

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

Appeal References: EA/2021/0083P

**Determined, by consent, on written evidence and submissions
Considered on the papers on 1 October 2021.**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Susan Wolf
and
Ms Suzanne Cosgrave

Between

A Curtis

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that these matters were suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence of 138 pages, a CLOSED bundle and additional submissions from both parties.

BACKGROUND

4. On 26 August 2020, the Appellant wrote to his local District Council (the Council) and requested information in the following terms in relation to the property of one of his neighbours:-

I would also request that you let me have a copy of their Building Control Plans submitted to you. This request is made under the Freedom of Information Act 2018. It is noted that these are not available on the... District Council website.

5. The Council responded on 7 September 2020 and refused to provide the requested information, citing regulation 13 of the Environmental Information Regulations 2004 (EIR) which refers to personal data. There was an internal review and the Council wrote to the Appellant on 28 September 2020 stating that it upheld its original position.

THE STATUTORY FRAMEWORK

6. The relevant provisions of the EIR are regulations 5(1), 12(1) to (3) and 13(1) and (2) EIR:

Regulation 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.

Regulation 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.

Regulation 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.

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations—

- (a) would contravene any of the data protection principles..

7. By regulation 2 EIR "the data protection principles" means, materially the principles set out in Article 5(1) of the General Data Protection Regulation (GDPR).

8. Section 3(2) of the Data Protection Act 2018 (DPA) (as also applied by regulation 2 EIR) defines personal data as ‘any information relating to an identified or identifiable living individual’.

9. Materially, Article 5(1)(a) GDPR reads:-

Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’).

10. Further, by Article 6(1) GDPR:-

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (f) 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...

THE DECISION NOTICE

11. In the decision notice dated 4 March 2021, the Commissioner decided that the withheld information was personal data:-

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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names and address of the data subjects quite obviously is information that both relates to and identifies those concerned. There is also further detailed information in relation to the data subject's property. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

12. In relation to the legitimate interests issue in Article 6(1)(f) GDPR the Commissioner found that the Appellant:-

32 ...has valid reasons for requesting sight of the Building Control Plans, as they are attempting to determine whether the Council has complied with various building regulations necessary for safety purposes/to prevent damage to their own property.

33. The Commissioner considers that there may be a wider legitimate interest, such as transparency about how the Council's processes are carried out and that they are adhering to specific regulations. There is also a legitimate interest in the Council being accountable for its functions.

13. In considering that disclosure would be necessary to meet the legitimate interests the Commissioner found as follows:-

36. As disclosure under the EIR is disclosure to the world at large, it is rare that such processing will be necessary to achieve a legitimate interest.

37. In this case, the Commissioner understands that while the Planning Permission documents have been published (as per normal procedure), the Building Control Plans have not been. The Commissioner is therefore not aware that the information would be accessible other than by making a request for information under the EIR, and she accepts that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure.

14. The Commissioner considered carefully whether the legitimate interests of the Appellant outweighed the ‘fundamental rights and freedoms’ of the data subjects (his neighbours):-

39...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 FOIA 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.

45. The Commissioner notes that Planning Application documents are made public as a matter of course... There is no such requirement under the Building Regulations and as such, the Council does not therefore routinely publish the information in Building Control files or generally make them available to other parties.

47. [The Council] also advised that the information relates to the data subject’s private lives, including work that has been carried out on their personal property and to disclose this could cause significant distress to them.

51. The Commissioner sees that there is a legitimate public interest in the building control process to determine that Building Regulations are being applied properly. At the same time, the Commissioner considers that the building control process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately...

53. The Commissioner also notes that the complainant has referred to the “Planning and Building Guidance notes”, specifically points 3.22 and 5.1, which they consider demonstrates why the withheld information should be provided. Whilst the Commissioner acknowledges the document referred to, it must be considered alongside the Data Protection Act 2018, when looking to release information. In this case, the personal data of the data subjects narrowly outweighs the need for disclosure.

THE APPEAL AND RESPONSE

15. The Appellant’s grounds of appeal are dated 31 March 2021 and essentially argue that (a) the information is not personal data; (b) if it is then the legitimate interests in disclosure outweigh the rights and freedoms of the individuals. The following extracts (with original punctuation etc.) indicate the main points made by the Appellant:-

The decision of the Information Commissioner is perverse. It is not Personal Data that has been requested as the Commissioner states at paragraph 20 and elsewhere of its Decision

The Information Commissioner had been party to the design and publication of the guidance entitled Planning and Building Control Information Online Guidance Notes for practitioners (August 2006) in conjunction with Parsol (copy enclosed). This guidance in the Foreword says:-

The revised guidance in this paper will assist local authorities in publishing information in a consistent manner and help ensure that their actions are likely to conform to the statutory requirements of the Data Protection Act 1998 and Copyright Designs and Patents Act 1988.

The guidance then explains the legal framework and at paragraph 3.18 states the reasons why the applicant's names and addresses will be made available in respect of the Planning Application. Quite understandingly with regard to Planning applications, at part f) Publishing plans and drawings, at paragraph 3.22 the guidance clearly states;- Compliance with the Data Protection Act is not an issue here, plans and drawings are not personal data. (My underling)

The guide at paragraph 5.1 explains the reasons for providing information on building control applications. The Commissioner acknowledges this at paragraph 53 of its decision but incorrectly comes to the conclusion that this is personal data and should not be disclosed. This comment however confirms that this Guidance is still in force. However, the Guide continues to deal with Building Control applications, and at paragraph 5.2 advises that the general information will be focused on the property rather than the individual making the application, and that Personal Data will only be contact details of the individual making the application, for example email address and telephone number. These could so easily be redacted if they are included in the plans.

The application is jointly in a partnership by [my neighbours], thus the application is not by an individual, but a separate legal entity. The Data protection act only covers individuals.

In addition when [my neighbours] leave the property, the Building Control documents will be disclosed too, and will be the property of the new owners, the purloins will be the exact same size, as well as all the other technical building specifications, and so cannot be construed as Personal Data of [my neighbours], but solely attributable to the property.

The Commissioners at paragraph 46 allege that the subjects would not expect their personal information to be disclosed, however I have no interest in any personal information, and I not requested any, just the Building Control plans which the guidance clearly states at paragraph 3.22 and paragraph 3 of appendix 2 that they are not personal data.

The Commissioners at paragraph 47 allege that the information relates to the subject's private lives, including work carried out on their personal property. And at paragraph 48 that the Building Control plans are more detailed and contain more personal data, but fails to state what this personal information is in either of these instances. What utter nonsense, the size of the purloins needed, as demanded by the Building Regulations is not personal data!

The Commissioner at paragraph 51 of its Decision suggests that disclosure could damage the public trust in the Building Regulation process, I would counter that; the effects of secrecy and non- disclosure; is creating doubt and mistrust. If errors, malpractice or even deficient regulation are not dealt with, the risk to society is far greater than to deny the bringing of any deficiencies to light, one need just to look at the Grenfell Tower disaster, and its precursor, the Ronan Point disaster in 1966, as well as many others.

16. In her response the Commissioner supports the decision notice and relies on the decision of the First Tier Tribunal (FTT) in the case of *Abbott v Information Commissioner* EA/2018/0158 (24 January 2019) where building control information was found to be personal data and disclosure not justified, in which she says that very similar arguments to those raised by the Appellant were rejected by the Tribunal.

DISCUSSION

17. Although we are not bound by what was decided by the FTT in the *Abbott* case, we agree with what was said therein and what follows in relation to whether the information requested was personal data aligns with the approach in that case. We are also aware that another FTT appears to have accepted that building control information was personal data in the case of *Durham v Information Commissioner* EA/2019/0346 (12 March 2020) (although in that case it was decided that the information should be disclosed).
18. Thus, we conclude that the information requested in this case is personal data and agree with the Commissioner's conclusions on this point. As explained in *Abbott* and with which concur:-

21. The withheld information in the Building Control file consists of information about building works proposed by the owners of the property 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 etc.). We find that all the other information (including information such as measurements, technical details, results of tests and certificates) also relates to those individuals. We find that this information about the owners' property is biographical in a significant sense. Further, taken with the other information held on the file, it is clearly possible to identify the owners from this information. We find that all of the information falls within the definition of "personal data" and redaction of names would therefore not remove the "personal data".

19. We also need to address the Appellant's argument that the information is not personal data because it is in the name of both of his neighbours. In our view this is an unsustainable argument, and the information is simply the personal data of two individuals rather than one.
20. Having decided that the information is personal data we must go on to consider whether the information should be disclosed in any event (as happened in the *Durham* case considered below).
21. We accept the Commissioner's conclusions that the Appellant has valid reasons for requesting sight of the building control plans, as the Appellant is attempting to determine whether the Council has complied with various building regulations necessary for safety purposes/to prevent damage to the Appellant's own property. However, these valid reasons are not perhaps as strong as might be considered at first blush. There is the competing counter interest referred to by the Commissioner at paragraph 51 (above) that the building control process has been introduced with the specific aim of entrusting the Council to apply the Building Regulations appropriately, which in turn creates a greater interest in protecting the integrity of the building consent process and that disclosure could damage the public trust in the Building Regulations process. We also note that the Appellant has been told by the Council's Building Control Manager that "I have... viewed the roof drainage...I can confirm that the roof drainage, hopper and downpipe appear adequate and conform to the Part H of the Building Regulations."
22. The Commissioner also found, and we agree, that the information would not be accessible other than by making a request for information under the EIR, and therefore on balance we find that that disclosure under the legislation would be necessary to meet the legitimate interest in disclosure.
23. We thus have to decide whether the legitimate interests of the Appellant outweigh the 'fundamental rights and freedoms' of the data subjects (his neighbours).
24. The neighbours would have a reasonable expectation that the documents on the building control file would not be made public as they had not been informed that their personal data would be disclosed. Planning application documents are made public as a matter of

course, and that is well known, but building control documents are not. The building control information contains detailed information about the neighbours' property, and we are of the view that the neighbours have a strong expectation of privacy. The detailed information on the file is not already in the public domain. Further, the fact that some information may need to be revealed to a prospective purchaser, as argued by the Appellant, does not affect an expectation that it would not be published to the world at large (as is required by the EIR). We find that disclosure would cause an unexpected loss of privacy relating to the owner's private property and that this is likely to cause some distress.

25. Therefore, we agree with the Commissioner that in this case, the legitimate interests in disclosure do not outweigh the fundamental rights and freedoms of the neighbours such as to justify disclosure.
26. We note that the 'Planning and Building Control Information Online' guidance notes (August 2006), relied on by the Appellant sets out circumstances in which building control information can be provided, but point 1.1 of the document states that 'in doing so some personal information about individuals will be disclosed' and so 'it is important to comply with the requirements of the Data Protection Act...'. As we have found that disclosure, in this case, would breach a data protection principle, and not be lawful, it seems to us that this must trump any guidance which appears elsewhere in the guide.
27. We are also aware that in the *Durham* case, disclosure was found not to be unlawful. From that decision it appears that the reason for this was the more general concerns of the Appellant in that case about compliance with and operation of building regulations (described at paragraph 24 as 'a systematic failure to understand and apply building control correctly'). We would compare that with the more targeted request in the current case for building control information about a specific neighbouring property from which individuals could be identified. Thus in *Durham* the 'legitimate interests' were given more weight by the Tribunal and the 'fundamental rights and freedoms' of individuals were less affected. As the Tribunal in that case said at paragraph 23, these cases are fact sensitive and so different results can emerge depending on the particular circumstances and the information sought.
28. For all these reasons this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 19 October 2021

Promulgated: 21 October 2021