



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

**Case No. EA/2011/0219**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FER0368830  
Dated: 8 September 2011**

**Appellants: MR & MRS D WALLIS**

**Respondent: INFORMATION COMMISSIONER**

**Second Respondent: DERBYSHIRE COUNTY COUNCIL**

**On the papers: 5 January 2012 at Field House, London**

**Date of decision: 31 January 2012**

**Before**

**Robin Callender Smith**  
Judge

and

**Jacqueline Blake and Mike Jones**  
Tribunal Members

**Written Representations:**

For the Appellants: in person

For the Respondent: Robin Hopkins, Counsel instructed for the Information Commissioner

For the Second Respondent: John McElvaney, Director of Legal Services and Solicitor for Derbyshire County Council

**Subject matter**

**Environmental Information Regulations 2004**

Exceptions, Regs 12 (4) and (5)

- Legal professional privilege (5) (b)
- Interests of an individual (5) (f)

Personal data, Reg 13 (1)

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 8 September 2011 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. The Appellants wanted to carry out works on property which they considered they owned free of any rights of way owed to any other persons or any other restrictions under the Highways Act.
2. The information they were seeking concerned them, their on-going dispute with neighbours about this matter and Derbyshire County Council's (DCC's) endeavours to establish whether the Appellants' intended works would interfere with the rights of way of others over the highway.

#### **The requests for information**

3. On 27 June 2010 the Appellants made the following request:

We request that under FOI DCC [the Second Respondent] shall now disclose and copy to us any and all information and correspondence in whatever form that may be, including inter-alia and/all DCC briefing and/or meeting or telephone discussion notes, internal, external e-mails including to/from any elected Member whether formal or informal copy letters or any other notes or photographs in your files concerning investigations or surveillance of any sort including RIPA and any annotations by hand that concern or relate in any way to the subject of [name of the street redacted], New Mills including the suggestion of "obstruction" and any related strands of correspondence. We understand that you may redact third-party names for confidentiality, but not DCC officers.

To avoid any doubt and adequately define the FOI subject request to a reasonably narrow area, it is limited at this stage to any document or image received, created or accessed since 1 January 2010 to date concerning "[name of street redacted]" and to/from any resident of [addresses and names withheld], including any other document(s) that clearly pertain(s) to the matter of the "status and extent" of [name of the street redacted] and any DCC investigations of whatever nature. Also disclose whatever "evidence" DCC has about the width of [name of street redacted], however "inconclusive" this may be.

4. The DCC responded on 5 August 2010 providing some information to the Appellants. It withheld other information on the basis of the exceptions in Regulation 12 (4) (e) relating to internal communications; Regulation 12 (5) (b) relating to the course of justice; Regulation 12 (5) (f) in relation to information supplied voluntarily by a third party and Regulations 13 (1) and 13 (2) (b) (i) in relation to third party personal data as defined by the Data Protection Act 1998.
5. Additional requests were made by the Appellants on 28 July 2010 to which DCC responded, disclosing further information to the Appellants but withholding other information before the reasons given above.
6. On 30 September 2010 DCC reviewed both of the requests by the Appellants, adjusted its position in relation to Regulation 12 (4) (e) in respect of internal communications but continued to withhold the information relating to the other exceptions.

#### The complaint to the Information Commissioner

7. On 23 November 2010 the Appellants complained to the Information Commissioner (IC). The IC, in an extensive review (Paragraphs 13 to 79 of the Decision Notice) covering of the various aspects of the exceptions claimed and the public interest factors that had to be weighed and considered concluded that DCC had correctly applied Regulations 13 (1), 12 (5) (f) and (12) (5) (b) to the information.

The appeal to the Tribunal

8. The Appellants object to the IC requiring the DCC to consider those aspects of the Appellants' requests being dealt with as subject access requests on the basis that the IC should have required the DCC to provide them with that information.
9. They complain that the IC did not offer them an opportunity to comment on the explanation as provided by the DCC or to submit material of their own.
10. They challenge the IC's acceptance of the DCC's assertions about the legal status of part of the Appellants' property.
11. The Appellants are concerned at the reference (in Paragraph 60 of the Decision Notice) that the dispute is characterised as being a "live" issue.
12. They also object to the IC making the Decision Notice publicly available on his website on the basis that the IC appeared to be making statements about the legal status of their property.
13. The Appellants are unhappy at what they perceive to be the DCC's maladministration, misuse and abuse of personal information, seeking to cover up misuse and abuse by withholding the disputed information and of blighting the legal status of the Appellants' property. They maintain that the disputed information is required in order for them to prove those allegations and to take appropriate action.
14. They also complain about the delay in issuing the Decision Notice and have not been given an opportunity to comment upon some of DCC's arguments.

## Evidence

15. Together with the other material supplied by the Appellants – in particular a four-page witness statement from Mrs M Wallis dated 3 January 2012 - the Tribunal has also had the benefit of considering information provided by the DCC in a closed bundle in support of the exceptions claimed.
16. The Tribunal has been asked by the Appellants whether there has been proper disclosure of the relevant material, some of which is internal material, by the DCC in the closed bundle. The Tribunal believes the closed disclosure has been proper, complete and accurate.
17. It understands the Appellants' concern in relation to this procedure but it is an inevitable consequence of the work the Tribunal undertakes that closed material has to be presented to it that is not available to the Appellants.
18. The Tribunal is experienced in dealing with this procedure and is alert to ensuring that the interests of the Appellants are properly protected and that those offering evidence under this procedure do not misuse the process.

## Conclusion and remedy

19. The Tribunal finds that the IC was correct in his conclusion that a significant portion of the disputed information was the Appellants' personal data and that it should be treated as a subject access request under s.7 DPA.
20. It also finds that the IC correctly concluded that additional personal data related to individuals who had contacted the DCC concerning the Appellants' proposal in the reasonable expectation that their

information would not be disclosed to the public. It has seen closed material that specifically confirms that expectation.

21. It is satisfied that, following *De Mello v IC* (EA/2008/0054), that the disclosure of that information would be in breach of the first Data Protection Principle because it would be unfair.
22. This is one of the situations where any countervailing argument in favour of transparency requires careful consideration but which does not succeed in this case.
23. The Tribunal finds that the IC gave due weight to the public interests in transparency and accountability in respect of DCC's actions in relation to the properties of individuals and to the discharge of its duties under the Highways Act. All relevant evidence needs to be made available to such local authorities when discharging their duties under the Highways Act. Disclosure of information voluntarily provided in such situations would erode confidence in the maintenance of confidentiality and would undermine the provision of such information in the future.
24. It was also important that public authorities needed to be able to seek clarification of their legal standing without fear or concern that the legal advice given in such situations would be made public without there being very good and compelling reasons. The Tribunal does not believe that this is a case that might fall outside that general principle.
25. The Tribunal is satisfied that it is a matter for any public authority to decide what (if any) exceptions apply in any particular case and it is the function of the IC to assess those matters. It is not part of his function to conduct this exercise as part of the consultation with the Appellants. The Tribunal has no jurisdiction over the manner in which the IC conducted his investigation.

26. On matters relating to the legal status of the Appellants' property and the Highway Act, the IC did not accept any of the DCC's assertions. He properly treated such issues as an unresolved dispute. Similarly the Tribunal is satisfied that the use of the word "live" in the Decision Notice simply refers to the legal advice and correspondence which the DCC's lawyers had in relation to an issue which had not – at that time – finally been resolved.

27. The Tribunal considered the accusations made by the Appellants about mal-administration, misuse or abuse of personal information by the DCC and – like the IC – could find no supporting evidence.

28. The Tribunal observes that the Appellants and the DCC find themselves in fixed positions. While upholding without reservation the DCC's use of the exceptions and the IC's Decision Notice, a brief face-to-face discussion with the Appellants by the DCC might (but only might) have led to some of the issues in the appeal being mediated.

29. For all these reasons the Tribunal is satisfied to the required standard – the balance of probabilities – that this appeal cannot succeed.

30. The Tribunal decision is unanimous.

31. There is no order as to costs

Robin Callender Smith

Judge

31 January 2012