

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date: 21 October 2010**

**Public Authority:** Carmarthenshire County Council  
**Address:** County Hall  
Carmarthen  
Carmarthenshire  
SA31 1JP

### **Summary**

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The complainant requested the full building control file ("project file") relating to the design and construction of a particular property. The Council considered the request in accordance with the EIR and stated that the information requested was exempt under regulation 13. The Commissioner has investigated and finds that the Council correctly applied regulation 13 of the EIR to some of the withheld information but that other information should have been disclosed.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## Background

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3. The Building Regulations are made under powers provided in the Building Act 1984, and apply in England and Wales. The current edition is the 'Building Regulations 2000' (as amended) and the majority of building projects are required to comply with them. They exist to ensure the health and safety of people in and around all types of buildings (i.e. domestic, commercial and industrial). They also provide for energy conservation, and access to and use of buildings.
4. The disputed information in this case is a project file relating to the design and construction of a particular property. The property in question is not the complainant's own. Since the improvement of this property was subject to Building Regulations, the property owners were required to seek Building Regulations approval. The Council is responsible for granting this approval once a construction is complete and monitoring the construction as it progresses, in line with the Building Regulations. The project file contains some personal data of the complainant and the owner of the property.

## The Request

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5. On 25 October 2008 the complainant wrote to the Council regarding Building Regulations relevant to the property in question and asked for:  
  
*"the project file and to be supplied with copies of the structural appraisal/assessment as mentioned by [name of Council official]"*.
6. The Council responded to the request on 25 November 2008. The Council disclosed the structural appraisal/assessment. The Council withheld the remainder of the project file by virtue of regulation 13 of the EIR. The Council stated that included within the project file were copies of correspondence between the Council and the complainant, to which it assumed the complainant already had access. As such, the Council did not consider disclosure of this information to be necessary. The Council stated that the remainder of the file constituted the personal data of the owner of the property and that disclosure would breach the first data protection principle.
7. On 2 December 2008, the complainant requested an internal review of the Council's decision.

8. On 9 January 2009, the Council issued the findings of its internal review. The Council upheld its decision to withhold the project file requested under the provisions of regulation 13 of the EIR.
9. On 18 November 2009, the complainant wrote a further letter to the Council. The complainant referred to three Decision Notices issued by the Commissioner in relation to similar requests, where the complaints had been upheld. The complainant invited the Council to reconsider its request.
10. The Council responded to the complainant on 15 December 2009. The Council explained that, in its view, the Decision Notices referred to related to requests for significantly different information to the project file that he had requested. The Council maintained that the information the complainant had requested was exempt under regulation 13 of the EIR.
11. Between December 2009 and February 2010 further exchanges between the complainant and the Council took place relating to concerns about the property in question. On or around 25 February 2010, the complainant wrote to the Council with the following request:

*"I will be grateful if you will supply me with copies of all documents from the above file [the project file] which provide proof that the roof, walls and foundations of this old building are capable of supporting the new loads to be imposed on them, i.e. structural engineer's letter and calculations"*

12. On 25 March 2010, the Council wrote to the complainant, providing some additional information within the scope of the request received on 25 February 2010. The Council advised that after careful consideration it had determined that the information disclosed related "only to a building with no reference to an individual". The Council has since explained to the Commissioner that this information should not have been disclosed to the complainant as it formed part of the project file in question.

## The Investigation

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### Scope of the case

13. On 25 March 2010, the complainant contacted the Commissioner to complain about the way his request of 25 October 2008 had been

handled. The complainant specifically asked the Commissioner to consider whether the project file he had requested should be disclosed.

14. During the course of his investigation, the Commissioner determined that some information contained within the file had already been disclosed, as a result of the complainant's request of 25 February 2010. This information comprised of:
- Structural appraisal/assessment which had been disclosed to the complainant on 25 November 2008
  - Letter from Atebglas Cyf Consulting Engineers to Roberts Building Consultants Ltd dated 31 July 2007 which had been disclosed to the complainant on 25 March 2010
  - Letter from Atebglas Cyf Consulting Engineers to Roberts Building Consultants Ltd dated 15 December 2008 which had been disclosed to the complainant on 25 March 2010
  - Letter from Atebglas Cyf Consulting Engineers to Roberts Building Consultants Ltd dated 5 July 2005 which had been disclosed to the complainant on 25 March 2010
  - Structural calculations for the "amended first-floor mezzanine" which had been disclosed to the complainant on 25 March 2010
  - Structural calculations for the "new first-floor mezzanine" which had been disclosed to the complainant on 25 March 2010
15. In addition, all correspondence between the Council and the complainant in reference to his information request and concerns about the property in question were also included within the project file.
16. On 2 September 2010, the Commissioner contacted the complainant to clarify whether the scope of his complaint included the items listed in paragraphs 14 and 15 of this Notice. The complainant confirmed that he wanted access to the project file in its entirety. The Commissioner therefore understands the scope of the complaint to concern that part of the project file which had not already been disclosed to the complainant as a result of his 25 February request.

## **Chronology**

17. Between 18 August 2010 and 26 August 2010, the Commissioner wrote to the Council on a number of occasions asking it to review the project file to identify any information that was not exempt under regulation 13 of the EIR. On 1 September 2010 the Council confirmed that the information listed in paragraph 14 of this Notice, had already been disclosed. The Council also confirmed that some information contained on the project file was publicly available; for example installation manuals related to solid masonry walls and an underground

LPG tank. However, the Council maintained its view that building control project files, as a whole, constituted personal data and disclosure would breach the first data protection principle.

18. On 1 September 2010 the Commissioner wrote to the complainant to confirm whether he was interested in access to information which was already available in the public domain, for example the installation manuals. The complainant maintained that he wished to pursue his complaint in respect of the full project file.

## Analysis

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### Regulation 13(1)

19. The exception under regulation 13(1) applies to information that is the personal data of an individual other than the applicant (the complainant), where disclosure of that information would breach any of the data protection principles or section 10 of the Data Protection Act ("DPA").

### Is the information personal data?

20. In considering whether the Council has correctly applied regulation 13(1) of the EIR to the withheld information, the Commissioner has first considered whether the withheld information can be considered to be 'personal data'.
21. According to section 1(1) of the DPA, personal data can be defined as follows:

*"'personal data' means data which relate to a living individual who can be identified –*

- a) from those data*
- 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 or any other person in respect of the individual"*

*and includes any expression of opinion about the individual and any indication of intentions of the data controller or any other person in respect of the individual".*

22. In considering whether the information requested is 'personal data', the Commissioner has also taken into account his own guidance on the issue.

23. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
24. The Commissioner notes that two generic installation manuals are included on the file. These documents are manuals relating to the construction of solid masonry walls and an underground LPG tank. They do not relate directly to the property in question and therefore the Commissioner does not consider them to be personal data. As such, in respect of the two installation manuals, regulation 13 does not apply and the Commissioner considers that these manuals should not have been withheld by the Council.
25. Part of the project file consists of correspondence between the Council and the complainant, dated between July 2005 and April 2009. In its initial refusal notice to the complainant of 25 November 2008, the Council stated that "part of the file is comprised of correspondence between the Authority and yourself, which it is assumed will already be in your possession".
26. The Commissioner considers the correspondence between the Council and the complainant to be the personal data of the complainant, and, accordingly, this information is exempt from disclosure under regulation 5(3). Instead the access route for this information would be via a subject access request under the DPA. Further, this information was provided to the Commissioner by the complainant as well as the Council, so this information is clearly already accessible by the complainant. The subject access matters in respect of the personal data of the complainant have been addressed separately under the DPA by the Commissioner.
27. The remainder of the project file relates to the design and construction of a specific property. All information (apart from the manuals referred to in paragraph 24) contained within the file relates to the property in question. It is the Commissioner's view that an individual or individuals can often be identified from a postal address through sources such as the Land Registry and the electoral roll. He is therefore satisfied that the information contained within the remainder of the project file relates to a living individual (the owner of the property), and that the individual can be identified from the information in question.

### **Would disclosure contravene any of the principles of the DPA?**

28. As the Commissioner is satisfied that the remainder of the requested information (that is, apart from the installation manuals and the personal information of the complainant) constitutes the personal data of the owner of the property in question, he has next considered whether disclosure would breach any of the data protection principles. The Council stated that it considered disclosure of the withheld information would breach the first data protection principle.

### **First data protection principle**

29. The first data protection principle has two main components. They are as follows:
- a) The requirement to process all personal data fairly and lawfully; and
  - b) The requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
30. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing (including disclosure as a result of an information request) will not be in accordance with the first data protection principle. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.

### **Would disclosure of the information be fair?**

31. For the reasons set out in paragraph 24 above, the Commissioner has concluded that the generic installation manuals do not constitute personal data, and therefore considers that the exception is not engaged in respect of this information. The Commissioner also considers that the access route for the complainant's personal information would be via a subject access request under the Data Protection Act. Therefore he is not required to consider fairness in respect of this information. The Commissioner has gone on to assess the fairness of disclosing the remainder of the project file.
32. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced these against the general principles of

accountability, transparency and considered whether there was a legitimate public interest in disclosure.

**a) Expectations of the individuals concerned**

33. The Council confirmed to the Commissioner that, as a matter of practice, it does not divulge details of Building Regulation files. Neither is the Council required to make such information publicly available by law.
34. The Council is of the view that disclosure of the withheld information would be unfair. The Council has explained that the legal framework for processing and determining planning applications is different from the legal process for building applications. Whilst planning applicants are aware that their applications are subject to a statutory consultation process and certain details of their applications will be in the public domain, applicants for Building Regulations consent are not subject to the same public transparency under the Building Act 1984.
35. As a result, the Council argues that applicants for Building Regulations consent will have a reasonable expectation that their applications are not subject to public disclosure. The Council explained that only a limited number of people are likely to be affected by the outcome of a Building Regulations application and that the existing process is in place to entrust local authorities to make the required technical decisions on behalf of the public and in the absence of public scrutiny.
36. The remainder of the project file contains information documenting the property owner's adherence to the Building Regulations. In this case, the property owners were required to apply for Building Regulations consent in respect of the construction of the new building. The Commissioner is satisfied that, in this particular case, the information was provided to the Council with an expectation that it would not be disclosed.

**b) Consequences of disclosure**

37. All of the data contained in the remainder of the project file relates to the owner of the property, and is processed by the Council to determine whether he or she has complied with the Building Regulations. Where a structure is found not to be in compliance with Building Regulations, action is taken by the Council against the property owner (not the contractor or agent involved in the construction).



38. The Commissioner agrees with the Council's argument that the building control process is in place to entrust the Council to make technical decisions on behalf of the public. The Council is required to follow strict procedures in ensuring that constructions are built in accordance with the Building Regulations.
39. As such, the Commissioner is persuaded that, where information contained on the project file is not already in the public domain, its disclosure would be unwarranted since such information is, by its nature, private to the property owner and not information that he would want or expect to be disclosed into the public domain. The Commissioner does not consider there to be an overwhelming public interest in disclosure because the building control process is well established and, in itself, provides reassurance that a construction has been built in line with the regulations.
40. The Commissioner has considered the submissions made by the Council and the nature of the withheld information and he is satisfied that disclosure of the remainder of the project file and the associated loss of privacy has the potential to cause unjustified detriment to the individual in this case.

**c) General principles of accountability and transparency**

41. The complainant indicated that he considered disclosure of the withheld information necessary to ensure that the correct process had been followed by the Council. The complainant stated that the proper administration of the Building Regulations is of general public interest to ensure that building work is being carried out safely and in accordance with the law. The complainant also stated that he considered "any papers on the file that may show personal data can be photocopied, redacted, and these redacted copies placed on the file for me to see" but that information relating to Building Regulations should be publicly available in order to meet the public expectation for open and transparent processes.
42. The Council has recognised that there is a legitimate public interest in being assured that the Council has properly assessed compliance, or otherwise, with the Building Regulations. The Council considers in this case, however, that the interest here has been met by the disclosure of the appraisal document.
43. The Commissioner acknowledges that there is a legitimate public interest in the building control process to determine that Building Regulations have been properly applied. However, in this case, he does not consider there to be sufficient legitimate interest to warrant

circumvention of the existing Building Regulations processes and procedures. The Commissioner considers that the process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately. The Commissioner considers that to some extent the information that the Council has already disclosed in this case, satisfies this interest. The Commissioner also believes that in this case there is a greater interest in protecting the integrity of the building consent application process and that disclosure could damage the public trust in the Building Regulations processes.

44. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject (i.e. the property owner). After considering these factors, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject.
45. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on to consider the other elements of the first data protection principle. The Commissioner therefore upholds the Council's application of regulation 13(1) in respect of the remainder of the project file because disclosure of this information would breach the first data protection principle.

## The Decision

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46. The Commissioner finds that the public authority was correct to apply regulation 13(1) of the EIR to the information that is the personal data of the property owner.
47. The Commissioner finds that the public authority incorrectly withheld some elements of the withheld information to the extent that some information is not the personal data of the property owner.

## Steps Required

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48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose to the complainant the information that is not the personal data of the property owner or the complainant. For clarity, this information is the following:

- Instruction manuals described in paragraph 24 above.
49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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50. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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51. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 21st day of October 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Regulation 13 - Personal data

**Regulation 13(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.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any 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
  - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it;and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

**Regulation 13(3)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

**Regulation 13(4)** In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**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 of the 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; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.