

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 27 August 2019

**Public Authority:** Carmarthenshire County Council  
**Address:** [foia@carmarthenshire.gov.uk](mailto:foia@carmarthenshire.gov.uk)

**Decision (including any steps ordered)**

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1. The complainant has requested various Building Control files for barn conversions. Carmarthenshire County Council initially refused the request on the basis of regulation 12(5)(e) of the EIR. However, during the course of the Commissioner's investigation, it altered its position, providing some generic information and refusing the bulk by virtue of regulation 13 of the EIR on the basis that the information is third party personal information. The Commissioner's decision is that Carmarthenshire County Council was entitled to rely on regulation 13 of the EIR to withhold the requested information. However, its delay in providing the information not falling within this exception, constitutes a breach of regulation 5(2) of the EIR. The Commissioner does not require the public authority to take any steps.

**Request and response**

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2. On 26 March 2018, the complainant wrote to Carmarthenshire County Council and requested the following information:

*"Whilst I wait for a list of building control alteration work applications which are not barn conversions, I would be grateful if I can have copies of the 15 full plans barn applications which I have marked with a tick on the attached copy of the list you sent me on 5 January 2018."*

3. The Council responded on 26 March 2018. It confirmed that it held the requested information but refused to disclose the files on the basis of regulation 12(5)(e) of the EIR on the grounds that disclosure would adversely affect the confidentiality of commercial information.
4. Following an internal review the Council wrote to the complainant on 13 August 2018. It confirmed it was satisfied with its original response to refuse the request by virtue of regulation 12(5)(e).
5. During the course of the Commissioner's investigation, the Council withdrew its reliance on regulation 12(5)(e) in favour of regulation 13 of the EIR.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 28 August 2018 to complain about the way his request for information had been handled. The complainant considers that there cannot be a greater public interest in being able to inspect the Council's files to see if it is enforcing the Building Regulations structural safety regulations correctly and the construction of the buildings is legal, safe and won't collapse and kill people.
7. The complainant has further stated that for the Council to argue that it needs to keep the files confidential to protect the commercial interests of itself and third parties, is so patently not a reasonable interpretation of the EIR that he considers it a fundamentally unethical way to behave.
8. The complainant also stated that the Council has previously supplied copies of building control files and that the principle of allowing the files to be inspected was established by the First-tier Tribunal ruling in EA/2011/0200.
9. The Commissioner considers that whilst the ruling on one particular case can be a helpful reference point, that each complaint must be considered on a case by case basis. As the Council has withdrawn its reliance on regulation 12(5)(e) of the EIR in favour of regulation 13, the scope of the Commissioner's investigation will be to consider whether the Council was entitled to rely on regulation 13 to withhold the requested information.

## Reasons for decision

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### The appropriate legislation

10. The Commissioner has first considered whether the information is environmental in accordance with the definition given in regulation 2(1) of the EIR:

*"any information in written, visual, aural, electronic or any other material form on -*

*'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, Legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

11. The Commissioner considers that the information in question relates to planning consent and falls within the scope of 'measures' defined by regulation 2(1)(c).

### Regulation 13 personal data

12. 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) is satisfied.
13. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>1</sup> As amended by Schedule 19 Paragraph 307(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

16. Section 3(2) of the DPA defines personal data as:

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual 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 the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The Building Control files contain information about proposed building works from the owners of the properties and submitted to the Council for inspection and certification under the Building Regulations. In addition to information such as names, addresses and other contact details which are obviously personal data, it contains details of their plans in relation to the property regarding its internal construction and design. Additionally, they include the results and analyses of various tests which have been undertaken to determine whether the properties meet various required standards.
21. The Commissioner considers that the definition of personal data is far wider than mere names and contact details, with all of this information of biographical significance, and taken with other information held on file, it is clearly possible to identify the owners from this information. She also considers that redaction of names would not therefore remove

the personal data. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

22. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

25. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"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, in particular where the data subject is a child"<sup>2</sup>.*

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

30. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. The Commissioner notes that the complainant has valid reasons for requesting sight of the building control files as he is attempting to determine whether the Council has complied with various building regulations necessary for safety.

*Is disclosure necessary?*

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

34. The Commissioner has considered whether there is a pressing social need for the disclosure of the building control files, and whilst she acknowledges that there is a general public interest in the correct application of the Building Regulations, she notes that there is already a process in place to ensure that Building Regulations are complied with via the Council's Enforcement Department.
35. The Council did however confirm that if an individual remains dissatisfied with the outcome of an investigation by its Enforcement Department, there is no external avenue similar to the Planning process, where the concerns can be escalated.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

36. The Complainant considers the disclosure of the files as necessary to fulfill his legitimate interest as he is concerned that the Council has a fundamental mis-understanding of how the Building Regulations work, and believes that the Council is approving buildings constructed in materials and methods which do not comply with Part A of the Buildings Regulations (which deal with structural safety).
37. The complainant has further argued that not one of the 23 files he has seen previously is there reference to the Part A structural safe loading legal requirement to safely support the combined dead, imposed and wind load on the existing roof and walls.
38. The Council has confirmed that Part A is one of a number of Approved Documents by the First Secretary of State providing practical guidance in respect of the relevant parts of the Building Regulations. The Approved Documents are intended to provide guidance for some of the more common building situations, however there may be alternative ways of achieving compliance, therefore there is no obligation to adopt a particular solution contained in an Approved Document if it can be met some other way.
39. The Council further informed the Commissioner that whilst Part A is not generally relevant to conversions, it becomes relevant, and contains advice in relation to how it is to be interpreted in respect of barn conversions. Confirmation that this has been complied with is found on the checklist proforma and the conditional approval of each file.
40. It is apparent however that the complainant considers there is a legitimate interest in the disclosure of the building control files.
41. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For

example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

42. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The Primary purpose in submitting an application under the Building Regulations is to obtain approval for work to a property. The Commissioner notes that Planning laws require an application for certain types of work to be approved prior to the work being considered lawful.
46. When submitting the application, the individual(s) submitting it would have expected the details which they provided on the form to be used for the purpose of establishing what the application was for, who the application was made by, and examining whether the plans met the building regulation requirements.
47. The Commissioner notes that whilst under normal, full planning, applications there is a general expectation that the application and copies of the plans will be published and open for comment and/or objection by members of the public, there is no such requirement under the Building Regulations. The Council does not therefore routinely publish the information in Building Control files or generally make them available to other parties.
48. The Council has further informed the Commissioner that although there is nothing on the Building Control application form which states that the information is not disclosed, there is a section within the Building Control web pages outlining who has access to the information the



individuals provide during the process. The Council has confirmed that with the exception of some limited specific circumstances where the information would need to be shared, the implication would be that the information provided would not generally be disclosed.

49. Whilst the section outlining who has access to the applicants personal information is not determinative, the Commissioner considers that it does create a legitimate expectation that the information supplied is confidential.
50. The Commissioner therefore considers that the owners of the properties in question would not expect that its Building Regulation applications or subsequent investigation and approval of records would be disclosed to the whole world in response to a request for information under the EIR.
51. In respect of the consequences of disclosure, the Council has stated that the individual data subjects would potentially be annoyed and/or distressed at the loss of privacy due the disclosure of such biographically significant information.
52. The relevant factor here is that disclosure under the EIR is considered to be disclosure to world at large, and is therefore tantamount to the Council publishing it on its website. The Council must consider the detriment that might be caused to the owners of the properties by disclosure of this material, not just to the complainant but the wider public.
53. Whilst the Council has confirmed that disclosure of the withheld information may not particularly cause any wider detriment to the data subjects other than a general loss of privacy, the Commissioner considers that the general expectation of privacy a private citizen, carrying out their legitimate interests, on their own private property carries a relatively strong weight.
54. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

**The Commissioner's view**

56. The Commissioner has therefore decided that Carmarthenshire County Council was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

## Right of appeal

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57. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.

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

**Signed .....**

**Catherine Dickenson  
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