



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER0846299**

Appeal Reference: EA/2020/0022P

**Considered on the papers
On 13 January 2021**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

KATE GAPLEVSKAJA & NAOMI MATTHEWS

Between

DEBORAH KOL

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DECISION AND REASONS

1. Ms Kol occupies part of a listed building. The local planning authority Banstead and Reigate Council approached Historic England in connection with the listed building. Officials of Historic England inspected and took photographs. Ms Kol entered into correspondence with Historic England and on 26 March 2019 (following on from a request for information on 20 February) made a further request under the Freedom of Information Act (FOIA):-

"I did not find amongst the attachment the documents referenced in your reply to Q6: 'We first became involved in application [redacted] on the 4th January 2019 when Reigate and Banstead Borough Council sought Historic England's advice regarding possible unauthorised works. We were formally consulted on this case on the 23rd January 2019, and provided the council with our response on the 19th February 2019. We were also formally consulted on application [redacted] on the 23rd January 2019, and provided our response on the 13th February 2019...'

If it is not too much trouble, might I ask you for copies of the correspondence between Reigate and Banstead BC and Historic England which you confirm are in your possession ie: dated 04/01/19, 23/01/19, 19/02/19 (pertaining to [redacted]) and then 23/01/19, 13/02/19 and 13/02/19 (pertaining to [redacted]) and copy of notes and photos taken during and following the named site visit on 07/02/19."

2. Historic England declined to provide the information relying on an exemption in Regulation 12(5)(b) of the Environmental Information Regulations (EIR). On internal review it maintained this stance. Ms Kol complained to the Information Commissioner.
3. In her decision notice the Commissioner confirmed that the relevant legislation was EIR rather than FOIA. Regulation 5 provides (so far as is relevant):-

Duty to make available environmental information on request

5. – (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.

.....

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

4. The Commissioner, considered Section 3(2) of the Data Protection Act 2018 (DPA) which defines personal data as:-

"any information relating to an identified or identifiable living individual".

5. She considered the information as being the personal data of Ms Kol and therefore the information was excluded from disclosure by Regulation 5(3). She advised:-

31. The Commissioner cannot require a public authority to take action under the DPA via an EIR decision notice. However in view of her decision that the withheld information comprises the personal data of the complainant, HE should consider providing a response to the complainant under the DPA in respect of the information she requested.

6. In detailed grounds of appeal (quoting extensively from the caselaw) Ms Kol argued that there had been an error of law and the request should have been considered under FOIA. She explicitly stated that she “disagreed with the decision notice in part only, namely that the requested information is characterised as “environmental”.” The explicit objects of the appeal were entirely around the identification of the correct information governance regime, for the Commissioner to change her guidance and “For the First-tier Tribunal to call in the disputed information from Historic England in order to decide if the information is environmental for EIR purposes”. She stated:-

“3. ICO did on its own accord make a determination on the Decision Notice that the requested information should be characterised as personal data. This part of the decision notice is not the subject of this appeal and the FTT is not being requested to make any decision on issues of personal data”

7. An attempt was made to strike out the appeal as entirely academic since the EIR provision with respect to personal data has its equivalent in FOIA and accordingly there was no practical consequence of the appeal. However Ms Kol was given the opportunity to continue with her appeal.
8. The Commissioner maintained her position explaining that:-

“All of the information is personal data because it is all contained in a file about the appellant’s house in the context of her being investigated for allegedly making non-compliant alterations and in the context of planning application supported by her. The purpose nature and content of the dataset is such that it is linked to the appellant as an individual.”

9. In the various documents she has submitted Ms Kol has accepted that photographs taken were personal data. However she argued that some of the data was mixed data – in part personal in part not personal data. She submitted that Historic England was acting outside its statutory powers and therefore its assertion that all the information it held was personal data could not be valid because it would not be in conformity with Historic England powers. In support of this assertion she submitted material relating to an unsuccessful Subject Access Request and argued that she was entitled to a remedy under GDPR/DPA. Ms. Kol argued that her request should have been considered under DPA. She also maintained her position that the material should be considered under FOIA rather than EIR.

Issues for the tribunal

10. Although in her lengthy submissions Ms Kol has raised many issues, much of what she seeks is beyond the power of this tribunal. Similarly arguments about the use of the term “manor house” are not material. The tribunal’s jurisdiction and role is set out in FOIA which provides by s58:-

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.

11. The jurisdiction is extended from FOIA to EIR by Regulation 18:-

18. –(1) The enforcement and appeals provisions of the Act [i.e.FOIA] shall apply for the purposes of these Regulations as they apply for the purposes of the Act...

12. The jurisdiction of the tribunal is limited to rights under FOIA/EIR. The provisions of GDPR/DPA are referred to in EIR/FOIA to control or limit the exercise of rights of access to information under FOIA/EIR. The positive rights of data subjects cannot be enforced by an appeal to the tribunal, it does not have the power to determine whether her SAR should be complied with. While the Commissioner has specific responsibilities with respect to both information governance and data governance they are distinct and the very limited role of the tribunal with respect to information does not extend to the broad sweep of her decisions as the regulator of data, nor can the tribunal consider complaints against the Commissioner.

13. The task for the tribunal is limited to determining whether, in the light of the evidence, the Commissioner's decision is correct in law. There are two issues raised by this appeal which fall within the jurisdiction of the tribunal. The first is the correct information governance regime and the second is whether the material is personal data.

14. Turning to the second question, personal data is defined by GDPR which provides by Article 4(1):-

'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;'

15. The definition is very broad and pertains to **any information relating to an identified...natural person**. Ms Kol's argument that the data is "mixed" does

not help her, either the information within a data file is personal data or it is not. The data in question is in a file relating to Ms Kol's property which has been generated in connection with her planning application with respect to alterations and an investigation into whether works have been carried out in breach of the law. The content, nature and purpose of the data is focussed on and inextricably linked to her, her intentions and actions. The (somewhat improbable) argument she has advanced that Historic England exceeded its statutory powers does not assist her with the question of whether or not the information is personal data.

16. The first and only question originally raised by this appeal, is the identification of the correct information governance regime - EIR or FOIA. The difficulty with this ground of appeal is that both S40 FOIA and Regulation 5(3) of EIR use GDPR/DPA as the framework within which questions of personal data are considered. The question is entirely academic EIR/FOIA makes no difference to the outcome of *this* appeal and accordingly this tribunal should not, in the circumstances of this case, deal with it.
17. The tribunal is satisfied that this appeal is misconceived and the appeal is dismissed.

Signed:

Chris Hughes

(Judge of the First-tier Tribunal)

Date of Decision: 02 February 2021

Date Promulgated: 08 February 2021