

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

Date: 26 July 2018

Public Authority: Bassetlaw District Council
Address: Queens Buildings
Potter Street
Worksop
Nottinghamshire
S80 2AH

Decision (including any steps ordered)

1. The complainant requested the full building control file for a specific property ("the Property").
2. The Commissioner's decision is that Bassetlaw District Council ("the Council") was entitled to rely on Regulation 13 (Personal Data) of the Environmental Information Regulations ("the EIR") to withhold the requested information – with the exception of a single document.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the document titled "DWELLINGS – Accessibility" to the complainant.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Complainant lives in a neighbouring house to the Property. He believes that the Council has not adequately enforced planning and building control restrictions in respect of the Property, thus causing access difficulties to and reducing the value of, his own property.

Request and response

6. On 7 March 2017, the complainant contacted the Council and requested information of the following description:

"Can you confirm that the attached document supplied by Enforcement is everything you hold regarding the planning permission for [the Property] please.

"If any documents are being withheld can you identify what they [are] and the grounds for not releasing them.

"Can you also provide me with the full file from Building Control on the same development please."

7. On 4 April 2017, the Council responded. It cited both Regulation 13 of the EIR and Section 40 of the Freedom of Information Act (Personal Data) as its justification for refusal – although it noted that some information was already in the public domain and highlighted, to the complainant, where that information could be located.
8. The complainant requested an internal review on 6 April 2017. The Council provided the outcome of its review on 27 April 2017. It maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 27 November 2017 to complain about the way his request for information had been handled.
10. The scope of the Commissioner's investigation and the following analysis is to determine whether or not the withheld information is the personal data of a third party and, if so, whether disclosure under the EIR would contravene the Data Protection Act 1998 – which was the law that was in force at the time the request was complied with.

Reasons for decision

Procedural Matters

Is the requested information environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

12. Having reviewed the withheld information at length, the Commissioner considers that the bulk of the information would fall under categories b) and c) of Regulation 2. This means that the information is environmental and that the request fell to be considered under the EIR.

13. As both Regulation 13 of the EIR and Section 40 of FOIA are identically worded (save for references to "this Act" instead of "these Regulations")

and as the Commissioner has not identified a procedural breach in the way the request was handled, the Commissioner's decision would have been the same under either regime, but the Council was clearly unsure as to which regime applied.

Regulation 12(3) / 13

14. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*"
15. Regulation 12(3) of the EIR states that: "*To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*"
16. Regulations 12(3) and 13 provide an exception for information that is the personal data of an individual other than the requester and disclosing that personal data would be in breach of any of the data protection principles. This means there are two main points to address when considering this exception; whether the requested information is the personal data of a third party and whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the withheld information the personal data of a third party?

17. The definition of personal data is set out in section 1 of the Data Protection Act 1998:

"...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, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

18. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. With the exception of a single document (which is discussed further below), all of the withheld information relates to the Property. The various documents within the Building Control File refer to the internal construction and design of the Property, from the initial application for

planning permission to the present day. The withheld information also includes the results and analyses of various tests which have been undertaken to determine whether the Property meets various required standards.

20. The complainant has argued that the file could be provided to him if "personal details" were removed. The Commissioner does not agree with this argument. As set out above, the definition of personal data is far wider than mere names and contact details. Except as described below, all the documents within the file relate specifically to the Property and hence specifically to the owners of the Property – therefore it is *all* their personal data.

Would disclosure contravene any of the Data Protection principles?

21. Schedule 1 of the Data Protection Act 1998 lists the eight Data Protection principles. The Council considers that the disclosure of the withheld information would contravene the First Data Protection Principle which states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless....at least one of the conditions in Schedule 2 is met."

22. The first matter for the Commissioner to consider is whether disclosure of the requested information would indeed contravene the First Data Protection Principle and hence engage the exception at Regulation 13. The Commissioner's approach when considering the First Principle is to start by looking at whether the disclosure would be fair. If disclosure would be unfair, the exception is engaged immediately. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
23. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the ICO takes into account a number of factors, including the following:
- What reasonable expectations does the data subject(s) have about what will happen to their personal data?
 - What are the consequences of disclosure?
 - Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject(s)?
24. The Council considers that the withheld information *"is not already available in the public domain and its disclosure would be unwarranted since such information is by its nature private to the property owner and not information that he would want or expect to be disclosed into the public domain."*

25. The primary purpose in submitting an application under the Building Regulations is to obtain approval for work. Planning laws require an application for certain types of work to be approved prior to the work being considered lawful.
26. When submitting the application, the individual(s) submitting it would have expected the details which they provided on the form to be used for the purpose of establishing what the application was for, who the application was made by and examining whether the plans met the requirements of building regulations.
27. Whilst under normal, full planning applications there is a general expectation that the application and copies of the plans will be published and open for comment and objection by members of the public, the Council has noted that there is no requirement for it to do so with Building Regulations applications and the subsequent investigation and approval records. It does not therefore publish these or make them available to other parties generally.
28. The Commissioner has noted that, on the Council's online portal for people to submit applications for building control approval, the opening page states "*The information on this form will be recorded on computer and also stored and processed as required. It is not a public document and will not be used as such.*"
29. Whilst the above statement is not, in itself, determinative, the Commissioner considers that it does create a legitimate expectation that the information that is supplied will be kept confidential.
30. The Commissioner therefore considers that the owners of the Property would not expect that the any building regulation applications or subsequent investigation and approval records would be disclosed to the whole world in response to a request for information under the EIR.
31. A disclosure of this information would involve biographical details about the owners and their property. The Commissioner considers that the owners would have a reasonable expectation that this level of detail about them and their home would not be disclosed.
32. As to the consequences of disclosure, as the complainant in this case lives close to the Property he is likely to be aware of many of the details about the Property – particularly the exterior – but he may not be aware of the very specific technical details within the withheld information or of any interior works. The wider public would also have no awareness of the information.

33. The key point here is that disclosure under the EIR is considered to be disclosure to the world at large. It is the equivalent of the Council publishing the information on its website. The Council must consider the detriment that might be caused to the owners of the Property by disclosure of this material, not just to the complainant, but to the wider world.
34. Disclosure of the withheld information may not particularly cause any wider detriment to the individual other than a general loss of privacy. However, in the case of a private citizen, carrying out their legitimate interests, on their own private property, this general expectation of privacy carries a relatively strong weight.
35. Given that the Commissioner is satisfied that non-disclosure of the withheld information is a reasonable expectation, then there would be some level of distress from disclosure, on the basis that privacy has been unexpectedly lost.
36. The Council does not appear to have asked the Property owners whether they would consent to this information being disclosed – nor does the EIR require it to do so. The Commissioner is aware of long-running disputes relating to the Property between the complainant, the owners of the Property and representatives from the Council. As such, she is satisfied that seeking consent was unlikely to be a viable option.
37. Next, the Commissioner has gone on to consider whether there is a pressing social need for the information to be disclosed which might make a disclosure under the circumstances fair – in spite of the owners' expectations. The question is whether the public has a legitimate interest in the disclosure of the information to the public which outweighs any unwarranted intrusion into the rights of the owners to have their information remain private.
38. The complainant has a legitimate interest in the withheld information as he is a neighbour to the Property and he has concerns about the legality and impact of previous works to the Property on his own property.
39. The complainant has also highlighted to the Commissioner that he considers there has been maladministration on the Council's part in relation to the building works and the requirements set out in the original Planning consent for the Property. A complaint has been brought before the Local Government Ombudsman (LGO) but was rejected.
40. The Commissioner considers that there is a legitimate public interest in the building control process to determine that Building Regulations are being applied properly. At the same time, the Commissioner considers that the building control process has been introduced with the specific

aim of entrusting the Council to apply the Building Regulations appropriately. This in turn, in the Commissioner's view, creates a greater interest in protecting the integrity of the building consent process and that disclosure could damage the public trust in the Building Regulations process.

41. The Commissioner further considers that the existence of a mechanism for addressing maladministration (ie. the Council's internal Complaints process, followed by a potential appeal to the LGO) reduces the weight given to any legitimate interest in accessing this type of information under the EIR.
42. The Commissioner is of the view that the LGO's finding – that there was no wrongdoing on behalf of the Council – further reduces the weight that can be added to any legitimate interest in disclosure of the withheld information.
43. Other than the complainant's own private interest in the information being disclosed, the Commissioner is unaware of any pressing social need for the information to be disclosed.
44. The Commissioner recognises that the legitimate interests of the complainant must be weighed against any unwarranted prejudice to the rights, freedoms and legitimate expectations of the owners of the Property. Having considered all of the above, the Commissioner's decision is that disclosure of the withheld information *would* be unfair to the owners of the Property.
45. Having determined that disclosure under EIR would be unfair to the owners of the Property, the Commissioner thus considers that Regulation 12(3) / 13 is engaged and therefore she does not need to go on to consider whether any of the Schedule 2 conditions would be met.
46. The Commissioner is satisfied that (with the exception of the document described below) the Council was entitled to apply Regulation 12(3) / 13 to withhold the information.

The document titled "DWELLINGS – Accessibility"

47. One document within the file is substantially different from all the others, in that it does not relate to the Property. It appears to have been photocopied from another document which gives general guidance on building regulations in relation to access arrangements.
48. Whilst the original document is clearly not the personal data of any third party, the version within the file contains some underlining which has clearly been done by hand. There are also some handwritten words in the corner.

49. The Commissioner considers it unlikely that the handwriting would identify its author and even if it did, the words that are written do not, in themselves, provide any further information about the author.
50. The Commissioner further considers that there is no obvious connection between the words that have been underlined and the Property. She does not therefore consider the document to be the personal data of any third party and hence can be disclosed to the complainant as Regulation 12(3) / 13 is not engaged.

Right of appeal

51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Ben Tomes
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