



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER0770385**

Appeal Reference: EA/2019/0346

**Heard at Field House, Breams Buildings, London
On 4 February 2020**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

PIETER DEWAAL & MIKE JONES

Between

BEVIS DURHAM

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Appearances:-

Appellant: In person

First Respondent: did not appear

DECISION

The appeal is upheld and the following decision notice is substituted.

SUBSTITUTED DECISION NOTICE

Dated 29 February 2020

Public authority: CARMARTHENSHIRE COUNTY COUNCIL

Address: County Hall, Castle Hill, Carmarthen SA31 1JP

The substituted decision

For the reasons set out in the Tribunal's determination, the Council is not entitled to withhold the information.

Action required

The public authority to disclose the identified information within 28 days of the date of this notice.

Judge C Hughes

REASONS

1. Mr Durham is an architect and is concerned at the level of compliance with Part A of the Building Regulations which deal with structural safety. He has raised the issue in 2011 with his local authority, Carmarthenshire County Council, and been provided with information. In his view the information disclosed on that occasion demonstrated that the Council was routinely giving approval to building work to existing buildings in breach of the legal requirements. He has raised the issue with the Welsh Government without obtaining an outcome he views as satisfactory. In 2018 he attempted to carry out a further survey and asked to see another randomly selected group of files in order to do so. On 5 December 2017 he sought information under FOIA:-

"Building Regulations Files for Barn and similar Conversions

I wish to inspect 20 of the above files please.

Would it be possible for you to let me have a list from which I can make a selection?"

2. On 5 January 2018 an Information and Data Protection Officer at the Council sent him a list of 35 completed barn conversions between December 2012 and November 2017. He replied:-

"As many on the list are building notice applications which do not include plans, if it does not cause too much trouble, would it be possible to have a list which includes full plans applications for any alterations to existing buildings and not just barn conversions please?"

3. He received an acknowledgement on 8 January indicating the 20 day timescale for dealing with a request under FOIA. On 28 January he requested information:-

"Whilst I wait for a list of building control alteration work applications which are not barn conversions, I would be grateful if I can have copies of the 15 full plans barn applications which I have marked with a tick on the attached copy of the list you sent me on 5 January 2018."

4. He was refused, relying on Environmental Information Regulations regulation 12(5)(e) that disclosure would adversely affect confidentiality of commercial information. The Council maintained its view on internal review. In the correspondence between the two the Council set out the arguments why it considered that the balance of public interest favoured withholding the information. It acknowledged that there was a public interest in the Council being open and transparent and also an interest in ensuring that buildings are safe. However, the deregulation of the building control function meant that the Council competed against private firms, and there should be a level playing field between them. There was a significant public interest in the general preservation of commercial confidentiality to prevent market distortions.
5. Mr Durham explained his concern that in approving designs for the conversion of existing buildings the Council was incorrectly interpreting the Building Regulations in a way which meant that:-

"What your building control officers are doing is asking engineers if they think a building's construction is safe and using their opinions as a criteria for giving Part A safety approvals. The Building Act 1984 and the Building Regulations 2010 do not allow the council to do this."

...

The Building Regulations Part A structural safety legal requirement is for buildings to be constructed so that the combined dead, imposed and wind loads are carried safely."

The Building Act 1984 enables the Welsh Government to control safety standards for complying with this legal requirement by approving values for the loads specified in the Part A regulation and safety standards for materials and methods of building construction which satisfy the Part A safety regulation. They are in the BS codes listed in Approved Document A. Alternative solutions are allowed, but they must be safety tested and proven by calculations to be equally safe."

Not one of the files I have seen even mentions this Part A structural safety legal requirement and the BS codes in Approved Document A, let alone check compliance."

If you inspect the 23 files sent to me previously you will see that on not one has the Part A structural safe loading legal requirement to safely support the combined dead, imposed and wind load on the existing roof and walls been mentioned or checked."

6. Mr Durham complained to the Commissioner.
7. The Commissioner considered that the material in question related to planning consent and therefore fell within the scope of EIR. During the course of the investigation, The Commissioner expressed some scepticism that the commercial interests exemption could be established and drew attention to a recent decision of the Commissioner where Bassettlaw Council had received a request for the Building Control file for a specific property and the Commissioner had concluded that Bassettlaw was entitled to rely on regulation 13.
8. In responding to this indication the Council informed the Commissioner that:-

"Some years ago, the Council dealt with a similar request from Mr Durham, where we refused to provide the information under Regulation 13. Mr Durham asked for an internal review, which upheld the original decision and then referred the case to the ICO, who also upheld the decision..."

The case was then referred to the FTT by Mr Durham and in the course of considering the case, the ICO provided legal advice which suggested that the Council was wrong in its approach. Our Counsel considered the advice and advised the council to concede and disclose 23 files, the case being concluded with a consent order."

9. In the light of the Commissioner's indication the Council relied on regulation 13 (the protection of personal data). She limited her investigation to whether regulation 13(2)(a) prevented the disclosure of the information. This provides:-

"13. – (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.

(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;"

10. She explored whether disclosure could be permitted under Article 6(1)(f) of the General Data Protection Regulation which provides:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the

interests or fundamental rights and freedoms of the data subject which require protection of personal data.."

11. The Commissioner considered Mr Durham (dn paragraphs 32):-

has valid reasons for requesting sight of the building control files as he is attempting to determine whether the Council has complied with various building regulations necessary for safety.

However she noted that (dn paragraphs 34-35):-

"there is already a process in place to ensure that Building Regulations are complied with via the Council's Enforcement Department ... however if an individual remains dissatisfied with the outcome of an investigation by its Enforcement Department, there is no external avenue similar to the Planning process, where the concerns can be escalated.

12. In considering the balance between the legitimate interests of Mr Durham and the interests of the data subjects she considered:-

- the potential harm or distress that disclosure may cause;*
- whether the information is already in the public domain;*
- whether the information is already known to some individuals;*
- whether the individual expressed concern to the disclosure; and*
- the reasonable expectations of the individual.*

13. She considered that a key issue was whether individuals had a reasonable expectation that their information will not be disclosed and noted the similarities, distinctions and links between Planning Applications and Building Regulations approvals and that for planning:-

"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 building regulation requirements.

47. The Commissioner notes that 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/or objection by members of the public, there is no such requirement under the Building Regulations. The Council does not therefore routinely publish the information in Building Control files or generally make them available to other parties."

14. She recorded that disclosure under EIR is to the world at large and concluded:-

"53. Whilst the Council has confirmed that disclosure of the withheld information may not particularly cause any wider detriment to the data subjects other than a general

loss of privacy, the Commissioner considers that the general expectation of privacy a private citizen, carrying out their legitimate interests, on their own private property carries a relatively strong weight.

54. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful."

15. The Commissioner therefore upheld the Council's position.

16. In his appeal Mr Durham joined issue with the explanations the Council had given to the Commissioner (and were summarised in the decision notice) over the interpretation and operation of the Building Regulations. He drew attention to issues around the understanding of Building Regulations shown by the inquiry into the Grenfell fire and the inquiry into the collapse of a school wall which led to the closure of 17 schools (Report of the Independent Inquiry into construction of Edinburgh Schools). His specific concern was the structural safety requirement of Building Regulations Part A and his concern that the Council did not apply this requirement correctly.

17. With respect to personal data he noted that while the ICO Decision Notice had stated that it was clearly possible to identify the owners (DN paragraph 50):-

"... if the building addresses and any names are redacted it is impossible to identify the building owners, in any case, the names and addresses of the building owners are already available for public view on the council's planning files under town planning legislation.

*51. Planning legislation allows the public to see building plans, therefore there is no point in preventing the public seeing them under the EIR. I have said that I only wish to see is proof that the building complies with the Part A structural safety legal requirement I do not require any addresses or names.
..."*

18. He further pointed out that he had only become aware of the basis upon which the Commissioner had considered the matter after he received the decision notice and he had offered to amend his request to exclude personal information and commented:_

"as the ICO allowed the council to change its reason for non-disclosure during the appeal without telling me, it is plainly not reasonable for the ICO not to allow me to amend my information request..."

19. He further noted that the Commissioner had in response to the Grenfell fire made a statement urging proactive publication of fire safety records and argued that there was no basis for the Commissioner to take a different view on structural safety. He also drew attention to s91A of the Building Act 1984

which makes provision for local authorities to keep *“in a register such information and documents as may be prescribed in connection with their functions, powers and duties conferred or imposed by or under this Act.”*

20. In resisting the appeal, the Commissioner reaffirmed her position and argued that redaction would be ineffective since a “motivated intruder” would be able to find the identity of the property owner. She argued that paragraphs 30-35 of the decision notice showed that there was no pressing social need for disclosure. The Commissioner drew attention to a FTT decision relating to a Building Control file where the tribunal concluded that *“there was a general public interest in transparency in relation to planning decisions because of the potential impact on neighbours of inappropriate development failures to comply or approval being given inappropriately...The disclosure of building Control files, which relate to technical compliance with the Building Control Regulations, is not necessary for that purpose.”*
21. In oral proceedings Mr Durham emphasised that barn conversions could occur in buildings which had inadequate foundations or had walls insufficient for the additional weight involved in the insertion of floors or could be destabilised by the addition of extensions. The records he had seen did not demonstrate that these effects had been properly considered in determining whether the building which was subject to the “change of use” would be structurally stable under new conditions.

Consideration

22. It seems to the tribunal that the Commissioner, by not disclosing to Mr Durham that the basis upon which she was considering the case was not the exception of commercial interests but the exception of personal data, did herself a disservice because she did not have the advantage of Mr Durham’s arguments related to the relevant exception in the circumstances of this case..
23. The attention of the tribunal has been drawn to two tribunal cases relating to Building Control and personal data, one of which was settled in favour of an individual seeking the information (after the Commissioner indicated that the withholding of the information could not be sustained (see paragraph 8 above)) and one where the tribunal upheld the Commissioner’s view that the information should not be disclosed. Neither case is binding on this tribunal and the most that can be said is that such cases are fact sensitive.
24. Although the Commissioner in her response to the appeal argued that there is no pressing need for the processing (i.e. public disclosure) on the basis of her reasoning in the decision notice, the terms of the decision notice (see paragraph 11 above) clearly indicate that the concerns which Mr Durham has raised, of a systematic failure to understand and apply building control correctly, cannot be addressed easily.

25. The relation to planning control is relevant. The statutory framework for planning means that personal information forming part of planning applications is available on a public register, while similar personal information forming part of the building control process is not, although compliance with building control is a standard condition of the grant of planning consent. The statutory disclosure of what in many cases will be the same information with respect to individuals strongly suggests that the assertion the Commissioner makes in this case in paragraph 53 of the decision notice (see paragraph 14 above) is considerably overstated. Given the existence of the register of planning applications the Commissioner's arguments with respect to a "motivated intruder" are entirely beside the point since the personal data will generally be available in the planning register.
26. The Sustainable and Secure Buildings Act 2004 inserted in the Building Act 1984 section 91A which provides for registers to be kept by local authorities of *"such information and documents as may be prescribed in connection with their functions, powers and duties conferred or imposed under the [Building] Act."* While the provision has been commenced it is clear that the extent of information which has been prescribed is not sufficiently extensive to encompass the information requested, although Parliament has legislated to permit a register to hold this information.
27. Mr Durham has argued that there is a pressing social need to ensure that Building Regulations are being correctly interpreted and applied and he asserts that, on the evidence he has seen, this has not been done by the Council. In her decision notice the Commissioner has acknowledged that Mr Durham has valid reasons for having sight of the material. The tribunal agrees. Building Control is a technical and complex matter which it is not for the Commissioner or the tribunal to rule upon. However, it may be noted that the Inquiries related to the Grenfell fire have shown difficulties with respect to the application of Approved Document B (fire safety) and the Edinburgh Schools Inquiry found difficulties with respect to the application of Approved Document A (structure). The Commissioner in responding to the Grenfell fire urged transparency with respect to fire risk assessments and had *"started work to consider how councils and other public authorities could make fire safety information available now and in the future"*. It seems to the tribunal that similar considerations to those applying to matters within Approved Document B apply with respect to Approved Document A.
28. It is clear that there is a pressing social need to ensure that buildings are constructed safely. There is a significant difference of view between Mr Durham (who has expertise in this area) and the Council. In order to determine whether the process is being applied correctly it is necessary to make the evidence available so it can be examined. In weighing those interests against the rights and interests of the data subject the tribunal is satisfied that in this case the matters listed in paragraph 12 above are of very little weight –

individuals will be aware that in planning personal information of applicants will be disclosed and are unlikely to be distressed or concerned by any personal information disclosed by meeting this request. Mr Durham has indicated that he would be happy for all identification of individuals and firms to be removed – in essence for the usual redaction of personal information which occurs in many FOIA/EIR disclosures - and that is appropriate.

29. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal
Date: 12 March 2020