



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2014/0031**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FER0501110  
Dated: 16 January 2014**

**Appellant: MICHAEL MAXWELL**

**Respondent: THE INFORMATION COMMISSIONER**

**On the papers**

**Date of decision: 11 February 2015**

**Before  
CHRIS RYAN  
(Judge)  
and  
NARENDRA MAKANJI  
ANDREW WHETNALL**

**Subject matter:** Request for information, Reg 5  
Exceptions, Regs 12(4) and (5)  
- Legal professional privilege (5)(b)  
Personal data, Reg 13

## DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

### REASONS FOR DECISION

1. This appeal arises out of a request for information which the Appellant sent to Wiltshire County Council (“the Council”) on 18 July 2012. The request concerned planning consent granted by the Council in respect of property owned by a neighbour of the Appellant, who we will refer to simply as “X”.
2. The request fell into three parts. The first part was correctly interpreted by the Council as a subject access request for the Appellant’s own personal data. Requests of that nature fall to be considered under the Data Protection Act 1998 (“DPA”). It is not capable of falling within the scope of this Tribunal’s jurisdiction, although the Appellant continues to have concerns about the way in which it was handled.
3. The second and third parts of the request constituted requests for information falling within the scope of the Environmental Information Regulations 2004 (“EIR”) and (by virtue of EIR regulation 18) do fall within the scope of the Tribunal’s jurisdiction. They read:

*“All information held by the Council relating to [X] and/or other supporters of the demolition which concerns [the Appellant] in his capacity as an objector to the demolition of [identified property] from July 2007 to current date.*

*“All information held by the Council relating to the exercise of its powers to grant planning and conservation area consent in relation to [identified property] from July 2007 to current date. To include background to the hearings of the applications on 28 May 2009 and 14 January 2010.”*

The Council provided some information but declined to disclose the remainder of what it said fell within the scope of the information request.

4. Under EIR regulation 5 a public authority holding environmental information is required to make it available on request. There is no

dispute that the requested information falls within the scope of the EIR, or that the Council is a public authority for these purposes.

5. The disclosure obligation is subject to certain exceptions provided under EIR regulations 12 and 13. One of those exceptions, arising under regulation 12(5)(b), entitles a public authority to refuse to disclose information which is covered by legal professional privilege. The Appellant originally expressed concern about the Council's reliance on this provision as justification for withholding elements of the requested information. He asserted that it should not apply unless each communication said to be covered was clearly identified so that he could check that the exception had been properly applied. However, he recorded in his Grounds of Appeal before this Tribunal that he was satisfied with the decision on legal privilege contained in the Decision Notice of the Information Commission from which this appeal arises. He said:

*"... my only concern was that Wiltshire Council had not properly checked the documents to ensure that privilege had not been broken by distribution to 3<sup>rd</sup> parties like councillors and the applicant for permission to demolish. The ICO have now inspected the files and therefore I am content to accept this has been independently performed."*

Strictly, therefore, the exception is not part of the appeal. However, in the course of determining the issues that do arise, we have had the opportunity of reviewing the documents which the Council refused to disclose and are satisfied that the exception was correctly applied.

6. The Council also sought to justify its refusal on the basis of EIR regulation 13, which provides that a public authority is not required to comply with an information request to the extent that the information requested includes personal data of a third party and disclosure would contravene any of the data protection principles set out in Schedule 1 to the DPA. In his Decision Notice the Information Commissioner, having reviewed the documents which the Council refused to disclose, found that the exception applied to:
  - a. three email chains between the Council and a party with an interest in legal proceedings that arose out of the relevant planning issues and fell within the scope of the first part of the information request; and
  - b. correspondence to and from third parties relating to their complaint about the Council's handling of those issues.

The Information Commissioner decided that those elements of information constituted personal data and that it would be unfair to those concerned to release their personal data to the world at large. Disclosure would therefore constitute a breach of the data protection principles. The Information Commissioner reached that conclusion (in paragraphs 21 – 30 of his Decision Notice) having taken into account the nature of the information, the reasonable expectations of the

individuals affected and the potential consequences of disclosure. He then balanced the rights and freedoms of the data subject against the legitimate public interest in disclosing the information. He found that no specific legitimate interest in disclosure had been put forward beyond the general principles of accountability and transparency and that these did not outweigh the reasonable expectations of the individuals affected and their right to privacy.

7. In his Grounds of Appeal the Appellant simply stated:

*“... in my view third parties should expect any correspondence to be disclosed under either the public policy of the council on planning matters under EIR or under FOI as complaints about council governance.”*

8. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

9. We have had the advantage of inspecting the documents which the Council refused to disclose and find no error in the Information Commissioner’s approach to the issue or the decision that he reached. We reject the Appellant’s very wide-ranging argument, as set out in his Grounds of Appeal above, for the general subjugation of personal data rights to the principle of transparency in planning matters.

10. The Grounds of Appeal raised a third issue in the following terms:

*“In my opinion based purely on commonsense and external discussions [the Council] have other communications in relation to both planning committee hearings which have not been disclosed and which do not come under legal privilege.”*

The Appellant’s concern about the adequacy of the Council’s search for information was not extensively pursued during the Information Commissioner’s investigation which preceded the issue of his Decision Notice. This appears to have been the result of the Appellant’s confirmation, at the outset, that he was not asking for the disclosure of information which had either been published on the Council’s website or provided to the lawyers representing him in litigation arising out of the relevant planning issues.

11. The issue was not addressed, either, in the Response which the Information Commissioner filed in answer to the appeal, beyond an acknowledgement that the Grounds of Appeal could be interpreted as

asserting that there was information, falling within the scope of the information request, which had not been disclosed to the Information Commissioner. If that had been the case, the Response said, it had obviously not been included in the Information Commissioner's investigation and he was not able to provide further assistance to the Tribunal.

12. The Tribunal sought the assistance of the Information Commissioner and, through his office, the Council in order to be certain that information had not been withheld, which fell within the scope of the information request but outside the categories the Appellant had indicated he did not need to be shown. We drew attention, in particular, to our uncertainty as to whether the search had included documents such as notes that planning officers may have made during the Council's consideration of the relevant planning application or specialist (non-legal) advice which the Council may have received prior to its decision to grant permission. The Council did not respond to the direction with particular speed and its first response was casual in tone and vague in content. However, following further enquiries we were ultimately satisfied that we had received a clear assurance from it that, notwithstanding the Appellant's suspicions on the point, no relevant information had been withheld beyond that included in our closed bundle of materials, being the material for which one or other of the EIR exceptions was claimed.
13. We therefore conclude that the Council had been justified in its original stance, refusing to disclose more than the small quantity of documentation provided to the Appellant at the time. The Decision Notice therefore contained no error in concluding that each item of withheld information was covered by one of the exceptions claimed and the Appeal should be dismissed.
14. Our decision is unanimous.

**Chris Ryan**

Judge  
11 February 2015