

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

Decision notice

Date: 4 May 2017

Public Authority: Carmarthenshire County Council
Address: County Hall
Carmarthen
SA31 1JP

Decision (including any steps ordered)

1. The complainant requested various pieces of information about a particular property. Carmarthenshire County Council ('the Council') stated it did not hold some of the information requested and withheld other information under regulations 12(5)(b) and 13 of the EIR and section 40(2) of the FOIA. During the course of the Commissioner's investigation, the Council acknowledged that some of the information requested constituted the complainant's own personal data. The Commissioner has concluded that, on the balance of probabilities, the Council does not hold information relating to one part of the request. The Commissioner has also determined that the remaining withheld information is exempt from disclosure under regulation 5(3) and 13 of the EIR of FOIA as it contains the personal data of the complainant and the personal data of third parties. The Commissioner does not require any steps to be taken.

Request and response

2. On 9 May 2016 the complainant wrote to the Council and requested information in the following terms:

"1 Instructions to Structural Engineer Wyatt & Watts resulting in the 30th March 2000 report by them on [address of properties redacted].

2 Letter sent to Wyatt & Watts date 26th April 2000.

3 Letter sent to Wyatt & Watts on 29th August 2000.

4 Instructions and background papers sent to the Counsel for the opinion referenced in the 2002 report to the executive board by Council Officers.

5 An un-redacted copy of the letter dated 14th September 1998 sent by the Director of Legal and Administration to [name redacted] at the Commission for Local Administration in Wales.

6 Copy of the Wyatt & Watts letter(s) date 30th March 2000".

3. The Council responded on 7 June 2016. It stated that it did not hold information to part 1 of the request and confirmed that it had previously disclosed the information relating to part 6 of the request in response to an earlier request for information. The Council also withheld other information under regulation 13 and 12(5)(b) of the EIR and section 40(2) of the FOIA.
4. On 28 June 2016 the complainant requested an internal review of the Council's handling of the request.
5. The Council provided the outcome of its internal review on 15 July 2016 and upheld its position relating to the request, as outlined in its earlier responses.

Scope of the case

6. The complainant contacted the Commissioner on 23 July 2016 to complain about the way his request for information had been handled.
7. The request in this case relates to a dispute between two neighbouring properties regarding the construction of an extension at one of the properties (property B). The complainant submitted the request to the Council on behalf of the individual living in the property next door (property A).
8. During the course of the Commissioner's investigation the Council acknowledged that the information held relating to some parts of the request constituted the complainant's own personal data and fell to be considered under the Data Protection Act 1998 ('the DPA'). The separate right of access provided by section 7 of the DPA therefore applies. The Commissioner has considered this separately. This notice only relates to

the FOIA aspects of the complaint. The Council reconfirmed that it did not hold information relating to part 1 of the request.

9. In light of the above, the Commissioner's investigation into this complaint is to determine whether the Council holds any information relevant to part 1 of the request, and whether the Council should disclose the withheld information relating to parts 2, 3, 4 and 5 of the request.

Reasons for decision

Regulation 5 – duty to provide environmental information

10. Under regulation 5(1) of the EIR public authorities have a general duty to make environmental information available when it is requested. When the information is not held, public authorities should issue a refusal notice, in accordance with regulation 14 that cites the exception under regulation 12(4)(a) of the EIR. This exception applies when information is not held.
11. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held; she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
12. The Council's position is that it does not hold any information relevant to part 1 of the request. Part 1 of the request is for a copy of instructions given to Wyatt & Watts (structural engineers) which resulted in their report relating to property B dated 30 March 2000.
13. The Council confirmed that on receipt of the request it consulted with its Building Control section who would have been the only relevant department which dealt with Wyatt & Watts concerning the subject matter. It was confirmed that the 'instructions' given to Wyatt & Watts were given verbally at a meeting and therefore no written instructions are held. The Council referred the Commissioner to the report from Wyatt & Watts dated 30 March 2000, which opens with the line "Further to our meeting on 22.03.00...", which confirms that the instructions were given verbally rather than in writing.

14. Based on the submissions provided by the Council and the evidence provided in support of its position that the instructions given to Wyatt & Watts were given verbally rather than in writing, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold information relevant to part 1 of the request.

Regulation 5(3) – the exemption for personal data - the complainant's own personal data

15. The duty to make environmental information available on request is imposed by regulation 5(1) of the EIR. Regulation 5(3) provides that regulation 5(1) does not apply to information that is the personal data of the requester.
16. The Commissioner notes that in this case the request was submitted by the complainant on behalf of the owner of property A and the request relates to a dispute between him and the owner of property B regarding the construction of an extension at property B.
17. The Council originally withheld information relating to part 4 of the request under regulation 12(5)(b). In relation to part 5 of the request, the Council stated that it had previously disclosed a redacted copy of this letter to the complainant and stated that it considered the remaining information to be exempt under section 40(2) of the FOIA.
18. As mentioned earlier in this notice, during the course of the Commissioner's investigation, the Council acknowledged that it should have considered some parts of the requests, specifically parts 4 and 5 of the request, as a subject access request under the DPA as opposed to the FOIA or the EIR. The Council also confirmed that following reconsideration under the DPA, it had disclosed the information that the complainant was entitled to.
19. There is no right of access to personal data about oneself under the EIR, as regulation 5(3) provides that information is exempt if it constitutes the personal data of which the applicant is the data subject. Personal data is defined in section 1 of the Data Protection Act 1998 ('the DPA') as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
20. 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.

21. Having considered the information held relating to parts 4 and 5 of the request the Commissioner is satisfied that it constitutes information that falls within the definition of 'personal data'. She is satisfied that it relates to a living individual who may be identified from that data and that it constitutes their personal information. The withheld information contains information relating to the owner of property A, including references to his name. The individual is identifiable from those references and the information relates to him. The withheld information also includes the personal data of other individuals, including the owner of property B.
22. The Commissioner, in her published guidance, "Personal data of both the requester and others" (<https://ico.org.uk/media/1209/personal-data-of-both-the-requester-and-others-foi-eir.pdf>) makes clear that in circumstances where, the personal data of the applicant is very closely linked to the personal data of other data subjects, ie it would be 'mixed' personal data, there is no requirement to assess the relative extent and/or significance of the different sets of personal data in order to establish the 'dominant' data subject. This is because there is no basis for regarding the individual whose data is more extensive or significant than the others as being the only data subject.
23. Where a request is made for information which, if held, would be the personal data of the applicant, the public authority should consider the information in its entirety under section 40(1) of the FOIA or regulation 5(3) of the EIR.
24. Taking the above into account, the Commissioner is satisfied that the information is the complainant's own personal data. This is because the requested information relates to complaints and legal advice concerning the dispute between the owners of properties A and B.
25. The Commissioner is satisfied that regulation 5(3) is engaged and that it can be applied to all of the requested information relating to parts 4 and 5 of the request. As stated earlier in this notice, the Commissioner has undertaken a separate assessment in relation to the data protection elements of this complaint.

Regulation 13 – the exemption for third party personal data

26. Regulation 13 of the EIR states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach one of the data protection principles or section 10 of the DPA.

Is the requested information personal data?

27. In order to engage regulation 13 the information sought by the applicant must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
28. In this case, the withheld information comprises correspondence relating to reports, drawings, surveys and other information relating to property B. Although the documents contain a minor reference to property A in the subject line of the two documents, ie the letters refer to “Re: property A/property B”, the Council contends that the information is principally focussed on the owner/occupier of property B and he could be identified from the information concerned and/or in combination with other data held by the Council.
29. It is the Commissioner’s view that an individual or individuals can often be identified from a postal address through sources such as the Land Registry and the electoral roll. It would be a relatively simple task to marry up this information with what is withheld, to determine the name of the owner/occupier. Additionally, local knowledge of the area will likely mean that local residents will know who occupies and/or owns the building. The complainant, of course, knows the name of the building’s owner as he represents the owner of the neighbouring property.
30. In addition to this, the complainant himself has argued that as a neighbour, he ought to have a right to the requested information on the basis that it relates to works carried out to a property which may impact on his own property, and therefore on his family and private life. The Commissioner finds the same to be true of the information in respect of the owner of property B. Clearly information about how property B is constructed will be information which has an impact on their family and private life.
31. The Commissioner therefore does not doubt that the withheld information is the personal data of the owner/occupier of Property B, for the purposes of the EIR.

Would disclosure breach one of the data protection principles?

32. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data

protection principles. He considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

33. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

Reasonable expectations

34. The Council advised the Commissioner that the individual has reasonable expectations that this information would not be disclosed into the public domain. This is because unlike planning applications, information relating to Building Regulations applications are not routinely disclosed or published into the public domain. In addition, the information in question does not relate to an 'ordinary' Building Regulations application. The applications are concerned with works which have not received completion certificates and which have been subject to enforcement action, with notices being served on the property previously. The withheld information in this case is, therefore, substantially different to ordinary Building Regulations applications – information which the Council and other public authorities have released in response to other information requests.
35. The Council advised the Commissioner that it did not consult with the owner of property B in relation to this specific request for information. However, it confirmed that the individual in question had refused consent in relation to a previous request for similar information.
36. The Commissioner accepts that the way in which the Council normally treats this type of information would shape the reasonable expectations of the individual, and they therefore would not expect the Council to disclose the information requested.

Consequences of disclosure

37. The Council considers that disclosing information of this nature would cause distress to the owner of Property B as it would result in an intrusion of their privacy by placing specific information regarding the matter into the public domain.
38. The withheld information relates to whether the owner of property B, has complied with the relevant Building Regulations. Where a structure is found not to be in compliance with Building Regulations, action is taken by the Council against the property owner (not the contractor or agent involved in the construction).
39. Whilst the Commissioner notes that the complainant may be aware of some of the history associated with building work at Property B, she accepts that an individual would not expect such information about any potential enforcement action against their property to be put into the public domain. The Commissioner also considers that the individual could suffer distress if such information about their property were to be made available to the public at large.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

40. The complainant has stated that his interest in the information stems from concerns about how the work carried out by the owner of Property B has impacted on the owner/occupier of Property A, whom he represents.
41. Both the Commissioner and the Council acknowledge and understand that the complainant has a vested interest in the withheld information. The Commissioner understands that the dispute between the two properties has been ongoing for a considerable amount of time and dates back to around 1990. The Commissioner understands that the subject matter associated with the request has been the focus of a complaint to the Commission for Local Administration in Wales in 1998 and the subject of High Court action in 1993. The Commissioner understands that the Council has made a number of previous disclosures to the owner of Property A and his representative over the years in relation to the matter. The Council has also disclosed information which is considered to be the personal data of the individual he represents in relation to the dispute.

42. The Commissioner's published view¹ is that the private interests of the requester, or even of a small group of people, are not relevant in the context of assessing the public interest in disclosure of personal data. Regulation 13 refers to "the disclosure of the information to a member of the public", not disclosure to the requester specifically. Furthermore, as disclosure under the EIR is considered to be disclosure to the public at large and not to the individual requester, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject; in other words, whether disclosure would tend to be of benefit to all.
43. There is always some legitimate public interest in the disclosure of any information held by public authorities as it promotes transparency and accountability. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
44. The Commissioner acknowledges that there is a legitimate public interest in the way in which the Council discharges its duties and responsibilities under the Building Act 1984, and how it monitors potentially dangerous structures. In this case, however, she does not consider there to be sufficient legitimate interest to warrant circumvention of the existing processes and procedures in place. The Commissioner also considers that, to some extent, the information the Council has already disclosed in this case, satisfies this interest.

Conclusion

45. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individual concerned to release their personal data. Disclosure would not have been within their reasonable expectations and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in matters relating to the how the Council deals with matters relating to potentially dangerous structures but she does not consider that any legitimate interests in disclosure outweigh the individual's reasonable expectations and right to privacy.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

46. As the Commissioner has decided that the disclosure of the information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a schedule 2 condition for processing the information in question. The Commissioner has therefore decided that the Council was entitled to withhold the information under the exception at regulation 13(1).

Right of appeal

47. 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

48. 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.
49. 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

Andrew White
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