



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

Appeal Reference: EA/2017/0273

**Decided without a hearing
On 16 July 2018**

Before

**JUDGE SOPHIE BUCKLEY
DAVID WILKINSON
GARETH JONES**

Between

MAIREAD WHITING

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is dismissed.

REASONS

Procedure

2. The parties and the tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal

Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The tribunal considered an open and a closed bundle of documents including the grounds of appeal, reply and the appellant's response. The closed bundle is subject to a direction from the Registrar under rule 14(6) of the Tribunals's rules.

Background

3. On 9 May 2016 the appellant made the following request for information to Winchester City Council ('the Council'):

Could you please send me copies of both complaints raised against Councillor [name] w.r.t. the planning application for [address]? I understand that we and our property are referenced in them and I would like a official copies [sic]

4. The Appellant has confirmed that she seeks a copy of only one complaint, which she believes was made by her former neighbours.
5. The Council neither confirmed nor denied that it held the information in reliance on s 40(5) of the Freedom of Information Act 2000 (FOIA). The tribunal agrees with the Information Commissioner (the Commissioner) that the request should have been considered under regulation 13(5) of the Environmental Information Regulations 2004 (EIR), because it relates to planning.
6. The Appellant complained to the Information Commissioner. Part of the requested information was the Appellant's own data and this was dealt with by the Commissioner as a subject access request under the DPA. The tribunal has no jurisdiction to deal with this part of the request.
7. In relation to the part of the request over which the tribunal has jurisdiction, the Commissioner issued Decision Notice FS50633024 finding that the exception under regulation 13(5) of the EIR applied and that the Council was correct to state that it could neither confirm nor deny whether it held the information. The Decision Notice found that a complainant and the subject of any complaint would have a reasonable expectation that the fact that a complaint had been made by or about them would remain confidential. She weighed the public interest in disclosure against the consequences of disclosure including that disclosure could deter future complaints and could be distressing to both parties.

The relevant law

8. The relevant parts of the EIR provide as follows:

Regulation 5(1):

... a public authority that holds environmental information shall make it available on request.

Regulation 13:

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information to the extent that –

(a) the giving to a member of the public a confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded

...

9. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:
...data which relate to a living individual who can be identified... from those data, or ... from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.'
10. The relevant data protection principle is the first one:
Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless... at least one of the conditions in Schedule 2 is met.
11. The conditions in schedule 2 include:
 6. 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.

Discussion and conclusions

12. It is not disputed that the requested information amounts to personal data. The question for the tribunal is whether disclosure would breach the first data protection principle, i.e. would it be fair and lawful and meet one of the conditions in schedule 2?
13. In deciding whether disclosure would be fair and lawful we take into account the possible consequences of disclosure and the reasonable expectations of the complainant and the Councillor. We agree with the Commissioner that there is a reasonable expectation that the fact of a complaint about a Councillor would remain confidential. We agree that the disclosure of the fact of a complaint could cause distress and embarrassment to both parties, and might deter others from making complaints.
14. We accept that there is a general legitimate public interest in transparency, and in knowing whether complaints have been made against Councillors. The Appellant also has a private interest in knowing whether or not this particular complaint was made, because she considers that it was triggered by the inappropriate disclosure of an email she sent to the Council. However, having regard to the consequences of disclosure and the high level of confidentiality normally attaching to complaints of this nature, and balancing this against the interests in disclosure we agree with the Commissioner and conclude that disclosure would not be fair under the first principle. Further, we agree with the Commissioner that it is not proportionate to disclose whether or not a complaint

has been made in order to respond to the specific concerns raised by the Appellant. The question of whether or not the particular email was disclosed inappropriately and any other concerns the Appellant has about other the conduct of other Councillors can be, and to some extent has been, investigated through other channels.

Signed
Sophie Buckley

Judge of the First-tier Tribunal
Date: 1 August 2018
Promulgation date: 9 August 2018