



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

Appeal Reference: EA/2018/0048

Decided without a hearing

**Before
KAREN BOOTH
JUDGE**

**STEPHEN SHAW and NIGEL WATSON
TRIBUNAL MEMBERS**

Between

GREG HENDRICK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Decided on the papers on 8th August at Field House, London

DECISION

1. The decision notice issued by the Respondent on 13/2/2018 (reference: FER0681637) is in accordance with the law and the appeal is therefore dismissed.

REASONS

Background to the appeal

2. The Appellant lives at an address in Suffolk ("Cottage A"). Cottage A is one of two semi-detached cottages. The other cottage ("Cottage M"), which was derelict and uninhabitable for a time, is in separate ownership. The Appellant has been involved in disputes with the owners of Cottage M and also with the occupiers of a detached cottage on the other side of his property ("Cottage B"). He has also been in related disputes with Mid Suffolk District Council ("the Council") for many years.
3. The information request that is the subject of this appeal relates to Cottage B. However, it is apparent from some of the appeal grounds and submissions provided by the Appellant that the Council's involvement with past issues relating to Cottage M are also relevant to the background to this appeal.
4. The title to Cottage M was acquired through what is known as adverse possession ("squatter's rights") which led, in 2007, to legal proceedings in which the Appellant unsuccessfully objected to the registration of "Mr X" and "Ms Y" as proprietors and applied to become registered as proprietor himself. Mr X subsequently carried out works of extension and refurbishment on Cottage M. The Appellant initiated proceedings against Mr X in connection with those works (which consisted of a claim for damages for nuisance, an application for an injunction to regulate future conduct of work and a boundary dispute). The nuisance claim was settled and the injunction application was dropped. On 17/10/13, a Recorder at the Norwich County Court gave judgement in favour of the Appellant in relation to the boundary dispute (a copy of the Judgement is at page 103 of the bundle) and ordered rectification of the title registers of both Cottages. In the course of those proceedings the Recorder heard evidence from a number of persons, including an officer of the Council who was described in the judgement as "a thoroughly unsatisfactory witness" and whose actions in a particular respect were described as ".....in a small way, an abuse of power".
5. Those court proceedings gave rise to a complaint by the Appellant to the Council (which agreed on 7/8/14 to introduce appropriate improvements and changes – page 67 of the bundle) and a complaint to the Local Government Ombudsman ("the LGO") (which couldn't be investigated as they related to court proceedings and alleged criminal matters – page 22). The Appellant made a further complaint to the Council in June 2017 about works being undertaken at Cottage M, which was investigated and rejected (page 63).

6. The Appellant's concerns about Cottage B and its occupiers relate to an extension at that property (which he alleges encroaches on to his garden), the alleged unauthorised removal of his hedge, the re-siting of an oil tank and the alleged dumping of waste at the rear of his property.

The request for information and the response

7. On 2 July 2016, the Appellant wrote to the Council requesting:

“a copy of the [1] planning and [2] building control files and [3] environmental control file for [Cottage B]”

The bundle of evidence does not include a copy of the original request, but it is apparent from page 69 that those were the terms of the request.

8. The Council's initial response dated 22/8/16 can be summarised as follows:

- Planning files are available via the Council's online planning record (address provided) and paper files are available at the Council's planning reception. An online search from 2008 had revealed no applications.
- The building control information was not being made available in reliance on regulation 12(3) (exceptions to the duty to disclose) and regulation 13 (personal data) of the Environmental Information Regulations 2004 (“the EIRs”).
- No environmental control information was held.

9. Following an internal review on 12/10/16, the Council advised the Appellant as follows.

- The planning files had been updated online and all files should be available via the planning portal (reference 1253/00).
- The Council was continuing to refuse to make the building control information available for the reasons stated above.
- Some environmental information had since been found but it was being withheld in reliance on regulation 12(3) of the EIRs.

A second review was requested but does not appear to have been undertaken.

The complaint to the Information Commissioner

10. The Appellant made a complaint to the Respondent about the way in which the Council had dealt with his request for information.
11. On 12/10/17 (page 72), the Respondent's Case Officer began her investigation. She raised a number of queries with the Council. She also requested a copy of the withheld information.
12. On 18/12/17 (page 78) the Council responded to the Respondent's queries.

- *Planning file* – The Council provided a link to the address at which the information could be found. They acknowledged that the link had included some irrelevant information that had been misfiled and which would be removed.
- *Searches* – They answered the queries relating to the searches that had been undertaken and explained why further environmental information (a “report” from the Appellant to the Council) had subsequently been found and disclosed to the Appellant.
- *Building control file* – They provided a copy of the withheld information to the Respondent only and explained why it was being withheld in reliance on regulation 12(3) (it contained personal information about a person’s home and an investigation by the building control team, there would be no expectation on that part of the person that the information would be disclosed to others and it was unclear whether their consent had been requested).

The position regarding what environmental control information was held was very confusing and the Respondent’s Case Officer sought clarification regarding this. The Council eventually clarified the position by explaining that they held the report referred to in the second bullet point above (but were now referring to it as a “worksheet”) and two letters dated 3/7/15 and 27/7/15. They provided the Appellant with copies of the worksheet (with redactions) and the letter dated 3/7/15¹. They withheld the letter dated 27/7/15. The redacted information and the letter were being withheld in reliance on regulations 12(3) and 13(1) of the EIRs.

The Information Commissioner’s decision

13. On 13/2/18, the Respondent issued her decision notice. She decided as follows.

- On the balance of probabilities, the Council had provided all of the information in the relevant planning files.
- The Council was entitled to withhold the building control information and the withheld environmental information in reliance on regulation 13(1) of the EIRs.
- The Council had failed to make the disclosed information available within the 20 working day deadline required by regulation 5(2) and had failed to issue a refusal notice in respect of the withheld information within the 20 working day deadline required by regulation 14(2). However, as both a response and a refusal notice had by then been issued, the Council was not required to take any steps.

¹ This is a letter from the Council to the occupier of Cottage B regarding the alleged dumping of green waste at the rear of Cottage B. The worksheet includes details of the complaint that led to that letter.

The appeal to this Tribunal

14. On 10/3/18, the Appellant appealed to this Tribunal against the Respondent's decision notice.

15. His appeal grounds (pages 21-26) can be summarised as follows.

- The Council cannot claim protection under regulations 12(3) or 13(1) because the Council had permitted the occupiers of Cottage B to remove his hedge and to build upon his garden. The release of the building control files will reveal why the Council permitted this in breach of their own procedures and planning regulations. Consideration should also be given to repeat behaviour and harassment from the Council.
- It is only due to the Respondent's intervention that the Council issued a response at all. They sought to ignore requests/complaints in order to protect wrongful actions of their officers. During the Respondent's investigation, the Council repeatedly altered its position (in breach of its Constitution).
- The relevant planning/building control applications were made prior to the establishment of computer storage. The Council are required to hold information on microfiche and other non-networked sources. These sources have been ignored by the Council.
- Building control and planning information is held for many reasons (for examples, for proof of health and safety compliance prevention of over development and abuse of planning controls etc.) and not just to record work done to a building. In particular, the purpose of building Regulations includes fire prevention (citing the Grenfell disaster and others). He refers to "a pressing social need for disclosure".
- Building control inspections/reports are made for the wellbeing of the wider public and end user of the building. These records should be disclosed in order to demonstrate the competence of relevant Council officers (suggesting that they are being withheld to hide incompetence). He notes that the Respondent has already found procedural breaches (of regulations 5(2) and 14(2)).
- The Council's reference to his "unfounded allegations" against the Council is incorrect. He refers to the court Judgement referred to above Court and the Council's alleged failure to take action against the relevant officers which "demonstrates a complete absence of integrity by [the Council] and a further reason for full disclosure of the BR files."
- As the owner of Cottage A he is entitled to know what information has been used inappropriately and falsely.
- Building control matters are in the public interest. The court case referred to above allegedly demonstrated bias. Withholding further evidence of falsified applications etc. amounts to further bias. Querying

why the Council authorised the removal of a hedge that protected his privacy and the installation of an unlawful/non-compliant oil storage tank.

- Allegations of false applications by neighbour and failure by Council officers to follow procedures.
- Further arguments about the wider public interest in disclosure and assertion that the Respondent misinterpreted the LGO decision.
- The powers of the Respondent and LGO should not be used to allow the Council to escape enquiry/justice by withholding evidence held prior to computer storage. Full disclosure is required to prevent further abuses of power, bias and harassment etc. and further breaches of the Council's constitution and the law.

The Appellant's desired outcome is stated at page 18: "The ICO has failed to act and failed to consider the wider public interest. I would like building regulation files & documents on microfiche disclosed as well as other documents held in the environmental & planning depts. And the behaviour of [the Council] be sanctioned or referred to the LGO."

16. The Respondent's Response to the appeal is at page 29 of the bundle. This expands on the relevant legal framework and includes submissions on the grounds of appeal.
17. The Appellant subsequently submitted various additional planning/building control documents and a final written submission dated 24/6/18 in which he put forward further arguments aimed at showing "that it is in the broader Public and Social interest to release Building Control and Council records in this case" and that "Showing the failures of the Council Publicly is in the broader Public Interest".

In that submission he covers many issues that concern him regarding works at Cottage B, including: "overlooking issues" (the removal of the hedge between his property and Cottage B); foundation depths; sewer pipe installation issues; and alleged fire hazard issues relating to the siting of an oil tank. He again refers to the powers of the Respondent and the LGO "being used to dismiss and conceal wrongdoing by the Council". He asserts that "Non disclosure poses a further risk of damage or harm to People and their Environment". He repeats his concerns about corruption and abuse of power on the part of Council officers and considers that it is for the Council and the Respondent to explain why this is being tolerated.

Our task and the issues we had to decide

18. Our task is set out in section 58 of FOIA:

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

19. The relevant provisions of the EIRs are regulations 5(1), 12(1) to (3) and 13(1) and (2), which (at the relevant time) provided as follows.

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.

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.

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

20. The issues that we had to decide were as follows.

- **Issue 1:** Whether the Respondent had correctly concluded that, on the balance of probabilities, no further relevant planning information was held by the Council.
- **Issue 2:** Whether the Council had correctly decided that the relevant building control information and the withheld environmental information could be withheld in reliance on regulations 12(3) and 13(1).

21. We could not consider the Appellant's allegations -

- that the Council had permitted the occupiers of Cottage B to remove the Appellant's hedge and build on his garden;
- about false applications by neighbours and alleged failures by Council officers to follow procedures;
- about abuses of power, bias and harassment on the part of the Council and its officers.

As regards the Appellant's desired outcome, we have no power to impose sanctions on a public authority or to refer matters to the LGO.

Determination on the papers

22. 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 open bundles of evidence include lengthy submissions made by both parties, which were helpful and thorough.

23. The evidence before us consisted of: the papers in the open hearing bundle (280 pages); the additional open documents; and a closed bundle (comprising the withheld building control and environmental information and unredacted copies of pages 86 and 89 of the open bundle).

What we decided and why

Issue 1

24. The case law relating to the issue of whether information is held by a public authority has established that the test to be applied by the Respondent is whether, at the relevant time and on the balance of probabilities, the authority held information that fell within its scope. On a complaint by an applicant, the Respondent will investigate the adequacy of the search made by the public authority. Where the issue of whether information is held comes before the Tribunal, it is our task to review the Respondent's conclusions and we must also decide the issue on the balance of probabilities. We cannot demand

certainty. We will need to be satisfied that the public authority has carried out a reasonable search (i.e. a search that has been conducted intelligently and reasonably). An exhaustive search conducted in unlikely places is not required. We need to consider all relevant factors, including the scope of the search and the rigour and efficiency with which it was conducted.

25. The Council has made planning information falling within the scope of the request available to the Appellant by providing him with the relevant online link (page 78). After being alerted to the presence of information within that link that was not relevant they arranged for it to be removed. The Appellant considers that further information is held *but, significantly, he hasn't identified what he thinks is missing*.
26. We noted the detailed questions asked by the Respondent's Case Officer about the searches that had been undertaken (page 75) and the Council's responses (pages 78-79). We were satisfied, on the balance of probabilities, that further planning information (and environmental information was not held).
27. The Council is under a legal duty to hold planning records. The obvious location in which the planning information would be held is the online planning record/portal. The Council advised that it had been updated. We noted that searches were undertaken of all networked resources by address. As regards the environmental information, a further search was undertaken of the street (which revealed additional information). They said they believed that the planning information that was been held in an archived file was scanned on to the portal. They acknowledge that further relevant information might at some stage have been held and deleted/destroyed but they could not determine if that was the case and, if so, when that occurred. We considered these responses to be reasonable and credible. We were a bit puzzled regarding the response at bullet 8 on page 79 (second sentence), but we took this to mean that a search of the indices had been made.
28. On the evidence before us, we were satisfied that the Council had conducted a reasonable search of the records where the information would be likely to be located with sufficient rigour and efficiency, and that the Respondent had properly investigated the adequacy of the search.

Issue 2

29. After reviewing the withheld information, we were satisfied that the Respondent had correctly relied on regulations 12(3) and 13(1) in refusing to disclose that information.

Withheld building control information relating to Cottage B

30. We were satisfied that this information fell within the meaning of "personal data" (section 1(1) of the Data Protection Act 1998):

"personal data" means 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,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;”

31. The withheld information consists of the information in the building control file (40 single sided pages) about building works proposed by the individual(s) who owned Cottage B 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 of the property owner(s) and the anticipated cost of the works etc.). It includes other information that is less obviously so (for examples, plans and measurements, inspection requests and site inspection record sheets etc.).

Even if all of the data that identified individuals were stripped or redacted from the documentation in the building control file, that stripped/redacted data would still be in the possession of the data controller (i.e. the Council). *All* of the information, therefore, falls within the definition of “personal data”.

32. We then had to consider whether the disclosure of the information would contravene any of the data protection principles.

33. The data protection principles are set out in Schedule 1 to the DPA. For the purposes of disclosure under FOIA, only the first data protection principle is of likely relevance:

“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.”

[“sensitive personal data” is defined in section 2 of the DPA as follows:

“In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992,

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.”]

34. The withheld building control information did not include any sensitive personal data. We only needed, therefore, to consider Schedule 2. The only Schedule 2 condition of potential relevance is condition 6(1):

6(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.

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

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

36. As regards bullet 1, the third party in this case is the Appellant. As to whether, in seeking the information included in the building control file, he was pursuing a *legitimate interest* it was not clear to us that he was. We noted his concerns regarding an oil tank and the removal of a hedge and it is arguable that those concerns amount to a legitimate interest. However, as regards bullet 2, it was not clear that disclosure of the building control information was *necessary* for the purposes of that interest; it was not apparent to us how the disclosure of all or some of the information could help him to pursue those issues. He also refers on many occasions to a wider public interest in disclosure, which we did not accept (see below).

37. As regards bullet 3, we were satisfied that the answer to the question in bullet 3 was “yes”. Disclosure under the EIRs is a disclosure to the world at large, not just to the requestor. Our understanding was that building control information (unlike planning information) is not generally accessible to the public because there is generally no wider public interest in such information. The withheld information includes some highly personal information in respect of which the individual(s) concerned would clearly have an expectation of privacy. We noted from the Respondent’s Response (paragraph 35 on page 39) that building owners are not informed that their building control information may be made publicly available, which reinforces that expectation generally. We agreed with the Respondent that disclosure of the withheld building control information would be unwarranted in this case due to the prejudice this would otherwise

cause to the privacy rights of the individual(s) concerned and that disclosure would also be unfair.

Withheld environmental information relating to Cottage B

38. After reviewing the withheld information it was clear to us that this also fell within the meaning of personal data. As it also included *sensitive* personal data, it could not be disclosed unless one or more conditions in Schedule 3 of the DPA was satisfied. That was clearly not the case and it was, therefore, unnecessary for us to further examine whether the disclosure would be otherwise fair and lawful.

General points

39. Contrary to the Appellant's assertions, the Council *could* rely on regulation 13 to withhold information that includes personal data if its disclosure would breach any of the data protection principles (and, indeed, is *prohibited* by regulation 13 from disclosure in those circumstances).

The Council did not await the Respondent's intervention before issuing a response to the appeal.

Having reviewed the withheld information, we did not accept that there was any "pressing social need" for its disclosure. The building control information relates to building works at a modest, privately owned cottage and not a building to which a wider public interest is attached. The planning/building control issues raised by the Appellant are his personal objections to what has been done on neighbouring land, some of which allegedly breach his own property rights. There is no indication, other than as asserted by the Appellant, that they are of wider social interest. The Appellant has been involved in court proceedings in the past relating to another neighbouring property, in which the Judge criticised a particular Council officer. Those events have been the subject of a complaints process investigated by the Council. The Appellant makes unfounded allegations of continuing bias and abuse of power. The Respondent's powers have not been used to allow the Council to escape enquiry/justice. The Respondent's task was to consider whether the Council had dealt with his request for information in accordance with the EIRS. Apart from the breaches of regulations 5(2) and 14(2) (and the deficient processes/practices mentioned in paragraph's 58 and 59 of her decision), the Respondent decided that it had, and we agreed.

Conclusion

40. For the reasons set out above we were satisfied that the Respondent's decision notice was in accordance with the law and we dismissed the appeal.

Signed: Karen Booth

**Judge of the First-tier Tribunal
Date: 24th September 2018**