



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2013/0171 & 0172**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notices Nos:

FS50487647 Dated 5th August 2013

FER0487645 Dated 18th July 2013

BETWEEN

Miss Karen Harris

And

The Information Commissioner

Respondent

And

Herefordshire Council

Second Respondent

Determined on 10th January 2014 at Field House

Date of Decision 23.1.14

Date of Promulgation 24.1.14

BEFORE

Fiona Henderson (Judge)

Nigel Watson

And

Henry Fitzhugh

Subject matter: FOIA– s40 (2) – personal data

EIR – s12 (4) (a) – information not held.

Decision: Both Appeals are Refused

REASONS FOR DECISION

Introduction

1. Miss Harris applied to Herefordshire Council for planning permission this was refused in 2011 and went to appeal in November 2011 when Miss Harris was granted temporary planning permission lasting 3 years. At the date of the appeal it was anticipated by all parties that Miss Harris would make an application for permanent permission (which she has now done) once she had had the opportunity to establish the business to which the dwelling was ancillary.

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2. The Council's Land Agent Department consists of 2 employees, the Land Agent and the Assistant Land Agent. The department was consulted in relation to the original application and both employees attended the appeal (although only the Land Agent had done a site visit). Miss Harris' case is that as a result of her having undermined the credibility of the Assistant Land Agent during the appeal hearing, her line manager, the Land Agent, leapt to his colleague's defence and changed his opinion as to the merits of Miss Harris' case in a subsequent application. She believes that a vendetta has since then been pursued against her by the Land Agent Department and that the explanation for this must be that the 2 colleagues are related.
3. On 6th December 2012 Miss Harris asked whether the Land Agent and Assistant Land Agent for Herefordshire council were related to each other in anyway. Herefordshire Council refused to provide this information. This decision was upheld on review and also by the Commissioner in his decision notice.
4. Miss Harris appealed against the Commissioner's decision on the grounds that disclosure was necessary in the public interest and to enable her to seek a remedy for the way that she had been treated and that it was not unwarranted.

Scope of the Appeal

5. It is not disputed that whether two individuals are related is personal data, the issue for the Tribunal is whether disclosure would be fair, lawful and whether it would breach any of the data protection principles (namely schedule 2 condition 6).
6. We have considered the data subjects' reasonable expectations of what would happen to their data. Miss Harris argues that as the information has to be disclosed on a form to the Council, as public servants, the public have a right to know. The Council's "*Close personal relationships policy and procedure*" (the policy) which requires employees to declare close relationships provides at clause 4:

"Managers must maintain confidentiality of close relationships, unless those employees have indicated that they are in agreement with their relationship being made public, or it becomes necessary in the interests of the business."

7. The employees concerned do not consent to disclosure of whether they are related. The Council's evidence was that the employees concerned deemed the request intrusive,

inappropriate to their work and was designed to harass them. Disclosure would leave them with a feeling of a controlling influence from the requester and that this would be unfair.

8. We are satisfied that employees would not expect relationships declared by them to the Council would be disclosed to the public by the Council and that any right to disclosure or necessity in the interests of the business is subject to the data protection principles.
9. The types of relationships which are covered in the Council's policy are wide ranging and include extra-marital affairs, and would include declarations of paternity. The Tribunal can conceive of circumstances where disclosure of this information would be damaging to the private lives of those involved. If the Council were to disclose the information in some cases and withhold it in others the mere fact of withholding information in certain situations would be tantamount to a confirmation of the truth of the information sought. We are satisfied that this is material to the employees' expectation that this type of information would not normally be disclosed.
10. Miss Harris' case is that if they are related, the public knowing would have no effect on them. We agree with the Council that if it is disclosed that individuals are related it could be used to imply that their work is compromised and not the result of any professional judgment, this would be unfair.
11. To be disclosed, the information would have to be necessary for the legitimate aims of Miss Harris or the general public. She argues:
 - i. The public has a right to know if decisions are based on fairness rather than two employees looking after each other,
 - ii. It would shed light on a suspicion of wrongdoing.
 - iii. It would increase trust in the fairness of the Council.
12. We are satisfied that there is regulation and oversight to ensure that bias or undue influence does not arise as a result of close personal relationships. The Council's policy provides internal scrutiny in relation to relationships between staff. The stated aims of the policy include:
 - 1.6 "... to avoid any possible conflict of interest, perception or accusation of bias, favouritism or prejudice".
 - 1.7 "It is also intended to protect employees in such situations so that they are able to defend allegations of impropriety, bias, abuse of authority, conflicts of interest or fraud".

13. The Policy includes a requirement that employees declare relationships to their line manager (or a more senior manager if the relationship is with the line manager). Failure to declare a close personal relationship at the point of application or in a timely fashion following the start of the relationship may lead to disciplinary action.¹ It is wide ranging including close family relationships, close personal friendships including romantic attachments and extra-marital relationships and covers any relationship between workers with the potential to impact on working relationships. It includes relationships which exist or develop². It sets out the steps which should be taken to avoid future conflicts or operational difficulties³.
14. We also accept the Council's evidence that there would be no conflict of interest regarding the work carried out by the 2 named employees whether they are related or not. In reaching this conclusion we take into account that they are within the same department rather than working as e.g. customer/contractor or advisor/decision maker. Whilst it is in the public interest to scrutinise the probity of a public authority and its employees, we are satisfied that there are mechanisms for scrutiny within the Council which would enable external scrutiny were the Council's handling of the matter challenged through e.g. a complaint to the Ombudsman or Judicial Review.
15. Miss Harris also relies upon her private interest in pursuing an explanation for the change in opinion towards her planning application. She states that knowing that the 2 individuals were related would confirm her suspicions of malice but she was less clear as to the effect were it confirmed that they were not related, although she agreed that one explanation in those circumstances would be that they had failed to declare a relationship.
16. The fact or otherwise of a relationship is not determinative of her private interest in relation to her planning experience and therefore we are satisfied that disclosure is not necessary. She informs us that she has been told by the Council that she has passed the time limit for making a formal complaint there being apparently a 1 year deadline. (This information request was made over 1 year after the conduct complained of). Consequently there is no question that this information was necessary to enable her to pursue a complaint as on her evidence that time had passed, additionally any complaint would be based upon the conduct complained of which is not dependent upon establishing a relationship. She suggests that if she has confirmation of a relationship this would enable her to commence defamation proceedings. However, the fact of any defamation alleged is not dependent upon motivation and on her own evidence the acts alleged of took place in public settings and in the presence of other

¹ Clause 6.3

² Clause 3.1

³ Clauses 5.2.9 and 5.2.10.

parties whom she does not suspect of bias. Had she made a formal complaint it is to be presumed that any investigating officer⁴ would have had the information as to the existence or otherwise of a relationship made available to them. Disclosure to the world at large under FOIA would be unwarranted because in light of the other avenues of scrutiny available, disclosure would be disproportionate.

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17. When reviewing the land agency file relating to her planning application Miss Harris became aware that 4 photographs of her property had been taken without her knowledge by the Assistant Land Agent. In October 2012 Miss Harris asked Herefordshire Council:

“...who authorised intrusive surveillance at [the Appellant’s property] by [the Assistant Land Agent].

Who gave authorisation for the Assistant Land Agent to take intrusive surveillance/who told the Assistant Land Agent to take photographs of [the Appellant’s property] in the last 4 months.”

18. Initially the Council interpreted this as a case where confirmation was being sought that RIPA⁵ authorisation had been obtained and refused the request under regulation 12(5)(b)⁶ however, following complaint to the Commissioner the Council provided a new response refusing the request under regulation 12(4) (a) EIR⁷ stating that:

i. The Council did not consider the taking of the photographs to constitute intrusive surveillance as they maintain that the photographs were taken from the public highway.

ii. No surveillance was being conducted on Miss Harris or her property and visits were only made in connection with planning applications and when taking the photographs referred to in the information request.

iii. The photographs were taken by the Assistant Land Agent as a result of a complaint having been made regarding Ragwort on Miss Harris’ land (some of which was used to keep horses).

iv. No information was recorded concerning instructions to the Assistant Land Agent to take photographs or make any kind of surveillance.

⁴ Both within the Council and beyond

⁵ Regulation of Investigatory Powers Act 2000

⁶ adverse effect on criminal investigation

⁷ Information not held

19. In their correspondence with the Commissioner⁸, Herefordshire Council stated that:
- a) the photographs were taken as a result of a complaint made during the processing of a planning application by Miss Harris concerning use of property for horses.
 - b) The Land Agency team were advising on the agricultural aspects of the application, and considered the complaint as part of their response to the application.
 - c) The complaint was made directly to the Assistant Land Agent as the complainant knew that she was working on the planning application.
 - d) Miss Harris had requested a copy of the original complaint and sought confirmation that it was dated August 2012.⁹
20. In a telephone conversation to the Commissioner¹⁰ the Council stated that
- i. The Assistant Land Agent was consulted by the planning department over the appeal to the planning application. Because of her involvement in the appeal the complaint was made directly to her during the appeal stage.
 - ii. The Ragwort complaint was not critical to the planning application it was “purely incidental” that the Assistant Land Agent investigated it to obtain a full picture of the issues affecting the property.
 - iii. The photographs are not dated and the date of the photos is not known.
21. In another telephone call the same day the Council stated that:
- a) Miss Harris had been granted temporary planning permission which lasts for 3 years and that the file is left open or “active” throughout that period so that anything relevant to any future applications for extensions or permanent planning permission can be recorded.
 - b) Normally complaints about Ragwort would be dealt with by the Environment Agency.
 - c) The Information Governance Officer could “not explain” why Miss Harris thought the photos were taken between June and October 2012.
22. The Council confirmed to Miss Harris that the date of the Ragwort complaint was August 2012. She notified this to the Commissioner before the decision notice was issued, however,

⁸ Letter 10.6.13

⁹ In the context that the original planning decision was made around August 2011.

¹⁰ 10.7.13

from the information as set out above the Commissioner found that the photographs were taken around August 2011 and this was the date that appears in the Decision Notice.

Scope of The Appeal

23. After the issue of the decision notice, the Council confirmed to the Commissioner that Miss Harris was correct and the date of the request was August 2012. Miss Harris therefore appeals on the grounds that the Commissioner relied upon incorrect information from the Council and could not therefore properly have concluded that the information was not held.
24. Miss Harris argues that the Council's evidence is implausible because:
 - i) The Council have lied about the date of the complaint to the Commissioner in order to justify the Assistant Land Agent's involvement as otherwise she would have had no professional reason for involvement.
 - ii) The planning file would have been closed in August 2012 as the temporary planning permission had been granted and no permanent application had yet been made.
 - iii) No one would have had any reason to know that the Assistant Land Agent had been involved in the appeal, she was consulted in relation to the application but was not listed as a consultee at the appeal (although she did attend and give evidence).
 - iv) A complaint about Ragwort would not form part of the Assistant Land Agent's job as Ragwort complaints are dealt with by the Environment Agency.
 - v) In light of the Assistant Land Agent's level of seniority and job description she would have required authorisation to deal with a complaint about Ragwort or to go to premises to take photographs in these circumstances.
25. Whilst the Tribunal agrees that it is unfortunate that the Council's Information Governance Officer was not more accurate with the information that he gave to the Commissioner, we are not satisfied that the change in the account provided (initially suggesting a connection with the original planning application, then the appeal, then the aftermath of the appeal as summarized above) was dishonest. We take into consideration that the Information Governance Officer was passing on his understanding of information provided by another, and that Miss Harris was provided with the precise date of the complaint concerned by the Council prior to the issue of the decision notice. His account in the second telephone call (prior to absolute confirmation of the date) that the information would have been placed on the file with a view to future planning involvement is consistent with the eventually definitive

date provided. It is unfortunate that the exact date of the complaint was never provided by the Council to the Commissioner.

26. On the basis that the temporary planning permission would expire after 3 years and it is probable that an extension or permanent permission would be sought we accept the Council's evidence that they maintained a file on the property (albeit that this may have had no official status as there were no outstanding planning applications or appeals relating to Miss Harris's property at the time).
27. We do not accept that it is improbable that the complaint would have been made directly to the Assistant Land Agent as Miss Harris alleges. We are satisfied that it would have been public knowledge that the Assistant Land Agent was listed as a consultee for the original planning application. Additionally she was present at the appeal and her involvement at that stage could have become known through any of those involved in the appeal disclosing it.
28. Although we accept that investigating a complaint about Ragwort would not form part of the Assistant Land Agent's job, as this is the responsibility of the Environment Agency, she did provide agricultural advice to the planning department. Parts of the property were intended for use with horses and we are satisfied that this could be viewed as something that might be relevant to a future planning application.
29. We have reviewed the Assistant Land Agent's job description¹¹ and are not satisfied that she would have required authorisation to obtain further information relating to Ragwort which might impinge upon an expected planning application. It would be reasonable to conclude that the Assistant Land Agent was expected to act on her own initiative in such matters which could include the taking of photographs and that no authorisation or instruction was necessary, sought or obtained.
30. Taking the above matters into account on a balance of probabilities we are satisfied that the information is not held by the Council. In the absence of recorded information there can be no public interest in ordering disclosure and we are satisfied that the request was properly refused under regulation 12(4)(a) EIRs.

¹¹ Which includes: *Assist with the provision of valuations and professional advice in respect of agricultural/land agency matters to all relevant Directorates...*

Conclusion

31. For the reasons set out above both of these appeals are refused.

Dated this 23rd day of January 2014

Fiona Henderson

Tribunal Judge