IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0072**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

BETWEEN

EAST DEVON DISTRICT COUNCIL

Appellant

and

INFORMATION COMMISSIONER

and

Respondent

JEREMY WOODWARD

Second Respondent

Tribunal

Brian Kennedy QC
Suzanne Cosgrave
Paul Taylor

Appearances:
For the Appellant: Tom Cross of counsel.
For the First Respondent: Robin Hopkins of counsel.
For the Second Respondent: Richard Thurlow.

Hearing: **28 August 2014, 18 February 2015 & 20 March 2015.**
Location: **Exeter Magistrates Court.**
Decision: **Appeal Refused.**

Date of Decision: 5th May 2015

Subject Matter: The Environmental Information Regulations 2004 ("EIR's") and reliance by the East Devon District Council, ("the Council") on Regulation 12(4)(e) EIR's to withhold disclosure of the requested information.

Regulation 12(4)(e) EIR's provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

Introduction:

1. This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("the DN") dated 10th March 2014 (reference FS50498100), which is a matter of public record.

2. An oral hearing took place on 28 August 2014 and for a number of reasons (some of which will be referred to below) deliberations were delayed until the panel was in a position to meet again on 18 February and 20 March 2015. However, as will be explained, the matter has still not been satisfactorily or finally resolved.

3. In this appeal, the Tribunal has been provided with a paginated (1- 100) and indexed Open Bundle ("OB 1") along with a number of different Closed Bundles which the Council has provided at various stages and which contain the withheld information, which for obvious reasons is not in the public domain, or with the Second Respondent. We have a bundle of authorities helpfully provided by the Commissioner. We have also been provided with helpful final submissions from the Council and the Commissioner both dated 22 December 2014.

Background:

4. The DN concerned a request for information under the EIR's by the second respondent made on 14 February 2013 for information concerning the Appellant's proposed relocation of offices from its base in Sidmouth (Knowle) to different premises. The request was for (i) minutes ("unredacted minutes of all groups involved in the Relocation from Knowle"), and (ii) reports ("the Relocation Managers formal Progress Report") relating to the proposed relocation. It is to be noted that the disputed information includes a number of reports and some part reports, not just one.

5. The commissioner decided that the requested information was "environmental" within the meaning of regulation 2(1) EIR's and that "the minutes" requested at (i) had been correctly withheld, the exception in regulation 12(4)(e) ("internal communications") applied to them and the public interest balance favoured maintaining that exception. These issues are not in dispute between the parties in the course of this appeal.

6. However the Commissioner also decided that under part (ii) of the request, "the reports" did not constitute "internal communications", that regulation 12(4)(e) EIR was therefore not engaged in relation to part (ii) of the request and that as this was the only exception upon which the appellant relied therefore the reports should be disclosed and the first respondent so ordered. This is the main issue in this appeal.

7. The Council argues that the reports, in their entirety came within regulation 12(4)(e) EIR and the public interest balance favours the maintenance of that ex-

ception, for the same reasons, they argue, as were accepted by the first respondent in relation to the minutes.

8. Alternatively, if the reports are ordered to be disclosed, the Council now argues, before the Tribunal, that certain sections of the reports should be withheld (redacted) on the grounds of regulations 12(5)(b) (course of justice) and 12(5)(e) (confidentiality of commercial information) and identifies those passages it seeks to redact in the event of disclosure being ordered.

9. There is no dispute that the reports constitute "communications". The issue is, whether in the particular circumstances of the facts in this case, they constituted "internal" communications.

10. In the course of the relocation procurement exercise the Council had entered into a contract with Davis Langdon ("DL"), retaining their services in principle by the engagement of their consultant expert Mr. Pratten who authored the reports, which comprise the disputed information in this appeal. The appellant argues that Mr. Pratten was sufficiently "embedded" within the public authority to the extent that his reports comprised "internal communications" for regulation 12(4)(e) purposes.

The Issues:

11. The tribunal accepts that it is not possible, or desirable, to attempt to devise a standard test as to what constitutes internal or external communications. Each case will be decided on its own facts. However the Commissioner has considered [see paragraphs 23 to 25 of the DN] his own guidance and the extremely limited circumstances in which a communication with a third party are considered "internal". Both in his DN and in this appeal he considered the two decisions of DfT V IC (EA/2008/0052) and South Gloucestershire Council V IC and Another (EA/2009/0032). The Tribunal finds this helpful in that the parallels with this case, on the evidence, are in our view, closer to the South Gloucestershire Council case. Little in the evidence that we have heard or read in this appeal has led us to believe that the Commissioner made an error in the DN in this regard.

12. The Council argues, it is necessary to understand the role of the author of the reports and the circumstances and nature of the reports, in substance as well as in form. The Commissioner argues that the relationship between the council and Mr. Pratten provides context but what ultimately matters is not the relationship but the communications themselves. Both are correct but the Tribunal having heard the evidence and considered the reports on the facts before us in this appeal are unanimously of the view that in this case the reports were external communication.

Reasons:

13. It is accepted that Mr. Pratten was "embedded" to an extent in the Council in the course of his work. However it is also accepted that he was a Chartered Surveyor with over 35 years experience working in the construction industry who commenced working for Davis Langdon (now an Aecom Company) and was at all material times employed by them as a Senior Project Manager. He was seconded to the Council following a successful tender submission and interview: his work was as an independent and external expert seconded to advise on behalf of his employer, ("DL") who invoiced the Council on a monthly basis for this expertise, advice and input. This is the context in which he was embedded. Of course it meant he was and had to be familiar with discrete and confidential information and had to comment on and report on all aspects of the proposed relocation but his input was as an independent expert on those issues that he could contribute to the matters the Council were to make decisions on. The important distinction from being a council employee, officer or decision maker within the public authority always remained. He provided important input on behalf of his employer DL and always did so with their support, authorisation and the obligation to report back to his employer with all draft reports to which he was to put his name and the name of DL before they were issued.

14. In evidence Mr. Pratten confirmed that he did attend the DL offices at Bristol and discussed updates of his work, debriefing with directors at DL. While most of these discussions were about costs and did not require input from his directors there were other aspects to this reporting back to his employer both in terms of quality control and professional indemnity insurance and risks to the employer in that regard. He confirmed he used a DL laptop and email address and also confirmed that his reports were based on a DL template. Although all the reports (the disputed information) had first been seen in draft by Mr. Cohen (at the Council) for consideration and comment, (See witness statement of Steve Pratten dated 12 August 2014) they had then gone to partners in DL. Thee reports were, he confirmed, in fact approved and they had been variously signed off by one of two DL partners, prior to going to the Council, one in the Plymouth office and one in the Bristol office. He agreed that if he had written something inappropriate, they would have picked it up and they even corrected typos. He confirmed that if he became ill and was unable to attend to the contract, DL would supply his replacement. He further confirmed that DL's processes meant they would retain copies of those reports in their backup files. The Tribunal therefore finds as a fact on this evidence that the reports had been provided externally and subject to sign off by DL. Further, this appears from the evidence to have been before the request made by the second respondent on the 14 February 2013.

15. These reports therefore are clearly distinct from the requested information under (i) which were council minutes of council meetings.

16. Mr. Cohen, the Deputy Chief Executive of the Council gave evidence. When asked what part the reports played in the procurement process he answered that: "*They inform discussion. They provide options e.g. in securing new accommodation for the council".* He confirmed that by engaging DL, they, through Mr. Pratten give the weight of professional support. With all the information available to them *"on the table"* including the reports, the council can make their decisions.

He confirmed that if Mr. Pratten were not available they would have reverted to DL under the terms of the contract to provide a further consultant in his place. He agreed that the reports were on DL notepaper and by virtue of the language employed to all intents and purposes looked like and were a DL report.

17. The Council argues that Mr. Pratten was effectively a council employee in all but name, that he spent all his time in their offices and was totally immersed in this procurement project. He had little to do with DL and they had little to do with his work. That, in our view is not the test. We find that at all times he was an independent expert who advised and those advices were made by, and on behalf of, and approved by DL. Indeed within his own witness statement Mr.Pratten describes himself as follows: "*I am...employed and reimbursed by Davis Langdon /Aecom - an independent External Consultant, but take instructions exclusively from Mr. Cohen...".* The Council argues that Mr. Pratten had access to confidential and sensitive information and the reports contained such information. While this is undoubtedly true, it does not make the reports internal. The Council in the alternative can and does rely on other exceptions to seek redaction where confidentiality and sensitivity or the public interest otherwise requires or demands non-disclosure. It is our unanimous view that in all the circumstances and on the facts presented to us at this appeal, the reports referred to in part (ii) of the Request were external.

18. We accept the Commissioner's submissions that overall the Council was developing this project through means which were partly internal and partly external. Mr. Pratten's reports, they argue were predominantly external. He was an external party to whom the public authority afforded a significant degree of internal access but he at all times remained an external party. While we accept that he was continually engaged (even "embedded") with council officials and staff and discussing confidential and sensitive issues, he was primarily an independent expert advisor with that limitation and distinction pertaining at all material times.

19. We agree with the Commissioner that regulation 12(4)(e) was not engaged with respect to the disputed information relevant to part (ii) of the Request in this case because (a) the reports were never "internal" communications and/or (b) even if they had at some stage been "internal" communications, that "internal" quality had been lost by the time of the request, by which stage they had been disclosed externally to other individuals at DL.

20. However the Commissioner makes a further argument in relation to the application of regulation 12(4)(e) EIR and that is that it must be construed in accordance with Directive 2003/4/EC (tab 2 of the bundle of authorities). Under that Directive, exceptions to the duty to disclose information must be interpreted in a restrictive way: see Recital 16 and Article 4(1).

21. The Directive (and the EIR's) must in turn be interpreted so as to give effect to the Aarhus Convention (at tab 3 of the bundle of authorities). It is clear that public access to environmental information is of fundamental importance. As cited by counsel for the Commissioner: The Aarhus Convention provides at Article 4(3)(c) that a request for information may be refused if; "*The request concerns material*

in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served in disclosure".

22. The Aarhus Convention is explained in its official "implementation guide" and the relevant extract from the current version, in place as of April 2003 is at tab 4 of the bundle of authorities and the corresponding extract from the version in place up to April 2013 is at tab 5. We accept it is appropriate to take the Implementation Guide into consideration in this case before us.

23. Again citing counsel for the Commissioner, the current version says this (tab 4 of the bundle of authorities at page 79; *"The second part of this exception concerns "internal communications". Again, parties may wish to clearly define "internal communications" in their national law. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form. Opinions or statements expressed by public authorities acting as statutory consultees during a decision-making process cannot be considered as "internal communications". Neither can studies commissioned by public authorities from related, but independent, entities. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication".*

24. The same points are made in the previous version of the Implementation Guide see tab 5 of the bundle of authorities at page 58.

25. We accept the analogy made in submissions by the Commissioner that the reports relevant to (ii) of the Request are analogous to "studies commissioned by the Council from a related, but independent entity" (see the penultimate underlined sentence in the extract cited at 22. above). We agree with the narrow interpretation of internal communications as submitted by the commissioner and find the DL reports, the disputed information herein, fall within the wider context of external communications because in all the circumstances of this case, they are on the facts DL reports.

26. Accordingly for the above reasons we find that regulation 12(4)(e) EIR's is not engaged and the DN stands correct and this appeal is refused.

Regulations 12(5)(b) (course of justice) & (e) (confidentiality of commercial information) EIR's:

27. The Council after the DN was issued sought in their Grounds of Appeal, in the alternative, to limit disclosure under the above two exceptions by way of redaction where appropriate in the reports to be disclosed.

28. At this stage the Tribunal have done their best to read all of the closed material, which should amount to all the disputed information or reports requested. It has been difficult to do so, some 6 pages were only legible in the final version of the Closed bundle we received (Closed supplemental Trial Bundle Filed on 3 March 2015), we have had no opportunity to have any submission from the parties on

the views taken by the Tribunal on the application of EIR 12(5)(e) and further we remain uncertain as to whether or not all the relevant information has been provided to us. As an example, it appears (from the Closed bundle) that a report "5" issue date 7 January 2013 exists, whereas we have only seen report "5A" (9 January 2013). Pending clarification of this we propose to order disclosure of that information which we have been able to consider against the above exemptions, on a staged basis. We will do so initially through a closed annexe to this judgment, on 5 May 2015, until any proper objections can be considered and by way of Directions in relation to those pages upon which we require further submissions.

Interim Conclusion:

29. The Tribunal orders disclosure of all information to which the Council has applied regulation 12(4)(e) but not that in respect of which either regulation 12(5)(b) or (e) has been claimed and either this has been accepted by the Tribunal – as indicated by REDACTION ACCEPTED in its Closed annex or the Decision on any claimed exception remains pending as indicated DECISION PENDING in its Closed Annex and in relation to the Directions issued, until the Tribunal has ruled finally on those 6 pages.

30. Disclosure must not take place until after the time for an application for permission to appeal and any such appeal has been determined or discontinued.

Other Matters:

31. This Tribunal takes the unusual and unfortunate step of commenting on the conduct of the appeal itself. We are unanimous in our view that this appeal has taken much longer than it should have done and the reason for this seems to be the failure on the part of the public authority, the appellant, to address itself with sufficient attention to the details of what information and documents it was supplying to the Commissioner and ultimately also to the Tribunal. It was not until March 2015 that a fully legible copy of the disputed information was supplied and seemed to be complete. This is, in our collective experience, wholly exceptional and the time spent dealing with what we believe to be five different sets of disputed information is simply not a good use of the Tribunal's time nor fair, in terms of delay, to the requester. Correspondence on behalf of the Council, rather than ensuring the Tribunal was assisted in its function, was at times discourteous and unhelpful including the statement that we had the most legible copies possible. A statement, which was clearly inaccurate as subsequently, we have been provided with perfectly legible documents. We believe this appeal could and should have been dealt with completely at the hearing in August 2014 and the decision promulgated six months ago had the Council discharged its responsibilities properly.

Brian Kennedy QC 5th May 2015.