Neutral citation number: [2024] UKFTT 330 (GRC)

Case Reference: EA/2023/0197

First-tier Tribunal
General Regulatory Chamber
Information Rights
IC-203977-N7T8

Heard at: Worcester Magistrates' Court

Heard on: 15 April 2024
Decision given on: 24 April 2024

Before

TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER KERRY PEPPERELL

Between

KESTER DEAN

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: In person
For the Respondent: no appearance

Decision: The appeal is Allowed

Substituted Decision Notice:

To: Shropshire Council of
Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Shropshire Council disclose all photographs showing the display of planning notices erected by or on behalf of the planning applicant in planning applications 22/00213/FUL – and 22/02172/FUL within 30 days of the date hereof.

REASONS

1. The opening pages of Douglas Adams' 1978 satiric masterpiece *The Hitchhikers Guide to the Galaxy* find his hapless protagonist lying in the mud in front of a bulldozer to prevent it demolishing his house. His conversation with the individual in charge of demolition explains how the situation arose:

   "You were quite entitled to make any suggestions or protests at the appropriate time you know."

   "Appropriate time? "hooted Arthur. "Appropriate time? The first I knew about it was when the workmen arrived at my home yesterday. I asked him if he'd come to clean the windows and he said no he'd come to demolish the house. He didn't tell me straight away of course. Oh no. First he wiped a couple of windows and charged me a fiver. Then he told me."

   "But Mr Dent the plans have been available in the local planning office for the last nine months."

   "Oh yes well as soon as I heard I went straight round to see them, yesterday afternoon. You hadn't exactly gone out of your way to call attention to them had you? I mean like actually telling anybody or anything."

   "But the plans were on display…"

   "On display I eventually had to go down to the cellar to find them."

   "That's the display department."

   "With a torch?"

   "Ah, well the lights had probably gone."

   "So had the stairs."

   "But look you found the notice didn't you?"

   "Yes," said Arthur, "yes I did. It was on display in the bottom of the locked filing cabinet stuck in a disused lavatory with a sign on the door saying Beware of the Leopard."

2. Mr Dean's experience of the planning process of Shropshire County Council in 2022 suggests that 44 years of local government reform, and the adoption into UK law of major international and national measures to protect individual's rights with respect to the environment (Aarhus Convention), with respect to privacy (The General Data Protection Regulation) and long-standing arrangements to provide redress against

maladministration (The Local Government Ombudsman) have done little to provide protection for Mr Dean.

3. Mr Dean moved into his current home about seven years ago. Most days he walks round the corner, past a private road to go to his work or to visit his parents. One morning late in 2022 he awoke to hear heavy machinery working on a site at the end of the private road perhaps 15-20 metres from where he lives. As a former chair of the planning committee of a town council he (correctly) considered that such work required planning permission and he would have expected to be notified of the application for planning permission.

4. The Town and Country Planning (Development Management Procedure) (England) Order 2015 provides for publicity for applications for planning permission. One of the means of publicity is by the display of a site notice which is defined as:

   "by site display" means by the posting of the notice by firm fixture to some object, sited and displayed in such a way as to be easily visible and legible by members of the public;

5. In June 2021 Shropshire Council adopted a Statement of Community Involvement relating to planning issues, replacing its previous arrangements which had been in operation for some years. This emphasised the importance of the use of electronic means of communication including its planning portal and confirmed that site notices would be displayed. In assessing the impact of the changes it found the impacts of the changes on the quality of consultation and the engagement with all sectors of the community including those with protected characteristics uniformly positive. It did not contain a commitment to write to individual local residents who would be affected by a proposed development.

6. On 11 October 2022, having had his rude awakening, Mr Dean sought information about the planning process

   "All communications between the Council and the developers and/ or their agents in respect of Planning Applications [redacted] and [redacted]. Also all communications between different Officers and / or between Officers and Members of the Council also in respect of Applications [redacted] and [redacted]. This is a request under both the Freedom of Information Act and the Environmental Information Regulations."

7. He received an acknowledgement but no substantive reply. On 31 October he wrote asking for the substantive reply and received a stern response from the information governance team that "The target disclosure for your request is 7 November, 20 working days from receipt of your request". On 7 November he wrote again:

   "As per the emails below, I should have received the information I requested by 7 November 2022. No information, or request for proposed extension due to unforeseen difficulties, has been received.

My request is for basic planning information. The planning process is a public one, it should not be a private world of private liaisons between members of the planning department and those seeking planning permissions. My request is therefore a very simple one to administer and so I look forward to receiving the information by return.

To avoid doubt my request is because secret actions of the Council have permanently damaged my quality of life to deliver no public good or benefits whatsoever. I have a direct interest in the matter and require the information accordingly. I am not requesting the matter for vague reasons and so, if the information department is busy, I request prioritisation of my request accordingly."

8. During this period he also sought the assistance of Ludlow Town Council in whose area he lived. This resulted in an email to Ludlow Town Council from Shropshire containing information as to the public consultation periods for the two planning applications relating to the works:

   10th February 2022 - expiry 3rd March 2022
   30th May 2022 - expiry 20th June 2022

9. On 23 November concerned that there was still no response to a simple request he sought the assistance of the Information Commissioner:

   "I would be most grateful for your Office's kind assistance in respect of Shropshire Council with-holding public information.

   My life has been permanently damaged by the Council granting planning permission without following the statutory consultation procedure. Neither myself nor any of my neighbours received any notice of a development that now permanently damages our quality of life. There is no public benefit to the scheme - it is just a rich person with a big house adding value to it with extensions. We literally woke up one day to find the work in progress.

   So I asked for all emails, notes of telephone conversations and any other communications between the Council and the developer / and/or any agents involved. This was acknowledged on 11 October 2022 as below. The Council can easily locate the information under it's referencing scheme for Planning Applications 22/00213/FUL and 22/02172/FUL .

   It has ignored my complaint of 17 November 2022 about not providing the information within the prescribed time-scales as below.

   I attach a letter from my solicitor to the Council by way of background information. The Council is also well out of time to respond to my substantive complaint about the conduct of the Planning Department giving rise to major alarm bells suggesting it lacks any concern for public interest and the rule of law. This makes the FOI request even more important."

10. The solicitors' letter noted that there had been a previous application in 2015 where the Council had consulted 11 neighbouring residents by letter, that application had

lapsed and at the time Mr Dean had not lived in his current home. With respect to the 2022 application:

"The Council appear not to have carried out any notification of the adjoining properties in respect of this application, no reason is given for this in the case officer report. It is however noted that no public comments were received."

The letter addressed Mr Dean's planning concerns:

"…had our client, or the other neighbours, been notified of the second application he would have had the opportunity to object and inform the Council of the impacts of the permitted development on his private amenity space. As a result of the grant of the applications for this development, our client now has two windows facing his living room and creating significant overlooking. In addition, and due to the lack of conditions controlling construction hours, our client has experienced disruptive noise from the development works, throughout the day. Our client has spoken to the other adjoining neighbours of the development and none of them received any consultation letter, nor were they aware of the application for permission.

Our client is particularly sensitive to these impacts as he is autistic. Had the Council notified him of this application they could have taken these considerations into account in determining the application. As it is they have failed to impose any planning conditions limiting the development hours to certain periods during the week. The impacts of this failure on our client have been severe and he has suffered from lack of sleep and stress"

The letter went on to explore the planning law issues:

As the Council are no doubt aware, the publicity and notification requirements in respect of planning applications are underpinned by article 33 of The Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO") which requires the local planning authority to take into account any representations which have been made in response to them, and they are prohibited (by article 34(9) of the DMPO) from determining an application for planning permission before the end of 21 days beginning with the date a site notice was first displayed or notice served, or 14 days from the date of publication of a requisite newspaper notice.

Further Article 15 of the DMPO requires a local planning authority to post notice of the application in at least one place on or near the land, and to maintain it there for not less than 21 days. If it is removed, obscured or defaced during that time without fault or intention of the authority, they are not treated as having failed to meet this requirement so long as they have taken reasonable steps for its protection and, if need be, replacement (para.(6)).

In R. (Guiney) v Greenwich LBC [2009] J.P.L. 211 (a case under the GDPO) the Deputy Judge (HHJ Mackie QC) held that there had been a breach of the former article 8 in circumstances where the site notice had been placed in an area where it would not normally be seen by the neighbours of the proposed development, with the result that the claimant and others were not aware of the particular implications of the development for their homes. Had

they been notified, they would have objected. However, in the circumstances of the case, the court granted a declaration rather than quashing the planning permission in question.

Article15(5), provides that it is the responsibility of local planning authorities either:

(i)to mount a site display on or near the land for at least 21 days prior to determining the application, or

(ii)to serve the notice on any adjoining owner or occupier.

Where there is a choice regarding publicity (by site notice or neighbour notification) both choices are equally valid. However in the current case and given that under the previous application 11 neighbours were notified, we would have expected the Council to carry out a similar notification on this occasion, regardless of the fact that the application was considered to be a replacement of the lapsed consent. The reason for this is that a number of years have expired since the consideration of the previous application and the owners of the adjacent properties may have changed. The proposed development and the likely impacts arising from it should therefore have been considered afresh.

The letter went on to address the equality issues raised by the case, possible ameliorations to the design to reduce the harm and asked for the information Mr Dean had requested to be released and for the council's complaints procedure to be followed.

11. Following the intervention of the Information Commissioner certain information was released to Mr Dean on 7 December 2022. This included:

- an email from those making the planning application to Shropshire Council dated 9 February stating "Just to confirm we have displayed the notice as per the instructions"

- a reply the following day Thank you for notifying us that the site notice has been displayed, unfortunately I am unable to open the photos, can you please send them in a different format.

- an email from the planning case officer at 2.29pm 4th July describing internal discussions confirming certain features were acceptable, others problematic and suggesting alterations

- an email in reply from the planning applicants at 2.51pm 4th July –"WE agree with your comments I have attached the amended plans"

- on 5 July at 4pm an email from the planning department "Are you able to email me over an amended block plan, as the one submitted still show the dormers on the garage building."

12. Mr Dean was not satisfied by the disclosure he received. On 11 January 2023 he wrote to the Commissioner expressing thanks and seeking more assistance:-

"Unfortunately that release of information was inadequate and there are excessive redactions as well as being late. So I complained on 13 December 2022 accordingly. Please find attached the Council's response of 10 January 2023 which includes my complaint of 13 December 2022, apologising for the delay but defending its position regarding excessive claimed reductions and missing information.
The outstanding matters are as follows:

1. *The council blacked out an image believed to be concerning a purported planning notice that would allegedly publicly displayed it is contended that this information is not exempt from public release and should be released accordingly.*

2. *[meeting minutes]*

3. *[officer identities]*

If you could kindly adjudicate upon whether with the Council's withholding of information is legitimate or whether it should release the withheld information described above it would very much it would be very much appreciated.

13. In the decision notice the Commissioner defined the scope of the investigation and discussed the photographs:

"11. The withheld information in this case, which the Commissioner has viewed, comprises the names and contact details of the various parties to email correspondence about the planning applications. Three photographs, forwarded by the developer and showing the property in question, have also been withheld.

12. The analysis below considers the application of regulation 13(1) of the EIR to withhold personal data. The complainant has specifically asked that the Commissioner consider the disclosure of the Council officers' identities, and the disclosure of the photographs. The Commissioner has therefore excluded the small amount of personal data that relates to other parties, from the scope of this investigation.
…..
20. As regards the three photographs the Council has withheld, they contain images of the developer's property, including its name. The address of the property is in the public domain in connection with the planning application, and is known to the complainant. The Commissioner's established position is that the address of a private property (and consequently, information about it) constitutes the personal data of its owner/occupier. The photographs are, therefore, the personal data of the developer.

27. He finds that the developer would have a similar, reasonable expectation that their personal data, provided for the specific purpose of seeking planning approval from the Council, would not be disclosed to the wider world in response to an EIR request. The Commissioner has conducted internet searches, and he has been unable to locate any images of the property which are similar to the withheld images. Disclosure would therefore be placing new information into the public domain.

45… Finally, he recognises that one application was essentially re-applying for permission that had previously been granted, and which had lapsed. The other was for modifications to existing structures. The Commissioner does not consider that their approval would necessitate the level of deliberation which the complainant envisages."

14. Mr Dean appealed:

"8. The Appellant does not accept that three photographs of an alleged publicly displayed planning notice constitute personal data exempt from release under either or both the Environmental Information Regulations or Freedom of Information Act.

9. Firstly, the photographs must be of a view obtainable by any member of the public at any time. This is because the Council has stated the pictures are of a public notice publicly displayed.

10. Secondly, in the context of the Council relying so heavily on what it states are accessible publicly displayed notices in its new planning consultations regime, now devoid of individual notices provided to residents, the photographs should be released in the public interest.

11. Thirdly, the Appellant has exhausted the Council's internal complaints procedure and is contemplating a complaint to the Local Government Ombudsman. The Information Commissioner believes that the non-release of this information does not disadvantage the Appellant in that respect.

12. The Commissioner is contended to be mistaken. This is because in Milburn, R (On the Application Of) v The Local Government and Social Care Ombudsman [2022] EWHC 1777 (Admin) the Ombudsman was found to have wrongly accepted assertions by a Local Authority that were unsupported by evidence. The Appellant is at risk of a similar situation arising with his own complaint, should he decide to advance it.

13. Fourthly, the Appellant is concerned about the erosion of local democracy caused by the removal of planning notices formerly provided to residents over many decades, with those notices withdrawn at a meeting chaired by a property developer who did not declare her interest. It is therefore again contended that the release of photographs said to provide evidence of an allegedly prominently and publicly displayed planning notice should be released in the public interest."

15. In resisting the appeal the Commissioner argued firstly that the photographs were personal data as they were *images of the developer's property including its name* which relate to and identify the developer because the address of the property is in the public domain as a result of the planning application referenced in the request and because the developer is known to the Appellant. They were therefore data relating to an identifiable living person. The difficulty with this proposition is that it adds nothing of substance to the detailed information already in the public domain, indeed that information in the planning application giving details as it does of the new buildings means far more information (and that significant) has already been voluntarily placed by the applicant for permission than is contained in the picture

which does not contain any information about the individual not already placed in the public domain and to significant extent is a picture of someone else's fence.

16. The Commissioner further argues that the GDPR Article 6(1)(f) ground for disclosure - its necessity for the legitimate interest of Mr Dean is weakened by an apparent shift from arguing for his personal interest to a more general public interest in democratic processes and that in any event the interest could be met by less intrusive means. Sadly the Commissioner does not further explore this by demonstrating how this could be achieved. The Commissioner relies on the principle that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject". The problem with the Commissioner's approach was that, to the extent that the photographs are personal data that is data that the data subject was required by law to put in the public domain by public display and disclosure of that material now is necessary, to demonstrate that the planning applicant has discharged that duty and not infringed the rights of others by failing to comply with the planning law.

17. The third ground of appeal which the Commissioner identifies relates to the judicial review of the Local Government Ombudsman and argues that it is unclear on what basis this case could or should be used as authority for the proposition that any complaints that the Appellant might make would be thwarted by the absence of the requested photographs since the LGO would appear to have powers to request any information which may be relevant to it. While it is true that the LGO could require sight of the photographs it is clear that the Appellant cites the case in support of the proposition that the Ombudsman erred by wrongly accepting assertions made by the local authority unsupported by evidence – and that was an error into which the Commissioner had also fallen. The tribunal understands that the LGO has refused to investigate the Appellant's complaint, which on the evidence was a foreseeable outcome of a systemic failure by the council.

Consideration

18. The Environmental Information Regulations (EIR) are a regime of access to information distinct from the rights arising under the Freedom of Information Act. They arise from the UK's treaty obligations under the Aarhus Convention of 25 June 1988. This provides:

Article 1:

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 3

GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

19. In ratifying the treaty the UK undertook to guarantee rights of access to information, to participate in decision-making and access to justice in environmental matters, the "three pillars" of the Convention. The UK has implemented the access to information regime through EIR. The UK's position is that the other pillars are in domestic law through existing and evolving long-standing frameworks – participation through the Town and Country Planning legislation and policy, access to justice through courts and tribunals. While commentators have argued that litigation costs in UK courts are a significant barrier to access to justice, the overarching framework of planning control has received less criticism for being ineffective.

20. The effective entry point to public participation is guaranteed by Article 6:

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner

21. Article 3 of Aarhus emphasises the mutually reinforcing nature of the three pillars and that for them to be effective they need to work together compatibly. As Ban Ki-Moon wrote in the preface to the Second Edition of the UN Implementation Guide to Aarhus:

"The Aarhus Convention's twin protections for environmental and human rights, and its focus on involving the public, provide a mechanism for holding governments to account in their efforts to address the multi-dimensional challenges facing our world today.."

22. The Convention is clear and (as the solicitor's letter admirably shows) the procedures laid down by the planning procedure order of 2015 appears to be compliant with the Convention. If notices are displayed publicly for 21 days (or individuals are notified) then the opportunity for public participation is given. However the Appellant was unaware of how Shropshire Council managed consultation on planning applications. He was unaware of the applications which affected him. The information is available on Shropshire Council's planning portal. This continues to provide a large amount of information about these applications. Planning permissions for the applications were granted as a result of decisions under delegated authority by council officers. The decision was made for the first on 15 March and for the second on 6 July 2022.

23. It is important to understand why the implementation of the DMPO by Shropshire Council failed to accord local residents their rights. By ceasing to provide individual

notification to residents (as mentioned in the Convention) one easy, reliable means of ensuring transparency and the possibility of public participation (adopted by Shropshire for the previous, (lapsed) planning application) was abandoned. This left the display of site notices. Historically these would be displayed by an official of the planning department sticking a notice giving details on lampposts near the site (there is a lamppost conveniently adjacent to the private turning). Such an official will be aware of the need for a public display; it is possible that a check would be carried out after a period of time to ensure that the notice is still displayed for the full 21 days. This method also gives reasonable assurance that the public have access to the information needed for participation.

24. However it is clear that as well as ceasing the time-honoured practice of writing to residents with the information they need Shropshire Council has also abdicated responsibility for the display of site notices. Disclosed material shows that the developer was responsible for the display of notices. This creates two clear risks. The first is the moral hazard. Individuals with a strong pecuniary interest in minimising public involvement (with the possible consequence of delay, further expense or failure to obtain planning consent) are given responsibility for steps to enable public involvement. The second risk is that, however well-intentioned the execution of the display it may be inadequate to meet the requirement for a public display for 21 days. In this case the photographs are the only material which Shropshire possesses to demonstrate that any notices have at any time been erected at any location. Public comment on the application would have demonstrated that some members of the public were reached at the relevant time. There was, as the planning decision records, no public comment.

25. The full details of the applications including the name of the property owner, of the property, the architect and that the site cannot be seen from a public road (all information contained in the planning application) remain on Shropshire County Council's planning website and remain open to public inspection. They will remain in the public domain for some years to come. That statement as to the lack of visibility is a pointer to the possibility that, the guidance of Shropshire as to the display of the site notice or the execution of that guidance was inadequate to ensure that the most basic of requirements of planning law – public information to enable public participation - were met.

26. The decision of the Commissioner was that:

"The Commissioner has conducted internet searches, and he has been unable to locate any images of the property which are similar to the withheld images. Disclosure would therefore be placing new information into the public domain. For all parties, disclosing their personal data in response to this request would be unexpected and may cause them distress."

27. This is a pitiful failure to understand the scope and significance of material in the public domain and the role of data protection in protecting rights.

28. Data Protection legislation has always recognised the complexity of interactions with other rights underpinned by law. The first recital of Directive 95/46/EC addresses the issue:

"…encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the ***fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms****"*

29. This recognition of its links to rights is the same linkage identified by Ban Ki-Moon in the Aarhus Implementation Guide and the interlinked nature of the three pillars as well as the incorporation of issues of individual data privacy within the environmental information pillar mean that the approach adopted by Shropshire in this case is fundamentally ill-conceived.

30. This is exemplified by the way Recital 4 of GDPR explicitly links the rights and protections in GDPR to other rights:

"The processing of personal data should be designed to serve mankind. ***The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality****. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular* ***the respect for private and family life, home*** *and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business,* ***the right to an effective remedy and to a fair trial****, and cultural, religious and linguistic diversity."*

31. At paragraph 45 of the decision notice the Commissioner comments:

"Finally, he recognises that one application was essentially re-applying for permission that had previously been granted, and which had lapsed. The other was for modifications to existing structures. The Commissioner does not consider that their approval would necessitate the level of deliberation which the complainant envisages."

32. Shropshire will clearly have endorsed the wholesale and uncritical adoption of its arguments. This simple statement points starkly to the bankruptcy of the approach of Shropshire and the Commissioner. The law recognises the right of the Appellant to be informed and to be heard in the planning process. The failure of Shropshire to ensure that residents are informed and heard and have their views taken into account has been obscured by the mischaracterisation of the evidence as to the display of notices so that the failure of Shropshire is concealed. No harm or distress would be caused to the planning applicant by the disclosure of the photograph of evidence which the planning applicant was required to put in the public domain and, in so far as it is personal data, has remained in the public domain in the publicly available planning records of the council.

33. Whether the Appellant's representations would have had any effect on the planning process is an entirely separate question from the deprivation of his rights. The failure of Shropshire, the Commissioner and the LGO to protect his rights is a significant failure. The public interest in disclosing the failure of Shropshire to implement planning law adequately as well as the removal of the Appellant's rights are matters of substance. Any theoretical disclosure of personal data is de minimis.

34. The embarrassment to the Council which would be caused by revealing its failure and the self-deceiving statement in the 2021 Statement of Community Involvement that the changes would have a positive impact on all sectors of the community including those with disabilities was avoided by the Council using personal data provisions in Aarhus not to enhance rights (as the GDPR recitals emphasise) but to remove them. The Council has misused GDPR by putting a sign up "Beware of the (GDPR) Leopard". The Commissioner should not have permitted the Council to change the leopard's spots.

Signed Hughes Date: 24 April 2024