



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

Case No. EA/2011/0180

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FER0374428
Dated: 12 July 2011**

BETWEEN:

GROUP CAPTAIN DALLEY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

On the papers

Date of decision: 15th February 2012

**Before
CHRIS RYAN
(Judge)
and
ELIZABETH HODDER
JOHN RANDALL**

Subject matter: Environmental Information Regulations 2004,
regulation 12 (5)(d) Breach of confidence

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

1. On 12 July 2011 the Information Commissioner issued a Decision Notice, under reference FER0374428, in which he rejected a complaint by the Appellant about the manner in which the Commission for Local Administration in England had handled a request for information. The Commission for Local Administration in England is the official title of the Local Government Ombudsman (for the purposes of this Decision “the Ombudsman”).
2. The office of the Ombudsman was established under section 23 of the Local Government Act 1974 to investigate complaints of maladministration in local government. The Appellant, having become aware that the Ombudsman had issued a decision on a complaint made against Wokingham Borough Council by an individual (“Mr X”), who lived near him, sent a request for information to the Ombudsman on 7 November 2010. It read:

“Bearing in mind the drainage problems that remain unresolved following my three complaints, may I please (under the Freedom of Information Act) be provided with a copy of [Mr X’s] complaint, the council reply and your assessment and decision.”

3. It is clear, from the terms of the request, and from the written submissions provided by the Appellant in the course of this appeal, that the Appellant believes that release of the requested information would

provide information about various drainage and ditch in-fill issues relating to Mr X's property, which have troubled the Appellant for a number of years. He has provided us with a certain amount of information about those issues and the various attempts he has made to have them investigated.

4. In the course of this Appeal we have been shown the papers from the Ombudsman's file on Mr X's complaint. In accordance with the usual Tribunal procedure they were disclosed in confidence to the Tribunal only, to enable us to determine the Appeal. They were not provided to the Appellant, as to have done so would have prejudged the outcome. However, we can say that the subject matter of the complaint was such that their release would not disclose any useful information on the drainage issues that concern the Appellant.
5. The Ombudsman refused the Appellant's information request on the ground that section 32(2) of the Local Government Act 1974 prohibited disclosure. In relevant part it reads:

*"Information obtained by [the Ombudsman] ...in the course of or for the purposes of an investigation ...shall not be disclosed except –
(a) for the purpose of the investigation ...".*

6. Although the Ombudsman initially argued that this provision meant that the requested information should be treated as exempt from disclosure under section 44 of the Freedom of Information Act, he had conceded, by the time that the Appeal came before us, that it is not that Act but the Environmental Information Regulations 2004 ("EIR") that apply. They impose a duty on the Ombudsman to make available environmental information on request (regulation 5(1)) unless it falls within one or more of a number of exceptions set out in regulation 12. If it does fall within such an exception then disclosure may be refused if the public interest in maintaining the exception outweighs the public

interest in disclosing the information. The Ombudsman relied on the exception set out in regulation 12(5)(d), the effect of which is that a request may be refused if its disclosure would adversely affect *“the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”*.

7. The Information Commissioner decided that the requested information fell within the definition of “environmental information” in the EIR. That conclusion has not been challenged on this appeal. He also decided that the exception provided by EIR regulation 12(5)(d) applied to the requested information because:
 - (a) its disclosure would adversely affect the confidentiality of the Ombudsman’s “proceedings”; and
 - (b) the requirement of confidentiality arose from section 32 and was therefore “provided by law”.

8. The Appellant has suggested in one of his submissions to us that the Information Commissioner should not have based his decision on EIR regulation 12(5)(d) because “Regulation 12(5)(a) is appropriate and therefore Regulation 12(5)(d) fails”. The effect of 12(5)(a) is that the disclosure of information may be refused if its disclosure would adversely affect, among other things, “public safety”. However, the Appellant appeared to argue that, because the absence of information on drainage and flooding issues had made a particular lane dangerous for pedestrians, the information he had requested ought to have been disclosed. He was therefore seeking to base his case in favour of disclosure on a factor that is in fact only available as a ground for refusing it. Even if that were not the case, it is possible for more than one exception to apply to a particular body of information so that subparagraph (d) would remain available as an exception even if subparagraph (a) had been capable of applying.

9. We are therefore satisfied that the regulation 12(5)(d) exception is engaged and that we should turn to consider whether the public interest in maintaining it outweighs the public interest in disclosure.
10. Both the Ombudsman (during the course of the Information Commissioner's investigation) and the Information Commissioner himself have conceded that there is some public interest in the public being aware of investigations on environmental issues conducted by the Ombudsman. However, the Information Commissioner has argued that he was justified in concluding in his Decision Notice that this was outweighed by the public interest in maintaining confidentiality to enable the Ombudsman to conduct his investigations effectively.
11. The Information Commissioner referred us to previous Decision Notices (references FER0065671 and FER0349527) which addressed the confidentiality of Ombudsman investigations. These gave, as reasons for maintaining the exception:

"It is clear that parties submitting information to the LGO would have expected it to be held in absolute confidentiality, particularly due to the statutory prohibition in place."

"A disclosure of such information would breach this understanding of confidentiality, and has the potential to cause complainants and witnesses to withhold information or curtail evidence to protect them from exposure in future requests."

We agree that there is a public interest in enabling the Ombudsman to receive information in confidence, so as not to affect adversely his ability to investigate complaints and thus to maintain the accountability and transparency of local government.

12. The Appellant has not challenged the public interest factors relied on in support of maintaining the exception. The effect of the submissions he

has made is that they did not outweigh the strong public interest he perceived in the disclosure of information on the drainage issues and the failure of the local planning authority to address them in what he considers to be a satisfactory manner. However, as we have stated above, release of the requested information will not increase public knowledge of those issues. There is therefore nothing of any significance to be added to the general factors in favour of disclosure mentioned above and expanded upon in the Decision Notice. We have no hesitation in concluding that the public interest in maintaining the exception did therefore outweigh the public interest in disclosure and that the Information Commissioner was correct in concluding that the Ombudsman had been entitled to refuse the Appellant's request for information.

13. On that basis we dismiss the Appeal.

14. Our decision is unanimous.

[Signed on original)

Chris Ryan

Judge
15th February 2012