IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: EA/2010/0034

Information Commissioner's Ref: FS50176219

Heard on the papers at Holborn Bars, London, EC1N 2NP **Decision Promulgated**

On 1st June 2010 **11th August 2010**

BEFORE

Fiona Henderson

And

Ivan Wilson

And

Jacqueline Blake

BETWEEN:

SURREY HEATH BOROUGH COUNCIL

1st Appellant

and

MR KEVIN McCULLEN

2nd Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject matter:

Environmental Information Regulations
Regulation 12 (1)(b) – the public interest test
Regulation 12(5)(b) – Legal Professional Privilege
Regulation 12(11) - Redaction
Regulation 13 - Personal Data

Cases

Durant v FSA [2003] EWCA Civ 1746

S v Information Commissioner and the General Register Office EA/2006/0030
Hogan and Oxford City Council v Information Commissioner EA 2005/0026 and EA/2005/0030
Guardian Newspapers Ltd and Heather Brooke v IC EA/2006/0011 and 13
Burgess v IC & Stafford Borough Council EA/2006/91
DBERR v O'Brien EWHC 164

Decision

For the reasons set out below and in the confidential schedules, the Tribunal's decision is as follows:

1. The Tribunal allows Surrey Heath Borough Council's initial grounds of appeal in the terms agreed at the directions hearing dated 16th April 2010 and orders that a redacted version of the originating letter be disclosed.

2. The Tribunal allows in part Mr McCullen's appeal finding that:
   - The request should be considered under the EIRs.
   - Most of the disputed information was personal data (excepting the penultimate section),
   - Some small sections of personal data (as set out in the confidential schedules) should be withheld as disclosure would breach the first data protection principle.
   - The rest of the disputed information should therefore have been disclosed in redacted form.

3. The Tribunal refuses ground a(ii) of Mr McCullen's appeal in that it does not find that, if the personal data belonged to Mr McInulty, he had consented to the disclosure at the relevant time.

4. Save insofar as the Tribunal has found that disclosure of some of the personal data would breach the first data protection principle, the Tribunal refuses the remainder of Surrey Heath Borough Council's supplementary grounds of appeal and finds that:

- Regulation 12(5)(b) EIRs is not engaged, and that even if it were the public interest in withholding the disputed information is substantially outweighed by the public interest in disclosure.

5. Surrey Heath Borough Council are ordered to disclose a redacted version of the disputed information (as set out in the confidential schedules) within 28 days.

6. Confidential Schedule 1 to this Decision (which deals with personal data which the Tribunal does not order should be redacted) is to remain confidential until the redacted disputed information has been disclosed.

7. Confidential Schedule 2 to this Decision (which deals with personal data which the Tribunal orders should be redacted) is to remain confidential.

First Tier Tribunal (Information Rights) Appeal Number: EA/2010/0034

SUBSTITUTED DECISION NOTICE

Dated : 11th August 2010

Public authority: Surrey Heath Borough Council

Address of Public Authority: Surrey Heath House, Knoll Road, Camberley, Surrey GU15 3HD

Name of Complainant: Mr Kevin McCullen

The Substituted Decision

For the reasons set out in the Tribunal's determination, and the closed schedules the substituted decision is that:

1. The Disputed Information within the originating letter amounts to personal data, the disclosure of which breach the first data protection principle, and is therefore exempt under regulation 13(1) EIR.

2. Disclosure of those parts of the personal data within the planning expert's report (as set out in confidential schedule 2) would reach the first data protection principle, they are therefore exempt under regulation 13(1) EIR.

3. Regulation 13 EIR has been incorrectly applied to the remainder of the planning expert's report.

4. In failing to disclose the redacted version of the planning expert's report, Surrey Heath Borough Council failed to comply with its obligations under regulations 5(1) and 5(2) EIRs which require that environmental information shall be made available on request and no later than 20 working days after receipt of request.

Steps Required

Within 28 days of the date of this substituted decision notice Surrey Heath Borough Council are ordered to disclose:

- a redacted version of the planning expert's report (redacted in accordance with confidential schedule 2),

- a redacted copy of the originating letter (as attached to their original grounds of appeal).

Reasons for Decision

Introduction

1. Mr McCullen had complained to Surrey Heath Borough Council (SHBC) in relation to their decision to permit the felling of 200 trees within a property, additionally it appeared to Mr McCullen that in relation to the grant of planning permission a Council Planning Officer had been treated more favourably than an "ordinary" applicant. SHBC's monitoring officer (Ms. Karen Whelan) produced a report dated 15th June 2007 into these and other concerns. Mr McCullen was not given a copy of the report but provided with a précis in a letter dated 15th June 2007 which included references and quotations from documents and advice received by SHBC.

The request for information

2. On 12th July 2007 Mr McCullen requested a full copy of the report and a copy of the documents and advice that the report referred to from SHBC including:

(6) "Copies of the full advice given by the two "experts" (an ex-local authority chief executive and planning officer and the expert in planning law) together with the originating letters from the council which brought about these responses. The date of these communications would be 2006-7".

3. SHBC responded to the request and insofar as the items in (6) were concerned refused disclosure under section 42 FOIA:

(1) Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information.

4. Mr McCullen challenged this refusal by letter dated 19th August 2007. In relation to item (6) he noted that SHBC had referred to "*legal **and** professional privilege*" instead of "*legal professional privilege*" which he argued sought to expand the ambit of that exemption.

5. SHBC conducted an internal review and communicated their response to Mr McCullen in a letter dated 16th November 2007. They upheld their original decision upon the same grounds and did not address Mr McCullen's point that they had wrongly extended the range of professional opinion to which the exemption applied.

6. On 17th November 2007 Mr McCullen repeated his concern relating to the extension of legal professional privilege and the matter was again reviewed internally. On 19th December 2007 SHBC again upheld their reliance upon section 42 FOIA and also relied upon section 31(2)(b) FOIA *("the purpose of ascertaining whether any person is responsible for any conduct which is improper").* No public interest arguments in relation to these exemptions were given.

7. The matter was reviewed internally for a 3rd time on 19th December 2008[1] in relation to the originating letter to the planning advisor and his report. This review did not confirm the reliance upon 31(2)(b) FOIA but maintained reliance upon section 42 FOIA. Although reference was made to the public interest test, no public interest arguments were set out in support of their decision.

The complaint to the Information Commissioner

8. Mr McCullen complained to the Commissioner on 4th September 2007. The case was allocated to a case officer in January 2009, when having viewed the disputed information, the Commissioner informed SHBC that the matter should be considered under the Environmental Information Regulations (EIRs) because the information related to *"planning matters and activities which have a direct impact on the use of land and landscape"* pursuant to regulation 2 EIRs.

9. Having agreed to reconsider the request under EIRs SHBC then failed to respond adequately to the Commissioner's queries and the Commissioner issued an Information Notice (under section 51 FOIA) on 4th March 2009.

[1] By this time Mr McCullen had already complained to the Commissioner and was waiting for his case to be allocated to a case officer for investigation.

10. When they responded, insofar as the items contained in (6) were concerned SHBC relied upon regulation 12(4)(e)[2] and 12(5)(b)[3] EIRs. Again no consideration of the public interest test was apparent from their response. During the course of the investigation Mr McCullen agreed to remove the instructions to Counsel and Counsel's advice from his complaint in relation to item (6).

11. The Commissioner found several procedural breaches in the way that the request was handled but these are not the subject of this appeal and are not dealt with further. In relation to the exemption claimed under 12(4)(e) the Commissioner found that this was not engaged as the planning Consultant was not a Council staff member and constituted a 3rd party, as such communications were not "internal". This finding is not challenged on appeal.

12. The Commissioner also found that section 12(5)(b) was not engaged in relation to the originating letter or the report. However, he did find that regulation 13 was engaged in that the contents of the report were the personal data of a third party and disclosure would be unfair (breaching the first data protection principle).

13. SHBC were ordered to disclose the originating letter within 35 days.

The appeal to the Tribunal

SHBC's original appeal

14. SHBC appealed on 20th January 2010 on the grounds that part of the originating letter should not be disclosed because it constituted the personal data of the author of the report. SHBC attached a copy of the letter with their proposed redactions[4]. In his reply the Commissioner did not object to the proposed redactions. Mr McCullen was contacted upon the direction of the Tribunal and indicated that he did not object to the proposed redactions to the originating letter.

15. It was agreed at the telephone directions hearing that:

[2] the request involves the disclosure of internal communications.

[3]disclosure would adversely affect - the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

[4] The Tribunal has not seen an unredacted copy of the letter. The Tribunal has seen the context of the redactions and received the representations of SHBC as to their general contents in the grounds of appeal. In the knowledge that the Commissioner has seen the unredacted letter and in light of the agreement between the parties, the Tribunal is satisfied that there is no need for it to see a copy of the unredacted letter.

"SHBC's grounds of appeal are to be allowed without consideration of the evidence by agreement between the parties"

and that the substituted Decision Notice would follow the proposed form of words as set out at paragraph 19 of the Commissioner's reply dated 16th February 2010 namely:

a) *The Disputed information amounts to personal data, the disclosure of which breach the first data protection principle and is therefore exempt under regulation 13(1) EIR.*
b) *[SHBC] is required to disclose the originating letter with the Disputed Information redacted."*

Mr McCullen's appeal

16. In his response to the Tribunal indicating that he did not object to the proposed redaction, Mr McCullen indicated that he wished to apply for leave to appeal out of time on different grounds. Leave was granted dated 3rd March 2010 and on 5th March 2010 Mr McCullen appealed. In response to these grounds of appeal the Commissioner served a reply dated 31st March 2010. In this document the scope of the planning expert's report was clarified as follows:

"It is understood that the Disputed Information was commissioned by the Planning advisor to review planning applications linked to a number of complaints made by another member of the public (i.e. not Mr McCullen)."

Mr McCullen has indicated that he believes this member of the public to be a Mr McInulty and has provided a letter from him indicating that he would in principle be content for disclosure of his personal data to Mr McCullen. In light of this, at the Directions hearing dated 16th April 2010 Mr McCullen's grounds of appeal were clarified as follows:

a) *Whether disclosure of the personal data would breach the First Data Protection Principle in particular because:*
   i) *The personal data relating to the Planning Officer was already in the public domain,*
   ii) *If the information related to Mr McInulty he has consented to this disclosure,*

b) In the event that the personal data did not belong to someone who had consented to its disclosure the document could be disclosed in redacted form to prevent the disclosure of the personal data.

SHBC's additional grounds of appeal

17. SHBC's reply dated 11th May 2010 to Mr McCullen's grounds raised the following additional issues to be determined by the Tribunal which the Tribunal ruled were additional grounds of appeal and leave was granted on 13th May 2010 for these issues to be considered out of time:
    i) Does the request fall under EIR or FOIA[5]?
    ii) Was the information personal data?
    iii) If so does it fall to be withheld under regulation 13 (if proceeding under the EIRs)[6]?
    iv) Does any other exemption apply e.g. regulation 12(5)(b) EIRs?

Evidence

18. The Tribunal has considered all material before it and deals with the specifics within the analysis set out below and in the closed schedules. In coming to its decision, the Tribunal has viewed the withheld disputed material. The Tribunal considers that it is necessary to provide 2 separate closed schedules to this decision. Schedule 1 deals with information that the Tribunal orders should be disclosed. This schedule is to be promulgated once the information so ordered has been disclosed. Schedule 2 deals with information which is to remain confidential,

Legal submissions and analysis

Ground 1 Environmental Information Regulations

19. Regulation 2(4) EIRs defines environmental information as

[5] The Tribunal issued directions on 12th May 2010 that only submissions under EIR should be submitted and in the event that the Tribunal found that FOIA applied they would invite further submissions.
[6] The Tribunal considers this ground of appeal to encompass Mr McCullen's grounds of appeal.

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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;*

...

(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;

...

20. The Tribunal is satisfied that the building or enlargement of buildings affects the land and landscape. Planning regulations are measures designed to protect the land and landscape. According to Ms Whelan (SHBC's former monitoring officer) in her letter to Mr McCullen dated 15th June 2007 the disputed information is a *" look at these files to ascertain whether they had been handled professionally and appropriately*". As such it too is a measure designed to protect the land and landscape. The Tribunal is satisfied that the information is environmental information and falls to be considered under the EIRs.

21. Regulation 13 EIRs provides that:

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.*

(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; ... 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 (which relate to manual data held by public authorities) were disregarded.

Ground 2 – is the information personal data

22. In order for section 13 EIR to be engaged, the withheld information must be personal data. It was agreed by all parties at the directions hearing that the disputed information did constitute personal data, however, this is now challenged by SHBC. In any event, the Tribunal is conscious that Mr McCullen made that concession without seeing the disputed information, and in light of this the Tribunal has been provided with a copy of the disputed information to enable it to determine this fact.

23. The definition of personal data is found in the DPA section 1(1):

"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,...

24. Further clarification is provided in *Durant v FSA [2003] EWCA Civ 1746* which can be summarized as:

- Is the information biographical in a significant sense ?
- Is the putative data subject the focus of the information?

The Tribunal follows this approach.

25. In this case there is more than one putative data subject. Mr McCullen identifies a Planning Officer and the alleged complainant Mr McInulty as those whose personal data it is likely that the report contains. Since SHBC have disclosed that the report involved the review of planning files, it is self evident that the report may reference the personal data of those who have made planning applications. The Tribunal has considered whether the disputed information is the personal data of any individual and in an attempt to detail its approach has discussed the general principles that would be involved in the three perceived categories identified above. This should be treated as illustrative and not as confirmation of the contents of the disputed information which is dealt with in detail in the closed schedules.

26. In considering the personal data of any complainant, it is accepted that this report was prepared as a result of complaints to SHBC. In *Durant* Lord Justice Auld stated:
"Just because the FSA's investigation of the matter emanated from a complaint by him does not, it seems to me, render information obtained or generated by that investigation, without more, his personal data."
The Tribunal is satisfied that if the complaint is merely the trigger for a freestanding review of planning decisions then the complainant would not be the focus of the report. If however, the review is not freestanding, in that the purpose of the report was to answer their concerns then it would be more likely that the complainant could be said to be the focus. This would be especially true if the report was an analysis of the complainant's views, and concerns.

27. It is suggested by Mr McCullen that the report may also contain the personal data of Council officials. The Tribunal observes that mere passing reference to such individuals in connection with e.g. a particular planning application would not necessarily be personal data. The Tribunal would consider whether it was significant and biographical. For example in the judgment of this Tribunal, any suggestion that an individual was responsible for misconduct, had been investigated, or had been incompetent in some way (even if unproven) would have more biographical significance and would imply a greater focus upon an individual, than e.g. the name of someone performing an administrative function to whom no blame was alleged or attached.

28. The Tribunal is satisfied that it is likely that the naming of an individual who had lodged a planning application in a private capacity in the context of a report such as this would be personal data. It would provide their name, a private address, and could be linked back to issues relating to the value, and layout of their property [7]

29. The Tribunal is satisfied that the majority of the report constitutes personal data. The question of redaction is dealt with at paragraph 43 below.

Ground 3

30. The Tribunal now considers whether disclosure pursuant to the EIRs would breach any of the data protection principles. The first data protection principle as set out in Schedule 1 of the DPA, applies to personal data:

*1. Personal data shall be processed **fairly and lawfully** [8] and, in particular, shall not be processed unless—*

(a) at least one of the conditions in Schedule 2 is met, ...

31. The way in which the first principle should be interpreted is provided in Part II of Schedule 1:

> *"(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed."*

32. Mr McCullen believes that the report contains personal data which would be in the public domain by way of the planning process. SHBC and the Commissioner argue that just because documents connected with planning applications have been placed in the public domain, does not mean that the disputed information is therefore material which is already in the public domain. This is because the specific content of the disputed

[7] Whether this information would already be in the public domain through the planning process or disclosable for some other reason is dealt with at paragraph 32 et seq below
[8] Emphasis added by the Tribunal

information is not contained in the planning file and the disputed information did not form part of the planning process.

33. The Tribunal accepts that this report did not form part of the planning process (in that it was a review of existing files) but acknowledges that the personal data of an applicant e.g. name, address, size and layout of their property may already be in the public domain by way of the planning process. The Tribunal therefore considers whether there is any additional information which has been imparted that would not be in the public domain as a result of the planning process. If so the Tribunal would then consider the circumstances in which it was obtained. Additionally the Tribunal would consider whether the context in which the publicly available information appeared (e.g. if the fact that a complaint has been received about a particular planning application) meant that it would be unfair to disclose it.

34. SHBC argued that the 3rd parties may not have known about the existence of the disputed information and would therefore have reasonably expected the material to be kept confidential. The Tribunal takes into consideration the circumstances in which the information was obtained but observes that there can be no expectation of confidentiality for information released into the public domain for planning purposes.

35. The Tribunal contrasts SHBC's concerns about the data of 3rd parties with their approach in their 19 page letter to Mr McCullen in which they responded to 12 allegations made by Mr McCullen. In this letter the properties which were the subject of his complaints were named, as were vendors, purchasers, and professionals who had dealings with the sales as were the Council officers involved. The letter made reference to the fact that legal and planning advice had been sought the implication being that it was in relation to these properties and persons. The letter was prefaced with the fact that some names and quotations were being withheld because of data protection concerns. The Tribunal will therefore take into consideration information that is already in the public domain when determining whether it is unfair to disclose the personal data within the report.

36. The Tribunal is satisfied it is not unfair to disclose some personal data within the disputed information, but that in relation to other personal data it would be. The details are set out in the confidential schedules.

37. When considering the "conditions" in Schedule 2 of the Data Protection Act 1998 Mr McCullen relies upon the first condition namely:

The data subject has given his consent to the processing...

if, as he believes, the complainant was Mr McInulty and the disputed information contains his personal data.

38. Mr McCullen has provided a letter from Mr McInulty dated 13th April 2010 stating: *"I have no objection in principle to any personal data within the disputed document...being disclosed, assuming of course that it is my personal data in question"*.

The Commissioner notes that it is not clear from this what Mr McInulty means by "in principle" (Mr McInulty not having seen the disputed information at the time of writing the letter) and it is not clear whether he understands that this is disclosure to "the world at large" *S v Information Commissioner and the General Register Office EA/2006/0030* and not just to Mr McCullen. The Tribunal has not sought clarification of these points because the letter was provided during the preparation of the case for appeal which was after the "relevant time".

39. The Tribunal must consider the position around the time that the request was being considered by the Public Authority[9]. This is because the question for the Commissioner is whether SHBC dealt with the request in accordance with the EIRs. The information was requested in July 2007 and responded to and reviewed between August and December 2007. There was an additional review in December 2008 after the matter had already been referred to the Commissioner. Mr McInulty's letter post dates all this consideration of the request and so it is clear that consent had not been given at the relevant time. The Tribunal is satisfied that in the event that the disputed information contains Mr McInulty's personal data it should not be disclosed on this ground.

[9] E.g. *Guardian Newspapers Ltd and Heather Brooke v IC EA/2006/0011 and 13*

40. Mr McCullen also relies upon Schedule 2 DPA 1998 Sec 6(1):

"The processing is necessary for the purposes of the 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 interest of the data subject."

41. The Tribunal accepts that Mr McCullen and others have the following legitimate interests in assuring themselves that inter alia:

- The planning process is being administered properly,
- Planning policies are being applied fairly,
- "Subsequent reporting" should be made public in the interest of maintaining confidence in the planning system,
- Complaints are being dealt with appropriately.

42. In assessing these legitimate interests against the prejudice to the rights and freedoms or legitimate interests of the data subjects, the Tribunal takes into consideration:

- The level of additional prejudice that disclosure would bring in light of the information already in the public domain.
- That there has been significant information already provided to Mr McCullen (in particular in relation to the 19 page letter from SHBC of 15th June 2007).
- That considerable information is made available through the planning process.
- There are additional levels of scrutiny of planning officials' conduct e.g. the Royal Town Planning Institute (RTPI) which can and had been exercised in this case.

Redaction

43. Regulation 12 EIRs provides:

(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which

is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

44. There is therefore a duty on SHBC and the Commissioner to consider whether any part of the information can be disclosed by way of redaction. The Commissioner now concedes that there is a section of the disputed information which can be divorced from the rest of the report and in which there is no personal data. The Tribunal agrees (for the reasons set out in confidential schedule 1).

45. The Tribunal goes on to consider whether the report can be redacted so that the personal data which is not disclosable pursuant to regulation 13 EIRs is not disclosed. The Tribunal is satisfied that it can be so redacted and gives details in confidential schedule 2 of the material that it finds should be redacted and the specific reasons for this. The Tribunal makes the following observations:

- most if not all those whose details would be redacted would be able to identify themselves, in particular the complainant.
- The Tribunal is satisfied that the unfairness or prejudice that it has identified (above) would arise from **public** dissemination of the fact that e.g. an allegation has been made or the probity of a planning application has been called into question.

To the extent that others (e.g. the complainant) are able to determine who is being referred to the Tribunal is satisfied that:

- There would be no additional prejudice in that they are already aware of e.g. the allegations,
- There is a difference between someone being able to make an educated guess at an identity, and having it confirmed "officially" in a format which would enable wider dissemination.

Ground 4 regulation 12(5)(b) EIRs

46. SHBC consider that regulation 12(5)(b) applies:

> ***12.*** *- (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.*
> *...*
>
> *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure* ***would*** [10] *adversely affect -*
>
> *...*
> *(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;*
>
> *...*

47. The test for the Tribunal is whether disclosure "would" (not might or could) adversely affect the course of justice, etc. Would in the context of "would prejudice" has been held in *Hogan and Oxford City Council v Information Commissioner EA 2005/0026 and EA/2005/0030* to mean "more probable than not". This definition has previously been applied to "would adversely affect" in the context of regulation 12(5)(b)[11] in other cases before this Tribunal (differently constituted), and this Tribunal adopts the same approach.

48. SHBC allege that the disputed information is legally privileged and that because of this its disclosure would adversely affect the course of justice. The Tribunal does not accept

[10] Emphasis added
[11] *E.g. Burgess v IC & Stafford Borough Council EA/2006/91*

SHBC's case in relation to the purpose and status of this report. SHBC assert that the disputed information was compiled *"at the ultimate request of Karen Whelan, a Solicitor employed by [SHBC], for the purpose of enabling her to advise her client [SHBC] in connection with the allegations made by [Mr McCullen]."* From the evidence before the Commissioner this was a verbal request.

49. There is no evidence, beyond assertion, before the Tribunal that Ms Whelan was acting in her professional capacity **as a Solicitor**. It is not disputed that she is a qualified Solicitor, but in her letter of 15th June 2007 responding to Mr McCullen's complaints she refers to:

"my investigation ***as the Council's Monitoring Officer***" additionally she concludes the letter with:

"Any further evidence which has arisen from commencing this investigation will be passed to the Council's, New Monitoring Officer to consider".

50. SHBC suggest that their evidence as to Ms Whelan's status at the time of the request is "unchallenged". The Tribunal notes that this assertion was not explored by the Commissioner in his Decision Notice who did not receive evidence as to Ms Whelan's role and status at SHBC. It has however, been challenged comprehensively in this case by Mr McCullen. His case is that:

- Ms Whelan was investigating his complaints in her role as Monitoring Officer not as a Council Solicitor.
- SHBC's constitution (Codes and Protocols) describes part of the Monitoring Officer's function as to "make enquiries into allegations of misconduct...".
- The Monitoring Officer does not have to be a lawyer;
- The current incumbent is not legally qualified.
- It was therefore coincidental and not material to the commissioning of the advice that Ms Whelan was a Solicitor.

SHBC submitted a reply to Mr McCullen's arguments but did not address the Tribunal further on this point. This was an oral request and there is no witness statement from Ms

Whelan clarifying the situation. Neither was the Tribunal provided with a copy of the memo provided to the Commissioner which referenced the commissioning of this report.

51. SHBC submit that the disputed information is covered by the legal advice privilege *"which attaches to the report prepared by Karen Whelan":*

    The Tribunal is not satisfied that legal advice privilege attaches to the report prepared by Karen Whelan.

- The Tribunal repeats para 48 et seq above.
- The Tribunal has not been supplied with a copy of the report (SHBC objected to Mr McCullen's request to include it in the bundle on the grounds that it was not relevant).
- Although the disclosability of the Karen Whelan report was not ultimately determined by the Commissioner[12], when the matter was still at large before the Commissioner, SHBC did not assert that it was legally privileged and only relied upon regulation 13 EIRs to withhold the report.

52. The Commissioner was provided with more information than the Tribunal (he having viewed the Council's report, the file note and the legal advice) and the Tribunal accepts the Commissioner's account as set out in the Decision Notice that there was a minimal link between the disputed information and the report:

    - the report into staff conduct makes slight reference to the planning adviser's response.
    - There is only one comment from the adviser's response which is quoted in the report and this had already been disclosed by SHBC to the complainant.
    - The barrister herself did not seek the planning adviser's report (although it may have been forwarded to her)[13] .

53. SHBC assert that the purpose of the disputed information was to enable Ms Whelan to advise SHBC in connection with allegations made by Mr McCullen. It is publicly

[12] It has been disclosed voluntarily pursuant to other legal proceedings and so the Commissioner was not asked to determine its disclosability.
[13] It is not now suggested that privilege attaches because it may have been sent to the barrister who provided an opinion.

acknowledged that the planning report does not contain the personal data of Mr McCullen and cannot therefore detail his specific complaints. Whilst it may be that there is an overlap with the concerns of another individual, the Tribunal does not accept that it was created in order to advise SHBC in relation to Mr McCullen's complaints.

54. SHBC allege that litigation privilege applies because Mr McCullen's complaints amounted to negligence and/or criminal conduct on the part of SHBC's officers and that this report was necessary for the purpose of criminal or civil litigation. SHBC further allege that the dominant purpose of the document was to identify failings by Council employees and then commence criminal or disciplinary proceedings if necessary. The Tribunal repeats its finding that the report was not commissioned to address Mr McCullen's complaints. The Tribunal does not have an exact date for the disputed information but notes that by the 4th April 2004 it does not appear that Mr McCullen was alleging criminality in that Mr McCullen stated: "*My view is now that this whole saga was not one of corruption; more one of an attempt to cover up a serious error of judgment*". The Tribunal is satisfied that this was before the commissioning of the disputed information.

55. Additionally having considered the disputed information the Tribunal is satisfied that there is no evidence that criminal or civil litigation was in fact then in contemplation.

56. Mr McCullen argues that any privilege that exists has been waived by its quotation in the letter of 15th June 2007, its circulation to Council members, an MP and its use in litigation. The Tribunal is satisfied that Council members and employees would constitute the client if a lawyer/client relationship existed and the disclosure to Mr McCullen is limited to 2 paragraphs of a longer report. The circumstances of its disclosure in litigation and to an MP are not before the Tribunal but this is clearly not wide distribution. The Tribunal is not satisfied on the evidence before it that waiver applies on the facts of this case.

57. Regulation 12(5)(b) EIR covers more than legal professional privilege however, and SHBC allege that disclosure would adversely affect the course of justice more generally. They argue that this is an expert report and that they would be prejudiced in legal proceedings if it were disclosed. The Tribunal is not satisfied on the evidence before it

that when the information request was being considered any trial or legal proceedings[14] were in contemplation which would have been prejudiced by disclosure of this document. As noted above, Mr McCullen in 2004 was no longer alleging corruption and a Council officer had by 15th June 2007 already been subjected to disciplinary investigations by the Royal Town Planning Institute (RTPI) in relation to her personal affairs who had imposed the lowest sanction available.

58. SHBC argue that their experts would not be candid if they believed that their reports would be disclosed under EIR. The Tribunal has considered the stated purpose of the report, its method and its content and is satisfied that there is no evidence that it would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.

59. In particular in relation to this limb of 12(5)(b) EIRs it was argued by SHBC that:

"It may deter the expert from providing a view as a result of concerns about complaints by third parties (particularly those whose actions were under consideration) Indeed in this particular case, the second appellant has previously argued that Karen Whelan's report is defamatory of him. This would, in this case, have therefore been a very real concern."

- The Tribunal notes that Mr McCullen is not the subject of this report.
- Mr Mc Cullen could not be the subject of any criminal or disciplinary proceedings in relation to the propriety of the planning regime.
- The Tribunal notes that this is a report being prepared by an expert. Experts are aware of numerous situations in which their confidential reports become circulated or public (not the least disclosure in legal proceedings).
- There is no evidence before the Tribunal that the author of the report was told that it was being prepared in confidence or that it would not be provided to the complainant.

[14] The Tribunal is aware that there is current litigation between Mr McCullen and SHBC but this is not so far as the Tribunal has been made aware the trial of any person.

- There is a difference between being candid and defamatory and it is not the function of the EIRs to enable information to be withheld just because it might be embarrassing to a public authority or an expert.

60. The Tribunal also notes the level of detail provided in the response of 15th June 2007 to Mr McCullen (and the Tribunal would expect that a similar level of information would go to the complainant in this case[15]) in support of its conclusion that there is no evidence that the prospect of disclosure would affect the quality of the advice obtained.

61. In support of the argument that disclosure of the disputed information would prejudice criminal or disciplinary proceedings it is argued that:

- *"it might alert third parties to arguments that they had not considered or to weaknesses/strengths in their own arguments that they may not have considered."*

The Tribunal observes that this is more applicable to assessing the strength of a planning challenge and is not realistically material to criminal or disciplinary proceedings.

- "*It would also put the party concerned on notice of steps that were to (or may) be taken."*

Again the Tribunal notes the contents and remit of the report and does not consider this argument relevant.

62. The Tribunal is therefore satisfied that the exemption is not engaged. In light of the paucity of the evidence surrounding the circumstances in which the report was commissioned, the Tribunal nevertheless goes on to consider the public interest test.

63. The Tribunal reminds itself that under the EIRs there is a presumption in favour of disclosure.

[15] The Tribunal has not been provided with any information dealing with any response given to the complainant and whether there is any overlap with information supplied to him and the contents of this report.

64. The Tribunal is also satisfied that the following factors support disclosure in the public interest:

i) Transparency and accountability in the planning process. It is in the public interest that planning law and SHBC's planning policies are applied fairly and appropriately and that the public are reassured that this is the case. Whilst the planning process itself is open, Ms. Whelan acknowledged in the letter of 15th June 2007 that:

"Because of the nature of the allegations regarding planning issues to do with [a Council Officer's] private property and the Oaks Nursery, any investigation undertaken by officers of the Council would be unable to satisfy the perception of the public as being fair and impartial. As a consequence the planning issues were examined by two different consultants. The first being an ex-local authority Chief Executive and Chief Planning Officer..."

SHBC having relied upon the fact of an independent review there is a public interest in the public knowing the exact remit of the review, how thorough it was and what it covered. If there is greater transparency about decisions taken by public authorities it is likely that this will promote accountability. It also impacts upon the quality of decisions if more information about the way that decisions are reached is disclosed.

ii) It is in the public interest to clarify any misapprehensions derived from incomplete disclosure. From the letter of 15th June 2007 Mr McCullen was left with the impression that the planning expert had conducted the review in response to **his** specific complaints. It is now in the public domain that the planning review was in response to someone else's complaints and it is Mr McCullen's case that the expert was not directed to his specific allegations. Additionally the way that the excerpts from the 2 expert reports are quoted in the letter to Mr McCullen of 15th June 2007 appears to attribute quotations from the legal advice to the Planning Expert[16].

iii) Disclosure of the disputed information would provide an additional layer of public scrutiny and inform debate as to SHBC's application of their planning policy,

[16] At page 18 of 19

thoroughness of their complaints procedure and the efficacy of their policies where an officer encounters a professional/private conflict.

iv) The Tribunal is also satisfied that it is in the public interest that information is available that allows individuals to understand decisions made by public authorities affecting their lives (in this case the planning decisions themselves and the reasoning behind the failure to uphold the complaints), and to assist them to challenge those decisions if applicable.

65. In favour of withholding the information

i) Experts would not be as candid if they believed that their reports would be disclosed under EIR.

ii) Expert's would be deterred from providing a view as a result of concerns about complaints by third parties (those whose actions were under consideration and the complainant).

iii) Public authorities would be disadvantaged by the absence of a level playing field in that it might alert third parties to arguments that they had not considered or to weaknesses/strengths in their own arguments that they may not have considered. (The Tribunal observes that this is only relevant in terms of any potential litigation. Conversely the same information assists the public to challenge planning decisions or informs their approach when making planning applications).

iv) It would put the party concerned on notice of steps that were to (or may) be taken.

v) In the event that the Tribunal is wrong and legal professional privilege does apply the Tribunal accepts that there is a strong inherent weight attached to the preservation of such privilege[17]

vi) It is in the public interest that decisions taken by local authorities are taken in a fully informed legal context where relevant.

vii) The advice needs to be comprehensive and point out the counterarguments. If this were not the case the quality of an Authority's decision making would be reduced because it would not be fully informed.

[17] *DBERR v O'Brien EWHC 164*

viii) A public authority might be reluctant to seek advice or to record verbal advice which could lead to unnecessary expenditure and poor decision making.

66. In determining how much weight to give these factors, the Tribunal has considered the stated purpose, content and methods employed in compiling the disputed information. The Tribunal also takes into consideration how much information there was already in the public domain. Whilst SHBC would argue that this reduces the need for the report to be disclosed, the Tribunal is satisfied that the publication of the remit and conclusions of the planning report in the context of the detailed letter of 15th June 2007 reduces the strength of the argument that an expert would expect his report to remain confidential.

67. The Tribunal is not persuaded that a public authority would avoid seeking legal advice or not record it. Public authorities are at risk of challenge and criticism if they fail to take advice when appropriate or do not keep adequate records.

68. The Tribunal has not been told of any "live" civil or criminal or disciplinary proceedings pending at the relevant time to which this report was material. However, the Tribunal does not consider that the disputed information was stale in that that information request was made 4 weeks after Mr McCullen received his response to his complaints in which this disputed information was briefly quoted.

69. For the reasons set out above and amplified in the confidential schedule, the Tribunal is satisfied that the public interest lies strongly in favour of disclosure (subject to the redaction of some personal data pursuant to regulation 13 EIR for the reasons set out at para 30 et seq above and in confidential schedule 2).

Other Matters

70. SHBC raised the issue of the applicability of EIRs in their additional grounds of appeal as follows:

"There would appear to be an issue as to whether or not the data falls within the EIR. If as asserted, the focus of the disputed information is the conduct of the chief planning officer (rather than, for example, the state of elements of the environment or measures affecting those elements) this is not, in our view, a matter that falls within Regulation 2 of EIR".

71. The Tribunal observes that having raised the issue of the applicability of EIRs SHBC were inconsistent in their approach and did not assist the Tribunal upon this point during the preparation of the appeal, in this respect their approach was not in keeping with the overriding objective in particular regulation 2(4)(b) of *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* :

- SHBC have the advantage of having seen the disputed information and it is not helpful for speculative arguments to be raised based upon the assumption of a litigant in person who has not seen the disputed information.
- No argument was advanced in the grounds of appeal or the submissions as to why an investigation of the conduct of a planning officer in their professional capacity is not capable of being a measure affecting land or landscape.
- Having raised the issue of EIRs in their grounds of appeal, SHBC did not make any representations in their written submissions to the Tribunal upon this point.
- In light of the Commissioner's indication that it was his view that the EIRs applied, SHBC made submissions to the Commissioner indicating which EIR exemptions were relied upon,
- The Commissioner did not uphold these EIR exemptions in relation to other linked documents that are not before the Tribunal, and ordered disclosure,
- SHBC accepted the application of the EIRs and the Commissioner's ruling as to the inapplicability of exemptions in relation to those documents. It has disclosed those documents.

Conclusion and remedy

72. For the reasons set out above and in the closed schedules the Tribunal finds that:

b) The request should be considered under the EIRs.
c) Most of the disputed information was personal data (excepting the penultimate section),
d) Some sections of personal data (as set out in the confidential schedules) should be withheld as disclosure would breach the first data protection principle.
e) The rest of the disputed information should therefore have been disclosed in redacted form pursuant to regulation 12(1) EIRs.

f) If the personal data belonged to Mr McInulty, he had not consented to the disclosure at the relevant time.
g) Regulation 12(5)(b) EIRs is not engaged.
h) Even if it were the public interest in withholding the disputed information is substantially outweighed by the public interest in disclosure.

73. Our decision is unanimous.

Signed

Fiona Henderson

Tribunal Judge Dated this 11th day of August 2010

Tribunals Service
Information Rights

Appeal No. EA/2010/0034

IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: EA/2010/0034

Information Commissioner's Ref: FS50176219

Heard on the papers at Holborn Bars, London, EC1N 2NP
On 1st June 2010

Decision Promulgated
11 August 2010

BEFORE

Fiona Henderson
And
Ivan Wilson
And
Jacqueline Blake

BETWEEN:

SURREY HEATH BOROUGH COUNCIL
1st Appellant

and

MR KEVIN McCULLEN
2nd Appellant

and

THE INFORMATION COMMISSIONER
Respondent

Reasons for Decision
Closed Schedule 1

Introduction

1. These reasons refer to the specific content of the disputed information (but do not make reference to material that the Tribunal considers should be redacted) and are designed to be read in conjunction with the open decision and follow the same headings. They are ordered to remain confidential until after disclosure of the redacted disputed information after which they may be promulgated and disclosed to Mr McCullen.

Ground 1 Environmental Information Regulations

2. The disputed information specifically states;

"My remit is to look at the applications associated with [2 named sites] and to see if the files demonstrate that the planning issues and approach is fair, reasonable and appropriate given my experience of working in planning...

I was also requested to review applications submitted by Jane Baldwin and her husband on their property in relation to the complaints made or implied in his email of 24.10.05"

On its face the disputed information is clearly a measure designed to protect the land and landscape. The Tribunal is satisfied that the information is environmental information and falls to be considered under the EIRs.

Ground 2 – is the information personal data

3. The Tribunal has compiled a table (see below) which sets out the material that it considers to be personal data that should not be redacted and the reason.

4. The Commissioner concedes that the section entitled:

"*Application files and Records"* concerns the Council's management of files and records relating to planning applications. Disclosure of this section would not reveal any personal data and could be disclosed without contravening the first data protection principle. The Tribunal agrees with this assessment. There is a reference to "*head of built environment has suggested that staff adopt a formal attitude to such correspondence..."*

The Tribunal is satisfied that an individual can be identified from this through his role. He is expressing an opinion in a professional capacity and judgment is being passed as to whether that is the correct approach. The Tribunal is satisfied that as the report is not critical of him

and the fact that staff had been told to take this approach is likely to be evident from the way that they handle the public, disclosure would not breach the first data protection principle.

5. The person whose complaints are considered in the disputed information is named. The Tribunal is satisfied that all the information save the penultimate section headed **application files and records** is his personal data because:

- The report is entitled "COMPLAINTS – PLANNING SERVICE
- The stated purpose of the review is:
  "I have been asked to review the planning applications associated with persistent complaints submitted by [the complainant] to officers and members of [SHBC]".
- It provides an assessment of the nature of the complaints,
- It sets out details of the complaints to the Chief Executive,
- The report references the allegation in each section, and is tied directly to the scope of the complaints.

The complainant is clearly the focus of the report, in that it is being compiled in order to respond to him. It is also biographical in that it details complaints he has made, his views and and actions he has taken.

6. Jane Baldwin and her husband are also both identifiable. The Tribunal is satisfied that this is also personal data in that the propriety (or otherwise) of her planning application is in issue. She is the focus of this section of the report which is headed "Assistant chief planner Baldwin" and her husband becomes so by association.

7. The report makes references to those who had conduct of the planning application and the Tribunal considers that the same arguments would apply by extrapolation to any other professionals acting in their professional capacity. Although not named they are identifiable through the planning file which is in the public domain. The Tribunal is satisfied that this is not personal data where it is not biographical (i.e.their role is limited, administrative and not criticized) neither are they the focus of this part of the report. If however, their conduct is being judged in some way (even if it is ultimately approved) the Tribunal is satisfied that it is personal data.

8. The author of the report is not named in the draft that the Tribunal has, however Mr McCullen appears to have identified him and as such the author would appear to fall within section 1(1) of the DPA. Although he is not the focus of the report in that it is not about him, he does express his views and opinions within the report which is about his conclusions having undertaken the review of the files. As such the Tribunal is satisfied that it contains his personal data.

Ground 3 - whether disclosure pursuant to the EIRs would breach any of the data protection principles.

9. Jane Baldwin's planning application is made in her married name, although she works under her maiden name. This might be the type of additional information which the Tribunal considered unfair to disclose in this context if it provided more information than the planning process. However, the Tribunal notes that the email of 16th August 2008 is in the public domain. This is headed "Jane Baldwin's planning application" and deals with a clerical error in the stamped signature upon a letter. It appears in the public planning file relating to her application. The Tribunal is therefore satisfied that the link between the "married" details of Jane Baldwin and her "professional" details is already in the public domain.

10. SHBC argue that Jane Baldwin was not aware of this report and that the disclosure of the analysis of a complaint about her would be unfair. The Tribunal notes that:

- Jane Baldwin is publicly accountable,
- The letter of 15th June 2007 is in the public domain and provides a very detailed response to Mr McCullen's allegations. In particular it quotes the conclusions of this report insofar as they relate to Ms Baldwin in this context.
- This report exonerates her.

The Tribunal is therefore satisfied that there was no expectation of confidentiality at the relevant time (which was after the letter of 15th June 2007) in relation to the public consideration of complaints relating to any conflict between her employment and her planning application.

11. It is not apparent from the evidence before the Tribunal that the **complainant's** complaints are fully in the public domain through the planning process or otherwise. References are made to representations from certain members of the public in the planning files that we have been provided with but they are not named. The planning files that are the subject of these complaints are not all before the Tribunal. There is no geographical nexus to the complaints (i.e. because of their location he could not be the next door neighbour to all of them) and cannot be identified that way.

12. The Tribunal does not consider that it is personal data to identify that the complainant was male. The size of the population is sufficient in this context that this will not identify the complainant.

13. The name of the applicants and their professional advisors relating to The Plant Centre and White Cottage Farm will all be identifiable by following the trail back to the planning file. This information is therefore already in the public domain. The "fresh" element is that a complaint has been made and the planning application reviewed. The Tribunal is satisfied that this additional level of information is not sufficient to make disclosure unfair. Any person making a planning application would expect that the merits of the application would be analyzed by the Council. There is no offer or guarantee of confidentiality relating to this; the planning process being public. Whilst this is not a part of the planning process in that a report such as this is not required under planning law, it is an exercise that could have been undertaken publicly during that process and the Tribunal is satisfied that disclosure in this context would not be unfair.

14. Mr McCullen also relies upon Schedule 2 DPA 1998 Sec 6(1) including his legitimate interest that his complaints are being dealt with appropriately. Mr McCullen asserts that he believed from the letter of 15th June 2007 that all his concerns had been reviewed by this planning expert, and apart from any overlap that there may be with this complainant's complaints it is apparent that none of his concerns were directly considered in this report. The Tribunal has not been provided with the actual complaints made by the Complainant, but there is no evidence that what Mr McCullen asserts was his specific concern in relation to his "allegation 12" was ever considered in this report namely that "*the chief Planner*

[name] had misrepresented the planning history of the property in question to a planning committee in order to gain favourable planning consent for a colleague".

15. Additionally from the letter of 15th June 2007 it states that:

Allegation 10 – Jane Baldwin tried to purchase the Oaks Nursery at a reduced price

(Notwithstanding the various professional views the Council has now received that [name] was acting as a professional and experience planner in adopting her approach to change of use)...

16. There is no evidence before the Tribunal that the disputed information considered this allegation or formed any conclusions on this point. The Tribunal notes from the letter of 15th June 2007 that in the context of Allegation 11:

" that [name] tried to coerce the owner into submitting a "change of use" application, when a colleague had already determined that the classification was appropriate."

Reference was made to:

"Brian Townley [Head of Built Environment] has previously had no involvement with this case in the past and was asked to look at these files to ascertain whether they had been handled professionally and appropriately. In essence he is satisfied that the advice given and the questions asked regarding the change of use enquiries were professionally handled.(p15 of 19)".

However, the Tribunal is satisfied that the letter of 15th June 2007 in the context of later reference to the disputed information and the quotation from it could give the misleading impression that this report had considered this allegation.

Ground 4 regulation 12(5)(b) EIRs

17. SHBC allege that litigation privilege applies because Mr McCullen's complaints amounted to negligence and/or criminal conduct on the part of SHBC's officers and that this report was necessary for the purpose of criminal or civil litigation. SHBC further allege that the

dominant purpose of the document was to identify failings by Council employees and then commence criminal or disciplinary proceedings if necessary.

18. In relation to complaint (a) – the allegation is that the landscape and garden centre on this site is unauthorised and despite complaining and raising the issue with the chief executive it still remains unauthorised after 3 years. The Tribunal is not satisfied that the analysis of the files in this context is relevant in a disciplinary context. Whilst the report finds that there is a staff backlog, the report does not seek to determine where the fault lies or to attribute blame. As such the Tribunal is satisfied that the focus is not disciplinary but upon the complaint.

19. In relation to complaint (c) there is criticism inherent within the complaint of Council employees who are alleged to have got their decision wrong. However, there is no individual attribution of action. The reference is to "officers" who inspected the site, "building control staff" and "officers" who recommended conditional consent. Whilst discussion is had with "the Building Control Officer" this is in the context of obtaining a "professional opinion" and not by way of challenging or scrutinizing his actions. Again the Tribunal is not satisfied that the purpose or intended use of this part of the report was disciplinary.

The public interest test

20. The Tribunal is also satisfied that the following factors support disclosure in the public interest:

21. Transparency and accountability in the planning process. It is in the public interest that planning law and the Council's planning policies are applied fairly and appropriately and that the public are reassured that this is the case. Whilst the planning process itself is open, Ms Whelan acknowledged in the letter of 15th June 2007 that:

> *"Because of the nature of the allegations regarding planning issues to do with [a Council Officer's] private property and the Oaks Nursery, any investigation undertaken by officers of the Council would be unable to satisfy the perception of the public as being fair and impartial. As a consequence the planning issues were*

examined by two different consultants. The first being an ex-local authority Chief Executive and Chief Planning Officer..."

As the Tribunal has already noted, there is no evidence that the disputed information dealt with the "Oaks Nursery" which is adjacent to Jane Baldwin's property but not the subject of either of the applications reviewed in the disputed information.

22. The Tribunal is also satisfied that it is in the public interest that information is available that allows individuals to understand decisions made by public authorities affecting their lives (in this case the planning decisions themselves and the reasoning behind the failure to uphold the complaints), and to assist them to challenge those decisions if applicable. The Tribunal is satisfied that in relation to White Cottage Farm, the response would allow the complainant and the wider public to understand the decision made. In relation to the Plant Centre:

"*some of the activities on this site are unauthorised at this point of time*" and that

"*Most of the detailed work on examining application SU 05/206 is complete but it is part of the backlog of cases which staff are trying to clear*".

is relevant in assisting the public to achieve a decision, or challenge a decision and participate in the planning process and highlighting the inefficiencies and problems then current within the planning department.

23. In favour of withholding the information

i) Public authorities would be disadvantaged by the absence of a level playing field in that it might alert third parties to arguments that they had not considered or to weaknesses/strengths in their own arguments that they may not have considered. It is accepted that in relation to White Cottage farm the report concludes that some of the activities are unauthorised, but in the context of an outstanding planning application and the tone of the report it is not the Tribunal's view that it is suggested that this is a serious problem.

24. In determining how much weight to give these factors, the Tribunal notes that apart from discussions with the Building Control Officer the report constitutes an administrative review

of the publicly available planning files. This is not a case where witnesses might be less frank or evidence might disappear and as such the Tribunal is satisfied that "the chilling effect" has less relevance in that the conclusions are likely to be those that any expert (including one employed by the public) could come to.

25. Our decision is unanimous.

Signed

Fiona Henderson

Tribunal Judge Dated this 11th day of August 2010

Confidential Schedule of data that need not be redacted

Data	Personal data?	disclose	redact	reason
Karen Whelan	Yes personal data Although it is in her role as monitoring officer it details her actions and interactions with the complainant.	Yes	No	It can be disclosed as there is no criticism of her. Not dissimilar to the sort of things said in the letter of 15th June 2007. The interactions are part of her professional role.
Chief Executive	Page 1 & 2 personal data because it references a meeting with the complainant which he found unproductive.	Yes	No	It is in the role as Chief Executive. This is a very senior position. Although it is critical of the Chief Executive, it is not a personal attack. The fact that the complainant is not satisfied is self evident by the fact that there is a complaint.
The Plant Centre	Not a person – but there will be a person behind the address whose personal data this is.	Yes	No	This is a business address. The fact that there will be a person behind the address is not sufficient in this context since that information will be obtainable through planning disclosure. The complaint is not directly about the applicants but the council's role.
White Cottage Farm	Page 1, 3 Not a person - but there will be a person behind the address whose personal data this is.	Yes	No	This is a business address. The fact that there will be a person behind the address is not sufficient in this context since that information will be obtainable through planning disclosure. The complaint is not about the applicants
Jane Baldwin and references to "her husband"	Page 1 second half of page, Page 3 (section (b) paragraphs 2-5) Page 5 Yes personal data	Yes	No	See paragraphs 6,7, 9 and 10 above
Chartered planner on behalf of the applicant	Page 2 Not personal data	Yes	No	Professional capacity and apparent from planning disclosure.

Data	Personal data?	disclose	redact	reason
Officers who dealt with Jane Baldwin's case	Page 3 Yes personal data. They are identifiable by reference to the planning file. This part of the report assesses their performance in light of criticisms made.	Yes	No	This is an assessment of the way they have done their job as evident from material in the public domain. There is no prejudice in disclosure
The applicant's agent	P4 Not personal data	Yes	No	Although identifiable he is not the focus of this part of the report but part of the history.
Building Control Officer	P4 Yes personal data He is identifiable by reference to his job title. He is the focus of this part of the report which gives his opinions and views	Yes	No	He is giving a professional opinion in a technical capacity. There is no evidence he expected this opinion to remain confidential.
Head of Built Environment	P5 Yes personal data in that he is identifiable and expressing an opinion	Yes	No	This is in a professional context. It is likely that this information would be evident from the way that staff deal with contact with the public.