



**IN THE FIRST-TIER TRIBUNAL**

**Case No. Appeal No. EA/2015/0174**

**GENERAL REGULATORY CHAMBER INFORMATION RIGHTS**

**ON APPEAL FROM Information Commissioner's Decision Notice FER0574247**

**Dated 16<sup>th</sup> July 2015**

**BETWEEN**

**Mr Robert Murphy**

**On behalf of**

**Peter and Emma Murphy**

**Appellants**

**And**

**The Information Commissioner**

**1st Respondent**

**And**

**Bristol City Council**

**2<sup>nd</sup> Respondent**

Determined on the papers on 9<sup>TH</sup> February and 10<sup>th</sup> May 2016.

Date of Decision 9<sup>TH</sup> June 2016

**BEFORE**

Ms Fiona Henderson (Judge)

Mr Paul Taylor

**And**

Mr Dave Sivers

**Subject r 13 EIRs** – Personal data

Case Law: *South Lanarkshire Council v Scottish Information Commissioner 2013 UKSC 55*  
*Goldsmith International Business School v IC and Home Office [2014] UKUT 563 (AAC)*

**Decision: The Appeal is refused (save in relation to documents available elsewhere)**

## REASONS FOR DECISION

1. This is an appeal against Decision notice FER0574247 dated 16<sup>th</sup> July 2015 in which the Commissioner concluded that Bristol City Council (the Council) were correct to rely upon regulation 13 of the EIRs to withhold the disputed information.<sup>1</sup>

### Background

2. Mr Murphy is the representative of the owners of No.4 (the Appellants), their neighbours at No. 3 had undergone building works on their property including the building of an extension. The building works were subject to planning permission and control under the Building Regulations 2010. The owners of No. 3 did not serve a party wall notice under the Party Wall Etc Act 1996 despite a letter sent on the Appellant's behalf from a Party Wall Surveyor<sup>2</sup> asking them to issue a Party Wall notice, pointing out what the Appellants believed were flaws in the existing plans which impacted their property and indicating that in the absence of a Party Wall notice this letter would serve as a "letter before action" should the Appellants need to seek an Injunction.
3. The owners of No. 3 submitted a revised foundation design (for the wall nearest to No.4) prior to an injunction being obtained. The Appellants were of the view that the new design appeared to significantly reduce a particular risk associated with one wall of the proposed extension but other issues remained. An agreed Schedule of Condition was also completed. On the advice of the Appellants' Party Wall surveyor the Appellants did not proceed with the injunction.

### The Information Request

4. On 7<sup>th</sup> November 2014 the Appellants requested:  
  
*"full information on the building regulations application and site inspections. This information should include the name and qualifications of the "approved inspector"."*
5. The request was refused on 22<sup>nd</sup> December 2014 under s40(2) FOIA.<sup>3</sup> Following reconsideration at an internal review the Council released the name and qualifications of

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<sup>1</sup> The Commissioner also held that the Council breached regulation 5(2) as it did not comply fully with the request within the prescribed 20 working day time frame. This is not the subject of this appeal.

<sup>2</sup> P58 OB dated 21.07.14

<sup>3</sup> Personal Data

the inspector<sup>4</sup> and concluded that the correct access regime was EIRs, nevertheless it withheld the rest of the information under reg 13(1) EIRs.<sup>5</sup>

6. The Appellants complained to the Commissioner on 4<sup>th</sup> March 2015 arguing that the withheld information was technical data and not personal data. During the currency of the Commissioner's investigation the Council disclosed information from the building control file which it considered to be the Appellants' personal data under s7 DPA<sup>6</sup>. The information included plans relating to the foundations of the party wall and extracts of the calculations.

### The Appeal

7. The Appellants appealed to the Tribunal on 10<sup>th</sup> August 2015 on the grounds that:
  - i) The majority of the data should be categorized as the Appellants' personal data,
  - ii) The Council had been inconsistent in their definition of what was the Appellants' personal data as they only provided structural information relating to the foundations close to the Appellants' property. Other structural information relating to within 3m of their property e.g. beams had been withheld.
  - iii) The information requested is technical and biographical details could be redacted. Layout of the rooms was already in the public domain
  - iv) Disclosure would not be unfair or unwarranted, as if there were errors in the construction of No.3 it was in the owners' interests to have those errors uncovered so that they could sue their advisors and possibly the Council.
  - v) The Appellants believed that the Council were misusing data protection legislation to cover up inadequacies in their procedures.
  - vi) The Appellants had a right to information which could potentially affect their home.
8. This case was listed for a determination on the papers on 9<sup>th</sup> February 2016. Upon consideration of the bundle prepared by the Commissioner the Tribunal was unable to

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<sup>4</sup> The information provided then was subsequently clarified

<sup>5</sup> Personal data

<sup>6</sup> The right of "Subject Access"

determine the case as it did not have sufficient information. The Tribunal having seen the withheld material raised the issue of whether it had been provided with all the information in scope of the request. The Council were therefore joined and further evidence was received from the Council and submissions from all parties.

9. Following the adjournment directions the Council clarified that some information was held on the electronic file and was not contained within the paper file from which the disputed information had been gathered. Additionally upon rechecking the paper file it became apparent that some of the documents were double sided and only one side had been copied and made its way into the disputed information. This information has been provided as annexes to the closed adjournment submissions and remains closed pursuant to rule 14(6).
10. The Tribunal is satisfied that it now has a complete copy of the disputed information. The Tribunal has set out its general reasons in this open decision and provided a closed table of the disputed material identifying the reasons that apply to each document. This should not be disclosed without leave of the Tribunal.

#### Scope

11. The Closed bundle included some documents which had originated from the Appellants and appear in the open bundle<sup>7</sup>. The Tribunal is satisfied that there is no issue to determine in relation to these documents and does not include them in its determination.
12. There is no dispute between the parties that the EIRs are the correct access regime.
13. Whilst the Appellants do not accept that the information requested constitutes personal data, if it is, they argue that in light of the impact upon their property, it is their personal data and they argue that the Council have been inconsistent in their provision of personal data under s7 DPA as a subject access request.
14. The Tribunal observes that if the remaining disputed information is the Appellants' personal data it is excluded from disclosure under reg 5(3)<sup>8</sup> EIRs and the Tribunal has no jurisdiction to order its disclosure. The Tribunal is satisfied that regardless of whether it is the Appellants' personal data, as set out below, it is the personal data of the owners of

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<sup>7</sup> P58-60 and 89-90 OB reflect p 18-20 and 22-23 CB

<sup>8</sup> To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

No.3 and the Tribunal has gone on to consider whether this information has been properly withheld pursuant to regulation 13(1) EIRs on that basis.

Information available publicly

15. It is apparent that the Council have applied the exemption to the entirety of the information that has remained without considering whether individual documents have been properly withheld under regulation 13. This is based on their understanding of the Commissioner's advice upon which they have relied. The Tribunal is satisfied that this is not the correct approach. The documents should each be considered individually as whether disclosure would breach the data protection principles would vary depending upon the nature of each document. Some of the documents that are currently withheld are publicly available for a fee from the Council or from other organisations<sup>9</sup>. There is a specific exemption for information accessible to an applicant by other means under FOIA (s21) but no directly equivalent regulation under EIRs, however, it is likely that regulation 12(4)(b) could be applicable if the Council's view was that disclosure under EIR would be manifestly unreasonable<sup>10</sup>. However, the Council have a duty to provide advice and assistance pursuant to regulation 9 EIRs and if not prepared to provide a copy under EIRs in our judgment they were obliged to notify the Appellant of where it could be obtained. We are not satisfied that it can be right in these circumstances to withhold that information under regulation 13.

Personal Data

16. The Appellants argue that the information is not personal data. They argue that the information requested is technical and biographical details could be redacted.

17. Personal data is defined under s1 DPA as:

*“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...*

18. The Tribunal agrees with the Commissioner that individuals can be identified from a postal address in conjunction with other sources such as Land Registry records or the

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<sup>9</sup> P1 (and reverse) p3 (and reverse) p8 and p16 (as presented in Appendix 4)

<sup>10</sup> In light of the requirement to pay a fee for this information

electoral roll as well as local knowledge. The Appellants know the identity of the owners of No. 3 and as such we are satisfied that this is not a case where redaction would anonymise the data such that it no longer constituted personal data.

19. The Commissioner argues that the withheld information is about the fabric of the property at No. 3, a person's home is a central part of his or her identity, it is typically the focus of family and private life. Information however technical about the layout design and construction of that home, is data that relates to those who live there. The biographical significance is that it tells about an important event in their lives namely the renovation and extension of their home.

20. The Tribunal agrees and is satisfied that the withheld information is the data subject's personal data. Although much information is already in the public domain through the planning process such as the layout of the rooms and some construction information, this is the detail of how the data subject's home is constructed and the process by which this was done. Although it is likely that much of the contact between the Council and the data subject is likely to be through the owners' advisors the Tribunal observes that additional biographical details may<sup>11</sup> also be included such as:

- A data subject's attitude towards and the extent to which he co-operated with the building control process,
- whether the build approved was that which he originally wanted or whether he was required to make alterations or to compromise.
- whether there was any enforcement element to the building control or criticism of proposals of work done. (This would be apparent from any revisions to original proposals and in what circumstances, how many inspections there were, what took place at the inspections, whether work had to be redone or additional works undertaken).

19. Reg 13 EIRs provides:

*(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.*

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<sup>11</sup> These are general observations upon the nature of the information requested and does not provide any indication of the actual contents of the disputed information in this case.

*(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; ...*

21. The first data protection principle, as set out in Schedule 1, Part 1 paragraph 1 to the DPA, 1998 provides, that personal data shall be processed:

*“...fairly and lawfully and, in particular, shall not be processed unless  
(a) at least one of the conditions in schedule 2 is met. ”*

22. The Tribunal accepts the Commissioner’s argument that the information was obtained fairly and lawfully pursuant to Schedule I Part II:

*1(2) subject to paragraph 2<sup>12</sup> for the purposes of the first principle data are to be treated as obtained fairly if they consist of information obtained from a person who—*

*... (b) is required to supply it by or under any enactment...*

as the Council is under a legal obligation to implement the Building Regulations 2010 and it is necessary for that purpose to record the withheld information.

21. The Schedule 2 conditions include –

*(6) (1) – The processing is necessary for the purpose of legitimate interests pursued 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 interests of the data subject”.*

23. The test to be applied in relation to Condition 6(1) of Schedule 2 to the DPA is that of *Goldsmith International Business School v IC and Home Office [2014] UKUT 563 (AAC)*

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<sup>12</sup> Paragraph 2 is not applicable on the facts of this case by reference to paragraph 3(2)(b)

(b) that the recording of the information to be contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

where the Upper Tribunal endorsed the principles to follow which include insofar as it is material on the facts of this case:

*“Proposition 1: Condition 6(1) of Schedule 2 requires 3 questions to be asked namely:*

- i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*
- ii) Is the processing involved necessary for the purposes of those interests?*
- iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?*

*Proposition 2: The test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.*

### Legitimate Interests

24. The first question is whether the person to whom the data is disclosed is pursuing a legitimate interest. We accept that we are entitled to take into account private interests (e.g. those of the Appellant and his family) as well of those of the wider public. In addition to the wording of condition 6 itself which includes the *“legitimate interests pursued by the ... third party”*; South Lanarkshire Council v Scottish Information Commissioner 2013 UKSC 55 (in the context of discussing necessity) states *“...a legitimate interest, which may be a purely private interest, in condition 6 ...”*.

25. The Appellants argued that disclosure was reasonably necessary for the furtherance of a legitimate interest. Those interests were identified as:

- i) their own reassurance in light of their belief that the design and construction of No.3 may be deficient and that the flaws could have been hidden<sup>13</sup>.
- ii) Safety to those using or passing No. 3 and No.4. including the general public
- iii) Scrutiny – so that the public will know that the Building regulations are being implemented effectively.

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<sup>13</sup> We have no confirmation that the foundation was actually built as shown [and have concerns from the outward appearance that there is adequate cover to the foundations to prevent ground movement]p89 OB



The Tribunal is satisfied that these are all legitimate interests however, as set out below, the Tribunal is not satisfied that disclosure is necessary for the purposes of those interests.

Necessity

26. The Appellants argue that the building regulations information should be treated like planning information and routinely disclosed. The Appellants have argued that Building Regulations are part of a legal process used to ensure that the health, welfare and convenience of persons living in or working in (or nearby) buildings is secured. Failure to comply with structural and other requirements of Building Regulations may put at risk the Health and Safety of Persons in an adjoining building or even persons passing in the street. Therefore Building Regulation information must be made available to any person who is likely to be affected by it.
27. This Tribunal is concerned with the disclosure of the disputed information in this case and has no jurisdiction to provide a blanket policy for future application. Disclosure in this case would not provide sufficient information for comment to be made about the operation of the buildings regulations in general by the Council and as such disclosure in this case will not further the legitimate interests of general scrutiny.
28. The Tribunal accepts the Council's evidence that where an independent buildings regulations inspector is used, they submit a form to confirm that they are taking on the work and have the relevant insurance. From the acceptance of the form the Council are not involved in the site and do not inspect. There is no further involvement until the independent inspector confirms completion. Consequently, it cannot be that there is an intention for anyone who has an interest in a building to expect to have a right to the information under EIRs since it will not always be held by the public authority.
29. The Appellants in this case have had it confirmed to them that<sup>14</sup>:
- "I can confirm that the application in this case is approved and that site inspections have been undertaken at the agreed stages to date. It will be inspected through to completion."*
30. The fact that the public are entitled to know that a building is subject to Building Regulations and that a certificate of completion has been issued (by application to the

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<sup>14</sup> P 86 OB

Council for a fee as advertised on their website) in our judgment is intended to provide the reassurance and scrutiny that constructions are being inspected and monitored for compliance.

31. If the Appellants have concerns that the Council is not fulfilling its duties properly (and in this case the Appellants have alleged that the Council's motivation for withholding this information is to disguise their own failures) there is a remedy available namely the Local Government Ombudsman.<sup>15</sup>

32. South Lanarkshire Council v Scottish Information Commissioner 2013 UKSC 55 states at paragraph 27:

*“A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.”*

33. In this case the Tribunal is satisfied that the legitimate aims identified were achievable by other avenues and thus not necessary.<sup>16</sup>

34. Information has been provided to the Appellants under Subject Access Request provisions of the DPA. This has reduced the necessity of the provision of the rest of the disputed information. Although the Appellant notes that none of the original building control information has been disclosed – only the “revised” foundation information, in relation to which he observes the structural calculations were legible but the design drawing was not. The previous plans and calculations where they have been superseded no longer have a bearing on the actual construction and can only go to the issue of whether the original plans were sufficiently rigorously scrutinized. The Appellants’ arguments are based on the assumption that the revision of the plans was a concession that the earlier plans could have had a detrimental effect on the property rather than an attempt to assuage the fears of their neighbours or in response to the input of the Council.

35. Prior to the commencement of the works, the Appellants wrote to No.3 proposing that their respective surveyors to come to an agreement under the Party Wall Act which

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<sup>15</sup> As detailed in Paragraph 30 DN

<sup>16</sup> We have had First Tier Tribunal case EA/2013/0055 drawn to our attention. We are not bound by this decision and we are not satisfied that sufficient consideration was given in that case to whether the legitimate aim could be achieved by something less than disclosure of the personal data to the world at large.

would settle their concerns around key structural issues. It is the Appellants case that No. 3 refused to co-operate, had they co-operated there would have been no need for the Freedom of Information request.

36. That the appropriate arena to raise the issues that the Appellants had (and still have) in relation to reassurance about the construction of the works is via the Party Wall process is reflected in the Council's email of 23.10.14:<sup>17</sup>

*“Normally where applicable consultation under the Party Wall Act would enable you to raise any such concerns about the proposal and the effects on your property, prior to commencement. However, this is civil legislations between the parties and not part of building regulation or planning.”*

37. The Tribunal observes that whilst it is correct that No.3 did not issue a party wall notice they revised their plans and a schedule of condition was agreed. In their letter to No.3 of 21.7.14 the Appellants stated that:

*“The remedy for a breach of statutory duty or unlawful work in this circumstance is in common law via either Injunctive relief and/or damages”<sup>18</sup>*

38. An injunction can be obtained in order to remedy the breach of statutory duty namely the failure to serve the Party Wall Notice. The Appellants chose not to do this but agreed to a course of conduct which provided them with fewer protections than a full party wall award would have ensured. The Tribunal is not satisfied that it is proportionate to disclose the contents of the building regulations file to remedy the Appellants choice not to enforce their rights under the Party Wall Act.

39. In the grounds of Appeal the Appellants also suggested that if errors in the inspection and application of the building regulations came to light this would be in the interests of the owners of No.3, the data subjects. They are entitled to the information relating to them by way of a subject access request under the DPA, as such we are not satisfied that disclosure to the world at large under EIR would be necessary on this basis.

#### Unwarranted

40. The Tribunal has also considered whether, if we are wrong in relation to necessity disclosure would be unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. We are satisfied that it would be.

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<sup>17</sup> P86 OB

<sup>18</sup> P59 OB

41. The Tribunal accepts that the information that is being withheld has no particular sensitivity; however, the Tribunal does observe that unlike planning applications building control files are not routinely disclosed or published to the world at large. Whilst this is not in itself a prohibition of its disclosure it informs the data subjects reasonable expectation when the information is obtained.
42. The Appellants argue that most people would not consider it different from planning information which is publicly available however, the Tribunal notes that the contents of the building regulation file are different from Planning information in that they are likely to include site visits/inspections, and unlike planning there is no consultation process or positive assertion that there will be publication. Although it is accepted that often similar types of information to that submitted in relation to buildings regulations is disclosed pursuant to a party wall agreement or as in this case in direct communication with a neighbour, in these cases it is bilateral and not to the world at large.
43. An alternative to using a Council Building Regulations inspector, as set out above is to use an independent inspector who has no obligation to provide inspection information to the Council. There is no evidence that this distinction has ever been brought to the attention of the data subjects who are thus at risk of the exposure of more of their personal data than someone who had not used a Council inspector. This inequality of position in our judgment is relevant in finding that disclosure would be unwarranted.

#### Conclusion

44. The Appeal is refused for the reasons set out above and in the closed schedule (save that the Tribunal is not satisfied that the documents itemised in footnote 9 to paragraph 15 above were correctly withheld under r13 EIRs as they were publicly available elsewhere). The Tribunal requires the Council to either provide the publicly available information to the Appellants or to direct them to where it can be obtained within 35 days. In all other respects the appeal is refused.

Dated this 9th day of June 2016

Promulgated 10th June 2016

Fiona Henderson  
Tribunal Judge