IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2015/0069
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50559952
Dated: 26 February 2015

Appellant: **JONATHAN SHAW**

Respondent: **INFORMATION COMMISSIONER**

On the papers at: **FIELD HOUSE, LONDON**

Date of hearing: **7 JULY 2015**

Date of decision: **4 AUGUST 2015**

Date of Promulgation: **5 AUGUST 2015**

Before

ROBIN CALLENDER SMITH
Judge

and

STEVE SHAW and ROSALIND TATAM
Tribunal Members

WRITTEN REPRESENTATIONS:

For the Appellant: Mr Jonathan Shaw

For the Respondent: Ms Elizabeth Kelsey, Counsel instructed by the Information Commissioner.

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GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Environment Information Regulations 2004 (EIR)

Exceptions

- Regulation 12 (3)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 February 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 23 September 2014 Mr Jonathan Shaw (the Appellant) visited the offices of the London Borough of Southwark – the Public Authority – to follow up a request for information he had previously made during a telephone conversation with a planning officer regarding his planning application. He wanted

   > Sight of the names and addresses of the people who have written to complain about a planning application [14/AP/1636].

2. The Public Authority subsequently informed the Information Commissioner that it had no record of when the discussions took place or what was discussed. Its position was that it simply did not have the records to confirm this.

3. What it did have, however, was an email dated 26 September 2014 from the Appellant in which he asked to view “non-redacted objection letters [relating to] 14/AP/1636”.

4. It appears that the objection letters to this planning application with the names and part of the addresses of the objectors redacted had already been published by Southwark Council on its website.

5. Southwark Council maintained that complying with the Appellant's request would mean that it was in breach of the Data Protection Act 1998 (DPA).

6. During the course of the Information Commissioner's investigation. The Council wrote to the Appellant issuing a refusal notice which relied on section 40 (2) FOIA before revising its position when it realised that the matter should properly be dealt with under the EIR regime. The relevant exception in respect of that regime was Regulation 12 (3).

7. The Appellant maintained that the names and addresses of the individuals who objected to the planning application should be disclosed.

8. In respect of Regulation 12 (3)/13 EIR, that provides that information is exempt from disclosure on the basis of the exception if it constitutes third-party personal data (personal data of an individual other than the person making the request) and that the conditions in Regulation 13 are met.

9. The Information Commissioner was satisfied that the unredacted objection letters did constitute the personal data of the objectors because it was information from which they could be identified and which related to them.

10. In respect of Regulation 13 (1) the legislation provides that

> To the extent that the information requested includes personal data of which the applicant is not the data subject and in respect of which either the first or the second condition below [in Regulation 13 (2)] is satisfied, a public authority shall not disclose the personal data.

11. The Information Commissioner had considered the Appellant's argument in relation to this in Paragraph 31 of his Decision Notice. Summarised, the Appellant's position was as follows:

> The [Appellant] submitted that objections to planning applications must by law go to the public file without names and addresses being redacted, and that the public authority states on its website that the names and addresses along with objections would be published or made accessible to the public. He provided a screenshot of the relevant page on the website. The [Appellant] further pointed out that other local authorities routinely publish objections to planning applications, including names and addresses of the individuals who objected. He noted that the public authority had in the past published unredacted letters and emails objecting to planning applications.

12. Southwark Council's position was summarised at Paragraph 33 of the Decision Notice as follows:

> …. individuals who make their objections to a planning application do so based on an implicit expectation that the public authority will not publicly reveal their identity. It explained that the Planning and Building Control pages on its website carry a fair processing notice which states that the planning objections will be redacted before being published.

13. The "neighbour consultation letter" sent to properties near where any planning applications had been made stated that all personal information would be removed except the objector's postal address which – in this case – meant an anonymized or truncated postal address. Southwark Council had amended the wording in its letter to make it clear that it referred to anonymised addresses.

14. The Information Commissioner stated that he appreciated the Appellant's frustration at the lack of clarity as to whether the individuals who objected to the planning application in question expected that their identities would be revealed publicly along with their representations.

15. However – on the evidence provided by Southwark Council – he was satisfied that the objectors expected "quite reasonably so in the circumstances of this case" that they would remain anonymous while details of their objections would be published.

16. In addition to the fair processing notice available on Southwark Council's website the objectors will likely also to have received the neighbour

consultation letter which was meant to reassure them that their identities would not be revealed publicly. Given the “sometimes emotive” nature of planning -related issues, it was highly likely that revealing their identities along with their representations would be distressing to the objectors.

17. The Information Commissioner had also considered whether there was a legitimate public interest in identifying the objectors. He had concluded that the legitimate interest to the public in understanding the nature of the objections and being able to test the veracity of any claims made in relation to the planning application had been met by the publication of the details of the objections along with the truncated postal addresses to provide geographical relevance.

18. He was not aware of any legal requirement for local authorities to publish the names and addresses of objectors to publications. He found that disclosure of the information requested would be unfair and would contravene the first Data Protection principle.

19. The information had been correctly withheld.

<u>The appeal to the Tribunal</u>

20. The Appellant’s position is concisely summarised in his two-page commentary dated 21 April 2015 on the Information Commissioner’s response to his appeal. In summary

    (1) He noted that the vast majority of comments were submitted electronically and that all the commentators would have seen the following wording on Southwark Council’s website (supported by a high-resolution version of a screenshot taken on 23 July 2014 which he provided):

    > Any written comment you make about an application, by law, must be placed on the public file. This means that your comment, and your name and address will form part of the planning application documents…. Your comment will be published on our website including your name and address.

(2) The Information Commissioner seemed to accept that when Southwark Council told objectors in its letter that their “postal address” would be made public, somehow it really told them that there “truncated postal address” would be published. He also seemed to have decided that the neighbour consultation letter said that “at least some of…. the names and addresses…. would not be published”. Southwark Council had clarified the position to him in an email dated 18 December 2014 in terms of exactly what its consultation letter said. Namely “the neighbour consultation letter states that ‘…. all personal information will be removed except your postal address.’”

(3) The Information Commissioner had relied on the fact that the most relevant factor was the policy that was in place of the time of the application. That policy was that comments would be published on the website including names and addresses.

(4) The Information Commissioner had accepted Southwark Council’s view of its legal obligations and that view conflicted with the actions of the “vast majority of other councils”.

(5) The Appellant had further reasons for wanting the names and addresses of the objectors including that he “….should be able to take legal action against anyone making untrue statements about me or my company.”

The questions for the Tribunal

21. In all the circumstances of this information request, was disclosure of the requested information exempt from disclosure under Regulation 12 (3) and Regulation 13 EIR?

Conclusion and remedy

22. We find – and there appears to be no dispute about this between the parties – that the requested information is “environmental information” for the purposes of EIR because it is information related to activities affecting or likely to affect matters identified in Regulation 2 (1) (a)-(b).

23. We find that it is also personal data within the meaning of section 1 DPA because it is data from which individuals could be identified and which relates to those individuals.

24. The issue we have to determine is whether the disclosure of the requested information would contravene the first data protection principle because it would be unfair on the basis that the objectors reasonably expected that they would remain anonymous while details of their objections would be published.

25. There is an unhappy lack of clarity about the "fair processing" notice on Southwark Council's website stating that objections would be redacted before being published.

26. The Appellant has provided undated evidence by way of a screenshot (at Page 34 of the Appeal Bundle) which is headed "Publishing your personal details: Comment on planning applications: Southwark Council".

27. This states that - in relation to planning applications and the publication of personal details - that any written comment made about an application, by law, had to be placed on the public file meaning that the comment together with "your name and address" would form part of the planning application documents and that "anonymous and 'in confidence' comments would not be considered". The comment would be published on the website including "your name and address". There was a warning that it would be possible for names and addresses to be browsed through Internet browsers and search functions such as *Google*, *Yahoo* and *Ask Jeeves.*

28. Southwark Council's position is that, at the time the objections were made about the Application, that statement did exist on its website. However, in a letter dated 18 December 2014, the Appellant had been told that the neighbour consultation letters sent to local residents stated that "all personal information will be removed except your postal address".

29. The Tribunal finds it unsatisfactory that the Council has been unable to identify the date that its website was amended to change the statement regarding the publication of the objectors' names and addresses. However

the existence of that unsatisfactory state of affairs – which should have been able to be resolved with some further internal technical enquiries – does not create a “free pass” for the Appellant’s information request to succeed.

30. The Tribunal finds that, when the totality of the information available is considered, those who presented their objections had an expectation which was reasonable in the circumstances that they would remain anonymous.

31. In addition to anything that appeared on the Southwark Council website it had sent “neighbour consultation letters” to the properties that could be affected by the application. Those letters stated that personal information would be removed with the exception of the postal addresses. This is clear evidence that the neighbour consultation letters stated that at least some of the information would not be published

32. It is clear from the evidence seen by the Tribunal that a number of objectors did as a matter of fact raise concerns about the disclosure of their personal details.

33. The publication of the personal data associated with comments related to historic planning applications falls to be considered under the policy that was in place the time of the planning application and the information that would have been provided to potential objectors.

34. It is clear that potential objectors were informed that at least some of their personal details would not be published and – whatever the Council’s past practice – that is a significant and, in the context of this appeal, a crucial feature which tips the balance of the result in this appeal so that such personal data is not revealed.

35. The view of the Tribunal is that to conduct an exercise that reveals some of the personal data where it seems that some people may not have

specifically objected to that while, on the other hand, not revealing anything other than the effectively anonymized information in relation to others does not solve the problem. Indeed it is likely only to create confusion and breach the relevant data protection principles.

36. While there may be a public interest in the planning process as a whole that does not mean that there is necessarily a public interest in the publication of details of anyone who may comment on planning applications.

37. What clearly matters in such situations is the nature and substance of the comments. These are likely to be clearer and more robust and informative on the basis that they are published in an anonymized form.

38. The process used by the Council meant that anonymous comments that were provided without any address were not accepted. Issues within planning processes can arouse trenchant opinions. The fact that names and addresses of the commenters are redacted does not prevent other individuals from responding to any points raised in such comments. As such, the view of the Tribunal is that there is no public interest in the disclosure of the requested information.

39. Even if the disclosure might be considered "fair" that fairness needed to be tested against the conditions in Schedule 2 of the Data Protection Act. There was no evidence presented to the Tribunal that there had been any abuse of the planning application process – people impersonating others or unscrupulous developers taking advantage of the situation – and, in any event, that could have been dealt with internally by verification checks conducted by Southwark Council to prevent that kind of abuse of process.

40. Our decision is unanimous.

41. There is no order as to costs.

Robin Callender Smith

Judge

4 August 2015