



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2015/0115

On Appeal from
The Information Commissioner's Decision Notice No: FER0558296
Dated: 27th, April 2015

Appellant: Margaret Shevlin ("MS")
First Respondent: The Information Commissioner ("the ICO")
Second Respondent: Cornwall Council ("Cornwall")

Before

David Farrer Q.C.

Judge

and

Suzanne Cosgrave

and

Narendra Makanji

Tribunal Members

Date of Decision: 7th. January, 2016

Date of Promulgation: 15 January 2016

Subject matter: Environmental Information Regulations, 2004

rr. 12(4)(d) (unfinished documents),

12(5)(b) (disclosure likely adversely to affect the course of justice) and

13(1) (protection of personal data)

The Tribunal's decision

The appeal is allowed to the extent indicated in paragraph 44 of the Decision. The information specified there must be provided within thirty – five days of the receipt of this Decision.

**David Farrer Q.C.
Tribunal Judge
7th. January, 2016**

Abbreviations (in addition to those above)

The DN

The ICO's Decision Notice

The EIR

The Environmental Information ,
Regulations 2004

The DPA

The Data Protection Act, 1998

The relevant statutory exceptions to the duty to provide
environmental information (all EIR)

- 12 (1) Subject to paragraphs 2, 3 and 9, a public authority may refuse to disclose environmental information requested if-
- (a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

.....

(4)

.....

(d) the request relatesto unfinished documents.

(5) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

.....

(b) the course of justice

13 (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(Only the first condition is relevant. For present purposes It is that disclosure to a member of the public otherwise than under the EIR would contravene any of the data protection principles (see DPA Schedule 1). The material principle is the first which requires that all data must be fairly and lawfully processed and, in particular, must meet at least one of the conditions in Schedule 2 to the DPA.)

Authorities referred to

Edem v Information Commissioner [2014] EWCA (Civ.) 92

Durant v Financial Services Authority [2003] EWCA (Civ.)
2046 .

Our Decision

The Background

1. MS lives in Gilbert 's Coombe near Redruth, Cornwall. Early in 2014, Cornwall granted to the landowner/ occupant a certificate of lawful use for motorcycle trials, practice and training ("the certificate") on land about fifty metres from her property.
2. The inevitable noise and the traffic aroused strong opposition from MS and other local residents. They challenged Cornwall's finding that such activities had taken place on the relevant land for more than ten years, which was the legal precondition to the grant of the certificate. Questions were asked as to whether council officers involved in the assessment of the claim for the certificate had themselves participated in these trials or practice so as to create an obvious appearance of bias in their decision.
3. In addition to this challenge, over a significant period, MS sought the disclosure of what she deemed important documents held by Cornwall, revealing the nature of its dealings with the application for the certificate.

The request

4. On 18th. March, 2014, MS wrote to Cornwall in these terms –

"I am requesting an enquiry into the recent granting to land at Gilbert's Coombe for a Certificate of lawful use of motor cycle trials, practice and training

(So far this was a request relating to a planning issue, not a FOIA request for information.)

I also request under the Freedom of Information Act any minutes of meeting, phone calls or indeed any other references taken during the time

(x) was making his decision. I also ask for the names of any persons who were involved in the decision to award the certificate (delegated decision). I also ask for the names of the three planning officers that are members of the Motor Club in question as this would certainly be a conflict of interest.”

5. Cornwall responded on 22nd. May, 2014. It indicated that some material within scope was accessible on its website and provided other information as a PDF attachment. It stated further that it held additional responsive information as to which it relied on exceptions provided for in EIR reg. 12(4)(d) and (e), 12(5)(b)(d) and (f) and reg. 13. This decision deals more fully with some of these exceptions and their relevance to this appeal below.
6. Cornwall also disclosed that the withheld information included a draft officer report (the final version of which was published on its website), a request for legal advice addressed by the planning department to a legal officer and the requested advice and a letter of objection.
7. Following an internal review requested by MS, Cornwall confirmed its refusal to disclose further information and its reliance on the exceptions already cited. It contended that the public interest, where a material factor, lay in withholding this information. MS complained to the ICO on 9th. October, 2014.

The ICO's investigation and the DN

8. On 4th.November, 2014 the ICO submitted to Cornwall the usual questionnaire, adapted to the facts of the particular case. In its response Cornwall produced a schedule which included on its first page a list of the exceptions relied on, linked to Appendix 1 to the response, which set out categories 1(a) – 1(e) of withheld information, attached to the response in unredacted form and described as follows –

Category	Content	EIR Exception(s) relied on
1(a)	Information disclosed to MS in redacted form	Reg. 13(1)
1(b)	Request for legal advice and advice provided	Reg.12(5)(b), 12(4)(e)
1(c)	“Legal correspondence” and draft report	Reg.12(4)(d), 12(5)(b)
1(d)	Note of legal team meeting	Reg. 12(5)(b), 12(4)(e)
1(e)	Objector’s letter	Reg. 12(5)(f)

All the documents referred to in this table were supplied unredacted to the Tribunal as to the ICO.

9. The DN upheld Cornwall’s reliance on reg. 13(1) as to “most of the personal data” contained in 1(a). It further accepted that the Reg.12(5)(b) exception (disclosure would adversely affect the course of justice) was engaged in respect of all the information in 1(b), (c) and (d) as was reg.12(5)(f) as regards 1(e) (disclosure would adversely affect the interests of the person providing the information). In each case it concluded that the public interest in maintaining the exception outweighed the interest in disclosure.

10. MS appealed.

The case for the Appellant

11. The submissions contained in MS’ Grounds of Appeal and two subsequent Responses to the Respondents’ arguments are directed in the main to the issues of law, fact and procedure relating to the issue of the certificate. She advances few, if any arguments on the engagement of the claimed exceptions, an understandable omission on the part of a factually

well – informed member of the public unfamiliar with the interpretation of the EIR.

12. She argued very clearly, however, that, if any of those exceptions were engaged, the public interest in transparency as regards Cornwall's handling of such a sensitive local issue was paramount.

The case for the ICO and Cornwall

13. The ICO's case as to reg. 13 is not entirely clear. He appears to argue that all the references to named individuals in the correspondence covered by 1(a) involve their personal data but that the disclosure of the names of senior council staff might not amount to unfair processing for the purposes of the first data protection principle. That would explain the reference to Reg. 13 being engaged as regards "the majority of the personal data". He argued that the objector letter was the personal data of the author and that disclosure would be unfair to her. Reg. 12(5)(f) was engaged but he did not consider questions of the public interest because of his conclusion as to Reg. 13.
14. He submitted that Reg. 12(5)(b) was engaged in respect of all the material in 1(b)(c) and (d), which involved information subject to legal professional privilege and that the public interest required that the exceptions be maintained. Alternatively, the names appearing in 1(c) involved the personal data of those concerned and should be redacted for that reason.
15. As regards the public interest in disclosure, there was no weighty consideration which displaced the importance to be attached to the maintenance of confidentiality between client and lawyer, here Cornwall, in the form of its planning officer, and its internal solicitor.
16. Cornwall indicated in its Response that it considered that Reg. 12(5)(f) (adverse effect on the interests of the person providing the information) was engaged as regards the objector letter (1(e)) as well as reg. 13.

Further, it stated that it had now disclosed the names of senior members of staff whose positions were identified in the DN, save in one case where the officer had not been involved in this case. So the Tribunal is concerned with the personal data of more junior council officers and of a number of members of the public and external solicitors.

Our Reasons

17. The first question is the scope of the request, which was for “any minutes of meeting, phone calls or indeed any other references taken during the time (x) was making his decision”. “Any other references” is a vague term, which Cornwall seems to have treated very liberally as covering anything relevant to the decision on the certificate which was created during the period when that decision was being arrived at. We shall proceed on the footing that everything in 1(a) is within scope. The remaining classes (b) to (e) are undoubtedly within the ambit of the request.
18. We are required to deal only with the exceptions enacted in reg. 12(4)(e), 12(5)(b), 12(5)(f) and reg.13; reg. 12(4)(e) and 12(5)(f) are of marginal relevance.
19. We deal first with the application of reg. 13(1) to the documents in 1(a), all of which have been provided to MS but with names and sometimes roles, blanked out.
20. Uncertainties as to the effect of *Durant v FSA [2003] EWCA (Civ.) 1746* on the interpretation of “personal data” have been dispelled by *Edem v Information Commissioner [2014] EWCA Civ 92*, where the Court of Appeal explained the limited relevance of the two “notions” canvassed by Auld L.J. in *Durant* in the context of a specious subject access request.
21. It is now apparent that, in any request involving information as to third parties, ‘A name is personal data unless it is so common that without

further information, such as its use in a work context, a person would remain unidentifiable despite its disclosure.” (per Moses L.J. at para. 20).

22. There is therefore no doubt that the names in the redacted documents are “personal data”.

23. That being so, there is no evidence whatever to demonstrate that any condition in DPA Schedule 2 is satisfied in respect of any possible disclosure of the personal data of council officers. Indeed, nobody argued that any condition was met. The only potentially relevant condition, as usual, was condition 6(1) which requires proof that disclosure of the names “*is necessary for the purposes of legitimate interests pursued by (MS)*”. Cornwall denies that any officer involved in the case had ridden on the land in question and there is no plausible evidence to refute that assertion.

24. Therefore, Cornwall was justified in withholding the names of members of its staff in documents in the range 207 – 233 of the Open Bundle, when revising its disclosures after the issue of the DN. It was, of course, entitled to provide names and particulars of senior staff, as it then did, with their consent.

25. The same applies for the same reasons, with few exceptions, to the names of members of the public appearing in the range 203 – 234, even though those familiar with this matter will have no difficulty in identifying most of them. Disclosure is disclosure to all the world.

26. One exception is the cremation certificate at 204. The name of the Registrar is critical to the validity of the document.

27. Another is the name of the author of the letter to Cornwall from Self – Drive Hire dated 31st. December, 2012. His identity is, in our opinion, critical to a proper assessment of the contents which support the grant of the

certificate. Condition 6(1) of Schedule 2 to the DPA is satisfied since MS was pursuing her legitimate interests as a landowner in seeking such information. Other names in the letter do not require disclosure.

28. The objector letter also raises different issues to which we turn below.
29. The engagement of the exception in Reg. 12(5)(b) requires proof that it is more probable than not that disclosure would adversely affect the course of justice. In this case that depends on whether legal professional privilege (“LPP”) attaches to the information concerned, although the fact that a document is privileged does not determine, of itself, whether the exception is engaged nor whether, if it is, the public interest favours withholding it.
30. There are two kinds of LPP
 - (i) legal advice privilege, which attaches to material involving the seeking and giving of legal advice, including tactical advice, between lawyer and client and
 - (ii) litigation privilege, which protects material, including lawyer – client communications, which is created in the course or in contemplation and for the predominant purpose of litigation.
31. It does not arise unless one party to the communication is a lawyer, regardless of the subject matter or the fact that legal advice is sought or given. By its nature, it does not attach to correspondence between solicitors on opposite sides of a dispute or a negotiation, though the latter activity may be conducted “without prejudice”, thereby potentially protecting it from disclosure in court.
32. The memorandum of 24th. May, 2013, (Appendix 1(b)) though apparently disclosed in redacted form (see 222), was sent by one of Cornwall’s solicitors to its planning officer in the context of a request for legal advice. It is

privileged.

- 33 The same goes for the minute of a meeting on 14th. August, 2013 between the same parties for the purpose of discussing legal issues involved in any grant of the certificate (Appendix 1(d)).
- 34 The draft report on the certificate question was clearly prepared for submission to a solicitor, as shown by the Email of 9th. May, 2013 to which it was attached. It, together with that Email and the responding Email from the solicitor, are equally plainly privileged. (Appendix 1(c) (part))
- 35 As regards each of these documents disclosure in March, 2014, would have revealed Cornwall's assessment of the strength of its position at a time when litigation or further complaints were a clear possibility. They are also covered by legal advice privilege. The general principle as to the weakening of trust in the confidentiality of privileged communications, for Cornwall and more generally, plainly applies.
- 36 We have no doubt that disclosure of any of this information would have adversely affected the course of justice.
- 37 These are weighty factors in the balance of public interests. As to interests favouring disclosure, there is always the virtue of promoting the principle of transparency in public affairs. and the presumption in reg. 12(2) must be born in mind.

- 38 However, there is nothing apparently improper or dubious
 In Cornwall's handling of this matter, such as to justify
 overriding LPP. The Tribunal always regards the
 preservation of client confidence in this privilege as a vital
 public interest which will prevail in the absence of powerful
 counter arguments specific to the case. There are none
 such here.
- 39 Different considerations apply to other "legal
 correspondence" in Appendix 1(c). Cornwall has now
 disclosed these documents with names etc. redacted
 but we rule on the matter since Regs. 12(4)(e) and
 12(5)(b) were initially relied on.
- 40 Neither the letter of 5th. August, 2013 from Stephens
 Scown to Mr. Woodley of the Planning department nor
 their Emails are privileged and no exemption applies
 save reg. 13 as already noted.
- 41 The two Emails to and from MY Motors are not
 privileged and no other exception is engaged, save, as
 before, Reg. 13 as regards the name of the proprietor.
 With that exclusion, they are disclosable.
- 42 The remaining withheld Emails passing between
 council officers and to and from a councillor are not
 privileged. They are internal communications within
 Reg. 12(4)(e). However, no argument has been
 advanced as to a public interest in withholding them
 In the context of this exception. The Reg. 12(2)
 presumption suffices, of itself, to require disclosure,
 subject again to the redaction of names which have not
 been disclosed.

43 That brings us to Appendix 1(e), the objector letter, which can be coupled with an Email of 5th. April, 2014 from MS to Mr. Woodley. In our view both require subject access requests pursuant to DPA s.7(1) and are exempt from disclosure under the EIR by virtue of Reg. 5(3). The objector letter would, no doubt, be disclosed with substantial redactions relating to the personal data of third parties.

Summary

44 The following withheld information is therefore disclosable.

- (i) The name of the Registrar who signed the cremation certificate,
- (ii) The name of the author of the letter referred to at Paragraph 27.

45 We allow this appeal to that extent.

46 This decision is unanimous.

David Farrer Q.C.

Tribunal Judge
7th. January, 2016