



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2015/0012**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50548705**  
**Dated: 17 December 2014**

**Appellant: Brian Egan**

**Respondent: The Information Commissioner**

**Heard at: Guildford**

**Date of Hearing: 29 June 2015, deliberations 28 August 2015**

**Before**

**Chris Hughes**

**Judge**

**and**

**Anne Chafer and Paul Taylor**

**Tribunal Members**

**Date of Decision: 8 September 2015**

**Attendances:**

For the Appellant: in person  
For the Respondent: did not attend

**Subject matter:**

Freedom of Information Act 2000

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 17 December 2014 and dismisses the appeal.

**REASONS FOR DECISION**

**Introduction**

1. The Appellant in these proceedings (“Mr Egan”) has a concern about how planning issues related to his property have been handled by his local authority, Waverley Borough Council (“the Council”). There were complaints by neighbours in 2009 and 2013. The earlier complaint resulted in enforcement action being started and withdrawn by the local authority against Mr Egan. He subsequently appealed a refusal of planning permission and there were also judicial review proceedings.
2. On 19 June 2014 Mr Egan wrote to the Council seeking information about the planning complaints and how they had been handled:-

*“1. IN CONNECTION WITH PAUL HARDWICK AND DARRAN EGGLETON’S VISIT TO (44 address redacted) ON 12/08/09*

*a. Letter of complaint from (name redacted X) of (address redacted) (or note of telephone conversation).*

*b. Officers report on visit on 12/08/09 from both Paul Hardwick and Darran Eggleton*

*c. Statements made by Paul Hardwick and Darran Eggleton to the in house solicitors dept. re the Temporary Stop Notice and Judicial Review*

*d. Any other relevant information in connection with the complaint or conclusion.*

*2. IN CONNECTION WITH RYAN SNOW AND VICTORIA CHOULARTON'S VISIT TO (address redacted) ON OR ABOUT 02/07/13*

*a. Letter of complaint from (name redacted Y) of (address redacted)(or note of telephone conversation)*

*b. Officers report on visit on or about 02/07/13 from both Ryan Snow and Victoria Choularton*

*c. Any other relevant information in connection with the complaint or conclusion.”*

3. The Council responded on 22 July 2014. With respect to each complaint it confirmed that it held notes of the original telephone call which it was not prepared to disclose relying on section 41 of FOIA – information provided in confidence. It provided the officers' reports for each visit, confirmed that it held no other information in connection with the complaints and confirmed that in respect of the earlier complaint it did not hold such statements made by the officers to the Council's lawyers.

4. Mr Egan complained to the ICO on 18 July 2014 and was advised to seek a review by the Council. By a letter of 29 July 2014 he sought an internal review of the decision stating:-

*You have ignored my request for copies of the written complaint from (name redacted X) of (address redacted) and the later complaint by (name redacted Y) of (address redacted). I do consider this information necessary in order to be able to prove members of your organisation have lied in order to cover up the heavy handed way in which an Enforcement Notice was issued.*

5. Following the internal review, to which it replied on the 27 August 2014, the Council found two further photographs taken on the first site visit and upheld its original decision with respect to withholding the complaints under section 41 explaining its reasoning:-

*In this case there is an implied duty of confidence in respect of this information, and this arises from the fact that the Council operates a long established practice that*

*complaints made to the Council's Planning service are to be treated confidentially in order to protect the identity of complainants, and in order to ensure that prospective complainants are not discouraged from making complaints by virtue of the fact that their details might be provided to other third parties. In my view this establishes an implied duty of confidence which would be actionable by those third parties should the Council breach that duty of confidence through disclosure of the information.*

*I am also satisfied that the public interest in maintaining the exemption under section 41 outweighs the public interest in disclosing the information. The Information Commissioner has established that there is a strong public interest in favour of maintaining the confidentiality of information provided in confidence, and there is no general public interest in disclosing confidential information in breach of a duty of confidence. While there is a public interest in ensuring the public scrutiny of the activities of public authorities, this will not in itself override the public interest in maintaining confidentiality where the interests of a private person or persons protected by the duty of confidence (as is the case in this matter)...*

*I have also concluded that disclosure of the information would restrict the effective administration of the Planning service by dis-encouraging the general public to submit concerns regarding Planning-related matters.*

6. On 9 September 2014 Mr Egan wrote again to the Council seeking further information relating to his disputes with the Council and complaints that he had made to the Council. There has been extensive subsequent correspondence raising a number of issues; however the request with which the tribunal is concerned is the request of 19 June 2014, which was considered by the Respondent to this appeal, the Information Commissioner ("the ICO") in his decision notice.
7. Mr Egan subsequently accused the Council of withholding information and complained that the Council on 25 November had decided to treat him as vexatious. The ICO investigating this complaint, dealt with it as the Council had, on the basis of whether section 41 applied. He also explained that while Mr Egan had raised many concerns relating to planning and the Council's complaints procedures, the ICO could only deal with matters relating to FOIA.
8. In his decision notice the ICO considered the question of the application of section 41 in the light of the law relating to confidentiality. He concluded that the information

was from a third party, it had the necessary quality of confidence, was imparted in circumstances imparting a duty of confidence and that the public interest in maintaining the confidence outweighed any interest in disclosure. He upheld the Council's decision to withhold the information.

9. In his notice of appeal (7 and 25 January) Mr Egan criticised the Council for sending him some information that he already had, raised issues with respect to the Council's complaints policy and delays in the Council providing it to him, he further argued that both of his neighbours who had complained had told him about the complaints and therefore the information was not provided in confidence. He also stated (bundle page 20) "Although I cannot prove it the Council has withheld documents other than those allowable under s41."
10. The ICO resisted the appeal. He maintained that the telephone notes were confidential and drew a distinction between what Mr Egan knew (which had not been told him by the Council) and the dissemination of the information to the world at large under FOIA. He noted that issues around the complaints policy were not within the scope of the request of 19 June and therefore not a matter for this appeal. Mr Egan's arguments with respect to destruction or suppression of documents also related to a later request.
11. The ICO in the light of the considerable number of documents which the Council had, at various times, supplied to Mr Egan, said subsequently that the withheld information lacked the quality of confidence and sent it to Mr Egan shortly before the hearing on 22 June 2015 (subject to minor redactions related to the identity of persons). He continued to maintain that there was no further information within scope of the request beyond the initial telephone notes of the planning complaints and letters to the complainants.
12. At the hearing Mr Egan maintained his belief that the Council was withholding information and the tribunal gave him further time to formulate and submit his arguments which he did in a series of documents at the end of July.
13. In considering these submissions the tribunal reminded itself that the issue for the tribunal was whether the decision notice of the ICO was correct in law or whether, in the light of further evidence, it should determine that further information within the scope of 19 June request, was held.

14. The arguments were set out in a 9 point document entitled “Schedule of specific documents requested from WBC derived from those already sent on 22<sup>nd</sup> July, a review requested on 29<sup>th</sup> July and review answers on 27<sup>th</sup> August”.

15. Points 1 and 2 of this document relate to Mr Egan’s requests for the statements made by the planning officers in 2009 to the Council’s Legal Department. In support of his assertion that these documents exist he pointed to an e-mail chain (bundle pages 431/2) of 19 June 2014. The start of this chain is an email to all staff from a Director of the Council stating that Mr Egan is to be treated as vexatious. It contains a direction to staff:-

*“Staff should not engage with him in conversation if he phones you, but advise him that he should write to the Executive Director with any matters he wishes to raise with the Council.”*

16. A recipient of the email communicated with her manager on the same day:-

*“Mrs Egan called me yesterday to ask for a copy of the Authorisation for serving the Temporary Stop Notice. I said that I would call her back this morning. Matthew has asked me not to call her back until we have the Authorisation to hand and that he is happy with it. If she calls me again this morning should I say she needs to contact Paul [the Executive Director] to request a copy?”*

17. Mr Egan asserts that this is proof that such an authorisation exists and is the same as the copies of statements from Paul Hardwick and /or Darran Eggleton he requested in his 19 June FOIA request –*“I suspect that Eggleton or Hardwick’s request for this authorisation contains incriminating evidence and definitely exists”*.

18. The tribunal is unable to accept this inference. The third part of the request of 19 June was for statements i.e. evidence, the document referred to is an authorisation – an instruction from the planning department to the legal department asking them to take action. The author of the email does not at that stage have any authorisation in front of her; she is seeking instructions about how to deal with a telephone call. In the Council’s reply to Mr Egan of 22 July 2014 (bundle pages 79-80) the Council confirmed with respect to the third part of the request relating to 2009 that:-

*“We are unable to locate any statements made to the in house solicitors by Paul Hardwick and Darren Eggleton.”*

With respect to the fourth part of that request:-

*“Any other relevant information in connection with the complaint or conclusion. – All details WBC holds are included in attachment WAV00913”.*

The Tribunal is satisfied that the email (paragraph 16 above) is email is not evidence of the existence of any further information which was not disclosed in response to the request.

19. Paragraphs 3 and 4 of the document amount to criticism of the Council and its officers and do not go to whether further information exists.
20. It is important to focus on the request of 19 June, although Mr Egan in his arguments has consistently sought to expand the interpretation of that request. The request relates to the planning complaints made about M Egan’s activities on his property and how the Council handled those complaints; as the request states *“relevant information ... in connection with the complaint or conclusion”*. The conclusion of the complaint is the action that the Council took or did not take with respect to an alleged breach of planning control. It does not relate to Mr Egan’s subsequent complaints to the Council about its decision- making. That is a separate matter falling outside the scope of the 19 June request.
21. Paragraph 5 relates to a further request for information from Mr Egan dated 7 August. This expanded the scope of his request of 19 June and which, although headed with a reference related to the 19 June 2014 FOIA request, is from its contents clearly a new request for information relating to complaints which Mr Egan has made about the Council.
22. Paragraph 6 relates to the consideration of Mr Egan’s complaint by the acting CEO of the Council. Paragraph 6a criticises the Council for its email retention policy. Paragraph 6b criticises the Council for how it handled a complaint by Mr Egan. Paragraph 6c relates to a request for details of one of Mr Egan’s planning applications. Paragraph 6d related to the Council’s decision-making in connection with seeking costs against Mr Egan. Paragraph 6e related to the details of Mr Egan’s planning application’s and the desirability or otherwise of the imposition of planning conditions.

23. Paragraph 7 related to the notes of two reviews of complaints made by Mr. Egan. The history of Mr Egan's complaints about the Council are not within the scope of 19 June request.
24. Paragraph 8 criticises the conduct of a Council officer. Paragraph 9 makes criticisms of the Council in the light of the contents of the material disclosed to Mr Egan by the ICO on 22 June 2015.
25. Mr Egan's submissions therefore throw no light on whether the Council holds more material within the scope of the request. He has advanced no sustainable grounds for challenging the decision of the ICO that no further information, beyond the initially withheld material which was sent to Mr Egan on 22 June, exists. The tribunal is satisfied that Mr Egan has not discharged the burden of proof and it is satisfied, on the balance of probabilities, that no further information is held.
26. The tribunal further noted that the difficulty which both the Council and the ICO appeared to have in resolving questions relating to the two information governance regimes for which the ICO is responsible – DPA and FOIA. The tribunal noted the change of position by the ICO and agreed that for the practical purposes of relations between Mr Egan and the Council, the information contained in the originally withheld material had already been disclosed to him. However the basis of that disclosure and whether such disclosures had been made to the world at large rather than to a single individual was unclear. The tribunal therefore concluded that in dismissing the appeal (which was contested on the basis that further information was held) it was inappropriate to substitute a decision notice addressing the question of whether in the circumstances of the case section 41 no longer applied. The issue raised by the handling of this case by the Council and the ICO is the practical handling of the interaction between FOIA and DPA. What has been disclosed to an individual, i.e. outside of FOIA, is irrelevant; such matters are not determinative in relation to disclosures to the world at large. FOIA is applicant blind, therefore it is inappropriate to take into account what an individual might know, or claims to know unless this can be demonstrated to have been made public in some way. By "public" it is important to distinguish between private conversation and published facts. Furthermore a requestor's personal data should not be disclosed in a response to him specifically because disclosure under FOIA is to the world at large. Instead consideration should be given to section 40(1) which applies in cases where



the requestor is the data subject. Provision of such information is then handled under the "Subject Access Provisions" in section 7, DPA98. There appears to be an approach with respect to the handling of personal data in this case (for example address, telephone number etc.) by both the Council and the Commissioner, apparently viewing such disclosures as minimal and not significant. If this approach is taken then care must be taken to ensure that other matters, for example sensitive personal data, are not similarly formally put into the public domain simply because the individual making a FOIA request would as the data subject, if he made a subject access request, have subject access rights to the information. The public disclosure of such sensitive data would be a significant breach of the DPA.

Conclusion and remedy

27. For the reasons stated above this appeal is dismissed.

28. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 8 September 2015