

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

**Date:** 22 May 2017

**Public Authority:** West Berkshire District Council  
**Address:** Council Offices  
Market Street  
Newbury  
Berkshire  
RG14 5LD

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to planning issues including enforcement files about alleged breaches of planning control in respect of two residential properties. The Council refused to provide the information from the enforcement files under regulation 13 – personal data.
2. The Commissioner's decision is that the Council is entitled to withhold the information contained in the enforcement files under regulation 13(1).
3. The Commissioner does not require the public authority to take any further action in respect of this matter.

**Request and response**

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4. On 17 April 2016 the complainant requested information of the following description:

"1. For each of the years 2013, 2014 and 2015 for householder planning applications in aggregate:

- 1.1. How many householder applications did WBC process?

1.2. How many representations to these applications were received?

1.3. How many representations were refused for publication or redacted

2. With regard to Certificates of Lawfulness and the specific provisions of the Town & Country Planning Act 1990 Part VII Section 194 whereby publishing untrue statements is an offence.

2.1. How any investigations did WBC undertake between 2010 and 2015

2.2. How many prosecutions were undertaken between 2010 and 2015 by WBC or by their request were undertaken by Police or the CPS.

3. Any records of communications on paper or digitally between the CEO and the WBC Planning Department or Legal Department or with any Councillor in matters connected with abuses of the planning system between May 2015 and July 2015.

4. Copies of the process or policy guidelines or internal controls that WBC use for policing and controlling planning representations loaded on to the planning portal or included on the public planning file including the most recent Data Protection Publication assessment

5. Copies of the Statutory Consultation letters with regard to planning application [reference] sent by WBC to the Environment Agency and [named organisation] on 20 July 2015 and any responses

6. A copy of the revised planning timetable agreed between the parties, pursuant to the requirements of the Town and Country Planning Act, provided by WBC with regard to planning application [reference] on or before 9 September 2015

7. Copies of information being any guidance notes, policy documents or other user instruction manuals in paper or digital format which would establish the meaning or definition of the following entries on the "Application Constraints" table published in the WBC planning portal

7.1. AG123 – Agricultural Land

7.2. Archaeology – Archaeological Site

7.3. What the entry "superseded" mean in the column marked "status" means

8. With regard to planning breaches relating to listed buildings in 2013, 2014 and 2015

- 8.1. How many such public complaints did WBC receive
- 8.2. Now many complaints did WBC investigate including breaches investigated without reference to a public complaint.
- 8.3. On how many occasion did WBC issue stop or enforcement action on these investigations.
- 8.4. How many planning breach investigations has WBC undertaken in Boxford Parish since June 2015.

9. Please provide information being paper records or information stored on digital systems or databases relating to the investigation and enforcement or formal authorisation of works reported as being breaches of planning permission and the recorded rationale for WBC derogating from their stated development plan and policies with regard to the following developments (EIR):

- 9.1. The replacement with modern tiling of the roof on a grade II listed barn at [Cottage 1] March 2015
- 9.2. The erection of structures and separately installation of concrete and wooden fences on or within the curtilage boundary of [Cottage 2].
- 9.3. The construction of concrete embankments and raising of land on the boundary of [Cottage 2] being flood risk management works.
- 9.4. The unlawful use of agricultural land north of [Cottage 2].

10. Copies of any correspondence and or notes including digital records regarding distribution to WBC staff or other third parties of information about proposals for drainage installations on [House 1] private land as per [named organisation] plans introduced to us in an email of 20 November 2015 titled "Boxford [House 1] – Drainage Ditch west of [Cottage 2] "

11. A copy of [named council officer] complaints response of 23 September 2015 to our complaint of 9 September 2015.

12. Copies of the policy statements or guidelines that record your assertions made on 11 November 2015 that WBC complaints policy either does not include provisions for, and or rather excludes complaints correspondence sent to the CEO and to Councillors.

13. A copy of the entries in the WBC complaints log for our complaints

13.1. Our complaint of May 2016 (sic) to plan apps and CEO (No WBC complaint ref issued)

13.2. Our complaint dated 9 September 2015 to Planning (No WBC complaint ref issued)

13.3. Our complaint held under WBC ref [reference]

5. On 24 May 2016 the Council responded and:

- disclosed some information,
- explained that some of the other information that had been requested was not held,
- cited the exception provided by regulation 12(4)(b)- manifestly unreasonable as grounds for withholding the statistics requested in parts 1.2 and 1.3 of the request on the basis that providing the information would be burdensome,
- cited the exception provided by regulation 13 – personal data, to withhold the information requested in part 9, and
- advised the complainant that there were provisions within the EIR and the Freedom of Information Act (FOIA) which allowed requests to be refused on grounds that they were vexatious.

6. The complainant requested an internal review on 27 May 2016. The Council sent him the outcome of the internal review on 29 July 2016. The Council revised its position in respect of some elements of the request:

- the Council now provided the information requested at part 1.2 of the request,
- the complainant had challenged the accuracy of the consultation letter to the Environment Agency which the Council had provided in response to part 5 of the request, the Council explained that the version of the letter that had originally been disclosed was one which had been 'recreated'.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 10 September 2016 to complain about the way his request for information had been handled. He raised a number of concerns regarding the Council's responses, some of which were not matters which the Commissioner had jurisdiction over. His main concerns however were the Council's response to part 5 of his request in respect of the consultation letter sent to the Environment Agency and its refusal to disclose the information on investigations in to alleged planning breaches requested at part 9.

8. During the course of the investigation the complainant advised the Commissioner that he did not necessarily require a formal decision in respect of his concerns over the Council's attempts to respond to part 5 of the request by re-creating a copy of the consultation letter that had been sent to the Environment Agency. Therefore the Commissioner has dealt with this issue under 'Other matters'. As a consequence the focus of the notice is on whether the information from the enforcement files on the alleged planning breaches can be withheld under regulation 13 – personal data.

## Reasons for decision

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### Regulation 13 – personal data

9. So far as is relevant regulation 13(1) provides that a public authority shall refuse a request to the extent that it includes the personal data of someone other than the applicant and its disclosure to a member of the public would breach any of the data protection principles set out in the Data Protection Act 1998 (DPA). It is important to note that the test is whether a disclosure to any 'member of the public' would breach the data protection principles, rather than simply a disclosure to person making the request.
10. 'Personal data' is defined in section 1 of the DPA as information which relates to a living individual who can be identified from that information or from other information which is in the possession of data controller or is likely to come into the possession of the data controller. The term 'data controller' simply means the person holding and controlling the information. In the context of a disclosure in response to an EIR request the data controller would include the public to whom the information would be disclosed.
11. The Commissioner has been provided with a copy of the information falling within part 9 of the request. Having viewed that information she is satisfied that it contains allegations that the occupiers of the two residential properties named in the request have breached planning legislation, correspondence with the occupiers, records of site visits and the internal dialogue within the planning department in respect of the allegations. The Commissioner is satisfied that these records identify and relate to the occupiers of those properties.
12. Having found that requested information constitutes personal data the Commissioner has gone on to consider whether its disclosure would breach any of the data protection principles. The Council has not specified which particular data protection principle it considers would be breached by the disclosure, however based on her experience of dealing with similar matters and gained through her role as regulator of the

DPA, the Commissioner has focussed on the first principle. This states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 of the DP is met.

13. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness, or whether a Schedule 2 condition can be satisfied.
14. 'Fairness' is a difficult concept to define. It involves consideration of:
  - The possible consequences of disclosure to the individual.
  - The reasonable expectations of the individual regarding how their personal data will be used.
  - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

15. The Council has explained that although it decided that no formal enforcement action was considered necessary in respect of the alleged planning breaches, the relevant enforcement files all remain open. When this was challenged by the Commissioner the Council explained that there is no established protocol governing when a file is closed. This is because a degree of flexibility is required when handling such matters. It may well be that although at the time an issue is reported to the Council the works in question do not warrant any enforcement action, it is appropriate to keep the matter under review as any additional works may change the character of the property to an extent where enforcement action may become appropriate.
16. Having viewed the information from these files and in light of the Council's explanations the Commissioner is satisfied that the files remain open. The allegations were made in 2015 and the files include internal and external communications extending into early 2016. Although the Commissioner would be sceptical of arguments that the files would remain open indefinitely, the Commissioner does accept that at the time the request was made in April 2016 it is not unreasonable to consider the files were still open. To release information from the files in these circumstances could lead the public to infer there had been wrongdoing by the occupiers of those properties where it may ultimately be concluded that this is not the case. This would be detrimental to the occupiers.

17. In terms of the expectations of the occupiers the Commissioner notes that the planning application process is a very public and anyone participating in that process would reasonably expect that any personal data included in an application or objections to an application would enter the public domain. However the same is not true in the case of allegations that there have been breaches of planning control. The Commissioner has looked at the Council's website which includes advice on how to report alleged planning breaches and about the subsequent investigations in the form of 'Planning Enforcement FAQs'. There is nothing within that advice which suggests that the process is a public one. The advice makes it clear that the identity of the person making the allegation will remain confidential and will not be revealed to those who are the subject of the allegation. The advice also states that the Council will update the informant of any significant developments as appropriate and inform them of the findings of any investigation. However such disclosures are only to the informant rather than a more general disclosure to the world at large.
18. The Commissioner also considers that there is a clear distinction between information generated as part of the planning process and that held in relation to allegation of breaches of planning control. A planning application simply seeks permission to do something; there can be inference of wrongdoing made in respect of the applicant. This is very different to information on a breach of planning control, where it is clear there has been an allegation of, and potential for there to have been, wrongdoing. This in itself would shape the expectations of the subject of any allegation that the information would remain confidential, at least up until the Council had decided there was a breach which required an enforcement notice to remedy.
19. The Commissioner is aware that under section 188 of the Town and Country Planning Act 1990 planning authorities have an obligation to keep a register of any planning Enforcement Notice it has served. The details contained in that register are limited and excludes the identity of the occupier, or the individual on who the notice was served. Importantly such information is only published once an enforcement notice has been served. In respect of the allegations referred to in part 9 of the request the Council has not had cause to serve any enforcement notice.
20. The Commissioner is therefore satisfied that it would be reasonable for the subjects of the allegation to expect that their personal data would not be disclosed to the world at large. This is notwithstanding the fact that these individuals may recognise that the actual person who made the allegation would be apprised of the findings of the investigation and the potential for some information to be published in the register if an enforcement notice is served.



21. The final test of fairness involves balancing the legitimate interests in the public having access to the requested information balanced against the rights and freedoms of the occupiers. Having viewed the information it is clear that the Council considered the allegations related to only minor enforcement issues. As such there does not appear to be any great public interest in disclosing the nature of the allegations or the details of the subsequent investigations. The Commissioner also notes that the Council already provides information on its website which explains, albeit briefly the circumstances in which it will or will not take enforcement action in response to allegations of breaches in planning control and how it prioritises its investigations into alleged breaches. Therefore the Commissioner gives little weight to the legitimate interest in making the enforcement files available to the public. Certainly it is not sufficient to outweigh the rights of the occupiers of the properties in question to have the allegations against them treated in a confidential manner while the files remain open and when there has been no formal enforcement action taken.
22. The complainant has directed the Commissioner to guidance produced by the Planning and Regulatory Services Online Project, 'Planning and Building Control Information Online – Guidance notes for practitioners – August 2006'<sup>1</sup>. This guidance was produced in collaboration with the Information Commissioner's Office amongst others. The guidance is aimed at assisting planning authorities when considering what information can be published on the internet in respect of planning control without breaching the DPA. The first point the Commissioner would make is that the guidance is just that, 'guidance' and the disclosure of information in each case needs to be considered on its own merits.
23. Part 4 of the guidance deals with enforcement registers and investigations of alleged breaches. The guidance makes it clear that before any formal enforcement notice has been served no details of the owners or occupiers of the property should be made publicly available. It does however suggest that disclosing information about alleged breaches may be possible without this necessarily involving the disclosure of personal data so long as the focus of any information published is on the property rather than the owner or occupier. This may be the case, however the Commissioner considers that in this case this would involve of the creation of a new document summarising the nature of the allegations and ensuring the focus was entirely on the property while at the same time removing the personal data. The Commissioner does not consider such a summary could be produced simply by redacting everything but the addresses of the properties and the allegations themselves as this would simply produce information

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<sup>1</sup> <https://www.gov.uk/government/publications/planning-and-building-control-information-online-guidance-notes-for-practitioners>



that would be meaningless to the general public. Nor is it likely to provide the complainant with the information he is seeking.

24. As referred to earlier in this notice the Council's website advises the public that anyone who reports alleged breaches in planning control will be updated on any significant developments in the subsequent investigation and informed of the outcome. However such a disclosure would be to the informant and would be made at the discretion of the Council. This contrasts with the situation under the EIR where the test when applying regulation 13 is whether it would breach the data protection principles to disclose information to the world at large.
25. Having considered the withheld information, the fact the enforcement files were still open, the consequence for the occupiers of the properties of people inferring wrongdoing when this may not necessarily be the case and the expectations of the occupiers in respect of the confidentiality of the investigation, together with there being only a limited legitimate public interest in the disclosing the information, the Commissioner concludes that disclosing the requested would be unfair. The disclosure would therefore breach the first data protection principle. The Council is entitled to rely on regulation 13(1) to withhold the information. The Commissioner does not require the Council to take any further action in this matter.

## **Other matters**

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26. Although not forming part of the formal decision notice, the Commissioner may use the 'Other matters' section to comment on matters that have been raised by the complaint or subsequent investigation.
27. In so far as is relevant, part 5 of the request sought a copy of the statutory consultation letter sent from the Council to the Environment Agency on 20 July 2015 in respect of a particular planning application.
28. In its initial response to the complainant the Council produced of a letter from itself to the Environment Agency regarding the planning application in question and which was dated 20 July 2015. The complainant had cause to challenge the accuracy of that letter at the internal review stage. As a consequence the Council informed the complainant that the original letter that would have been sent to the Environment Agency was produced using a template. The template contained the body of the letter with the details such as date, recipient, summary of the planning issue etc, being added. No copy of the completed letter is retained either

electronically or manually. The Council has advised the Commissioner that this is common practice within planning departments.

29. In responding to the request the Council had re-created the letter using the template and then re-populating it with the relevant data recorded on the system to produce a completed version of the letter. In doing so however, it had by accident used the wrong dates. The letter had in fact been sent to the Environment Agency on 4 September 2016, not 20 July 2016.
30. The Council has provided the Commissioner with copies of information held on the manual case file for the relevant planning application. This included a copy of the Planning Services Registration Check List, a pro-forma listing the different administrative tasks associated with the planning process, including when any consultee letters are printed. The pro-forma is initialled and dated to indicate that the consultation letters were printed on the 20 July 2015. However another document within that file, the EA Check Memo, shows that consultation letter was actually only approved on 3 September 2015. The Environment Agency's response shows that the letter was received on 4 November 2015.
31. It therefore appears that an error was made when re-creating the consultation letter and the date shown on the Planning Services Registration Check List was taken as being the date the letter was also sent out.
32. The complainant has also noted that the re-created letter contains the following comment at the end of the main text,

"No objection subject to informatives"
33. This records the Environment Agency's response to the consultation and so would not have appeared on the version of the letter originally sent out. The Council has provided the Commissioner with a copy of a recreated letter dated 4 September 2015 which it believes to be the date the original was actually sent. This again contains the note "No objection subject to informatives". The Council is unable to explain this.
34. In any event the Commissioner is satisfied that the letter provided to the complainant was inaccurate but that the inaccuracy was due to a clerical error.
35. The actual template letter without the addition of the relevant details would have been meaningless. Similarly the additional information on its own i.e. when not read in the context of the letter would also have been of limited value. Therefore the Commissioner is satisfied that by recreating the letter the Council was making a genuine attempt to present the information it had in the most meaningful way.

36. The Commissioner does not object to the Council adopting this approach. However it is important that when doing so the Council makes it clear to the applicant that the letter is a reproduction and explains the process that has been followed. It is unfortunate that in this case inaccurate information was accidentally used when recreating the letter which led to suspicions that the Council was deliberately trying to misrepresent the chronology of its handling of the planning application. Being upfront about how the letter was recreated would have made it easier for the Council to subsequently to re-assure the complainant that this was simply the result of a clerical error.

## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**