidence provided to the Council and that disclosure would increase the transparency. However, disclosure of the information would not allow members of the public to effect the decision making process, as this is a decision for the Council to make, based upon matters of fact.

43. The Council has also explained to the Commissioner that these applications are not 'subject to consultation'. However, opinions could have been submitted before a decision was made by the Council.

44...

45. Upon review of the withheld information, the Commissioner considers that even if the personal information was redacted, individuals would still be able to be identified, especially by those local to the area and by those who know other residents. Additionally, the Commissioner considers that even if the personal data were to be redacted, the content of the correspondence would not be easy to understand, as the redactions would render the remaining information meaningless.

46. The Commissioner finds, however, that two paragraphs of the email dated 23 September 2020, could be released under the EIR, providing any personal data is redacted. The two relevant paragraphs are general in nature and the third party can not be identified.

47. Whilst the Commissioner understands the complainant's reasoning for wanting to receive this information, she must consider the impact of disclosure to the world at large, rather than to an interested party. As this process is unlike normal planning applications in terms of the information that is placed into the public domain, the Commissioner finds that the individuals would not have a reasonable expectation that their personal data would be made public.

48. She therefore considers that disclosure of the remainder of the information would be disproportionately intrusive to the data subjects as it would reveal information about these third parties which is not otherwise in the public domain, and as such, disclosure could cause unwarranted damage or distress to the individuals involved.

15. On that basis, the Commissioner determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner

therefore considered that there was no Article 6 basis for processing and so the disclosure of the remainder of the information would not be lawful. The Commissioner considered that she did not need to go on to separately consider whether disclosure would be fair or transparent.

THE APPEAL AND RESPONSE

16. The Appellant's appeal is dated 4 October 2021 and essentially he states that 'full disclosure' is requested so that the decision-making process can be understood. The Commissioner's specific points about the disclosure of personal information are not addressed. The Commissioner's response reiterates what is in the decision notice.

DISCUSSION

17. The Tribunal has considered the closed bundle, and the documents therein, alongside the information publicly available in relation to the application online,¹ which is referred to in the decision notice.

18. The Tribunal accepts the Commissioner's analysis, applying the legal framework to the effect that the information in the closed bundle is personal information, but that the Appellant has a legitimate interest for disclosure and that disclosure is necessary to pursue that legitimate interest. Therefore, as did the Commissioner, this case turns on applying the correct balance between that legitimate interest and the interests and fundamental rights and freedoms of the data subject (who in this case is the person who made the application for the certificate).

19. At this point and having investigated the relevant council webpage it appears to us that some of the information withheld is very similar or identical to the information publicly available on the website. Where that is the case, our view is that it is not possible to say that the balance which has to be struck is in favour of non-disclosure.

¹<https://publicaccess.leeds.gov.uk/online-applications/applicationDetails.do?keyVal=QGFT7SJB3I00&activeTab=summary>

20. Thus, there are maps which are publicly available which show the data subject's property. These include a map based on an Ordnance Survey map, a Google aerial photograph of the property, and three UK Planning Maps showing the property (two of which seem to be identical).
21. However, on the Council's website relating to the application for a certificate there is an exact copy of one of these UK Planning Maps, and the other two UK Planning Maps are simply a larger scale version of part of the map. The Ordnance Survey map and the Google aerial photograph show similar views, but they add nothing to the UK Planning Map on the Council website, and would be easily available and findable in any event to anyone who had seen the map on the website.
22. Also withheld is an application for a lawful development certificate which consists mainly of the information available on the Council website. This includes the name of the applicant and the address of the property, both of which can be found on the website page relating to the application,
23. In our view (other than the part of the application form referred to below) there can be no reasonable expectation of the data subject that this information will not be disclosed because it is, essentially, already available on the Council's public website (or other public sources). In those circumstances, in our view the balance must be in favour of disclosure.
24. Also, in the CLOSED bundle are photographs of the property concerned and email correspondence with the Council about the application. These are not included on the Council website, and there is no statutory planning reason why they should be published and we accept that the data subject would have a reasonable expectation that such information would not be disclosed and, for the reasons set out in the decision notice, in our view the balance falls in favour of non-disclosure. As mentioned above there is part of the application form to which we take the same approach, namely the entry at section 5 of the application form where we agree the balance is in favour of non-disclosure.
25. On this basis, this appeal is partially allowed, and a decision notice substituted in the above terms in relation to the information in the CLOSED bundle.

26. Thus, the Tribunal requires the Leeds City Council to take the following steps to ensure compliance with the legislation:-

- **Disclose to the Appellant the information in the CLOSED bundle other than the photographs, correspondence (except the two paragraphs of the email dated 23 September 2020, paragraphs the Commissioner directed to be disclosed) and the response to section 5 (page in Closed Bundle A16) of the application form.**
- **Leeds City Council must take these steps within 35 calendar days of the date of this decision.**

27. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules² and may be dealt with as a contempt of court. Leeds City Council is not a party to this appeal and must be sent a copy of this decision.

Signed Tribunal Judge Stephen Cragg QC

Date: 26 April 2022

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1006547/consolidated-fft-grc-rules-21072021.pdf