



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

Case No. EA/2015/0173

ON APPEAL FROM:

Information Commissioner's

Decision Notice No: FER0569340

Dated: 16 July 2015

Appellant: Alan Doyle

Respondent: Information Commissioner

On the papers

Date of decision:

**Before
CHRIS RYAN
MALCOLM CLARKE
JEAN NELSON**

Subject matter: Environmental Information Regulations 2004
Exceptions, Regs 12(4) and (5)
- Request relates to unfinished material
4(d)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 16 July 2015 is substituted by the following notice:

Public Authority: **Spelthorne Borough Council**

Complainant: **Alan Doyle**

Decision: The Public Authority was not entitled to rely on EIR regulation 12(4)(d) to support its refusal to disclose to the Complainant the document that formed Appendix C to the Report of its Assistant Chief Executive presented to a meeting of a working party of the Public Authority in January 2013. The Public Authority is directed to communicate the information in that document to the Complainant within 35 days of the date of this Substituted Decision Notice.

REASONS FOR DECISION

Summary

1. The Appeal arises out of a request for information (“the Request”) submitted by the Appellant to Spelthorne Borough Council (“the Council”) under regulation 5 of the Environmental Information Regulations 2004 (“EIR”). As the matter comes before us the only issue that remains to be determined is whether, contrary to the Decision Notice from which this appeal arises, the Council was entitled to refuse to disclose certain background papers to a report submitted to one of the Council’s working parties.
2. It was accepted on all sides that, subject to the issue considered in paragraph 14 below, the withheld information fell within the exception provided for under EIR regulation 12(4)(d) (incomplete or unfinished documents) but we have decided that the public interest in maintaining the exception did not outweigh the public interest in disclosure.

The Council’s refusal to comply with the Request

3. The Request arose in the course of correspondence between the Appellant and the Council on the review of its Local Plan. It focused on a report prepared by the Council's Assistant Chief Executive, which had been presented to a working party of the Council in January 2013 ("the Report"). The Report itself has been available on the Council's website at all times and the Appellant focused his enquiries on "*background work/evidence*" which was said to justify certain specific conclusions which the working party had apparently reached. Part 4 of the Request then asked for:

"...all background papers to the Report of the Assistant Chief Executive, which, since it has now been considered by Local Plan Working Party, the Cabinet and the full Council, are required to be made available by the provisions of The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012."

At a later stage of this Appeal the Appellant argued that the information covered by the Request should not be limited to documents falling within the scope of the 2012 Regulations, but should include anything that could be characterised as background to the report referred to. However, we believe that he clearly defined the scope of the requested information by reference to the 2012 Regulations and we reject his argument for a broader interpretation at that late stage.

4. No issue arises in relation to the rest of the Request and, accordingly, it is only part 4 on which we are required to focus.
5. It is common ground that there were five appendices to the Report. In responding to the Request the Council directed the Appellant to its website to locate two of them. However it refused to disclose the remainder on the ground that it was environmental information falling to be considered under the EIR (which has not been disputed) and that it fell within the exception to the disclosure requirement provided by regulation 12(4)(d). The relevant part of regulation 12 reads as follows:

"(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) For the purpose of paragraph 1(a), a public authority may refuse to disclose information to the extent that –

...

(d) *the request relates to material which is still in the course of completion, to unfinished documents or to incomplete date...*

The Information Commissioner's Investigation and Decision Notice

6. The Appellant was not satisfied with the Council's response and, following an internal review which supported the original refusal, complained to the Information Commissioner. He investigated the complaint and issued a Decision Notice on 16 July 2016 in which he concluded that the Council had been entitled to refuse disclosure on the basis of EIR regulation 12(4)(d).
7. During the course of the investigation the Council released two more of the appendices to the report. The Information Commissioner therefore only had to decide on whether the final Appendix should have been disclosed. It was entitled "Appendix C – report on the LSS agreed by leaders". We understand that the word "leaders" refers to the Surrey Leaders Group, drawn from individual local authorities affected by the Local Plan.
8. The Decision Notice recorded that the Council had explained that, at the time when the Council received the information request, the withheld information was still being circulated for approval to a number of parties, including the Council itself and was therefore correctly characterised as "*unfinished*". The Information Commissioner accepted that characterisation and concluded that the exception was therefore engaged. He then proceeded to consider the public interest factors, reminding himself that EIR required him to apply a presumption in favour of disclosure. He recorded that, despite having been asked, the Council had not provided any information about the public interest factors in favour of disclosure which it had placed in the balance when reaching its decision to refuse disclosure. The Appellant, for his part, had insisted that the withheld information could not be considered confidential. Against that the Council had pressed on the Information Commissioner the importance of the inherent sensitivity of planning matters and the danger of the public debate on the Local Plan being distracted by speculation about any passages that might be amended or removed in the final form of the report in question. The Council also argued that disclosure would undermine the safe space that is needed to finalise a document of this kind.
9. The Information Commissioner concluded, by "*a narrow margin*" that the public interest favoured maintaining the exception. In reaching that conclusion he placed particular significance on the importance of protecting the safe space in which decision-makers should be free to discuss the matters under consideration.

The Appeal to this Tribunal

10. On 10 August 2015 the Appellant lodged with the Tribunal a Notice of Appeal accompanied by Grounds of Appeal. The Information

Commissioner subsequently submitted a written Response to the Appeal and the Appellant filed a Reply.

11. The Appellant opted to have the Appeal determined on the papers, without a hearing, and we agree that this is an appropriate manner for dealing with the issues that arise. Accordingly we have reached our decision on the basis of written submissions and a bundle of papers provided to us by the parties.
12. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
13. We were provided with a copy of Appendix C to the Report in a Closed Bundle and have therefore had the advantage of studying it, which the Appellant obviously had not.

The Arguments raised in the Appeal

14. The Grounds of Appeal included a suggestion that the withheld information might, on inspection, be seen not to be a draft or unfinished document. In those circumstances it would fall outside the scope of the exception relied on and would be a document which the Council was, in any event, required to disclose (regardless of any public interest issues in favour of withholding it) under the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
15. The Information Commissioner argued that the withheld information was a draft which had not yet been approved by two of the local authorities involved in the group of authorities affected by the Local Plan. It was open to either of those authorities to ask for further amendments to be made and it was not therefore appropriate to treat the document as anything but an unfinished draft. It followed, the Information Commissioner argued, that it fell outside the scope of the 2012 Regulations and the public interest test required by EIR had to be satisfied before disclosure could be ordered.
16. The Appellant further argued that, if the withheld document was covered by the exception, the public interest in favour of maintaining the exception did not outweigh the public interest in disclosure. In that respect he laid stress on the presumption in favour of disclosure set out in EIR regulation 12(2), quoted above. The Information Commissioner acknowledged the point, but argued that the presumption only operates as a starting point and that he had concluded in his Decision Notice that, notwithstanding its influence on the decision-making process, the factors in favour of maintaining the exception still outweighed those in favour of disclosure.

17. The Appellant also relied on the provisions of the National Planning Policy Framework and the Planning Practice Guidance, both of which stressed the importance of community members being closely involved in the development of Local Plans from an early stage. He accepted that the Information Commissioner had acknowledged the importance of public participation, but argued that the documents he had identified had the effect of removing any entitlement by the Council to a “safe space” in which to make decisions before exposing them to public scrutiny.
18. The Information Commissioner countered with two arguments. First, he suggested that the consequence of the Appellant being right would be that all information would have to be disclosed, even before it had been developed to a stage at which meaningful public engagement on its content could take place. That would be inconsistent with the guidance materials on which the Appellant relied as they clearly countenanced that documents, once completed, would be promptly made available to the public, but did not suggest that they should be disclosed before completion.
19. The Information Commissioner’s second argument was that the principles and guidance on which the Appellant relied applied most aptly to information that formed part of the substantive evidence base for a Local Plan and did not appear to have relevance to a document, such as Appendix C, which did not contain substantive evidence but focused on procedural issues, expressed at a fairly high level of generalisation, relating to the process for co-operation between local authorities in Surrey. Disclosure, the Information Commissioner argued, would not put into the hands of the public any evidence which would help it to assess or comment on the plans being developed.
20. The Appellant reinforced his arguments with a number of quotations from case law dealing with the importance of proper, public consultation based on thorough disclosure of relevant evidence. He suggested that the refusal to disclose the withheld information imposed an unfair disadvantage on those wishing to express their views during a consultation process which was already undermined by the short time given to those wishing to submit comment. The Information Commissioner’s response, again, was that, on the particular facts of this case, disclosure would not contribute anything significant to the public debate because of both its subject matter and its provisional nature.
21. The Information Commissioner also stressed the importance of a safe space for decision-making, particularly where a number of different local authorities were in the process of trying to agree a common position to adopt.

Our conclusions on the arguments raised

22. Having inspected the withheld document in the Closed Bundle, we are satisfied that it was an unfinished document awaiting approval and that the argument that it falls outside the exception relied on must be rejected.
23. Our view on the public interest balance is that there is little weight to be applied to either side of the scales. The withheld document is substantially procedural and its content would not contribute greatly to the public debate on the central issues we envisage would arise in relation to a new local plan. Even allowing for the public interest in openness with regard to planning issues, therefore, the public interest in disclosure is light. However, we find that the public interest in maintaining the exemption is equally light. A period of seven months elapsed between the creation of the document in July 2014 and the internal review decision in February 2015 to refuse disclosure. We believe that this provided the relevant decision makers with sufficient “safe space” to have resolved any differences of substance over a document of this type. We also consider that the scope for the withheld document distorting public debate is very limited, given its subject matter.
24. The Decision Notice records that the Information Commissioner reached his decision in favour of withholding the requested information by a narrow margin. We have found ourselves leaning in the opposite direction by a similarly narrow margin. It is unfortunate that, as found by the Information Commissioner, the Council presented no evidence to demonstrate that it considered the public interest in favour of disclosure when reaching its decision. However, assessing the relevant factors on their merits, as they have been presented to us by the parties and without regard to the Council’s apparent attitude during the Information Commissioner’s investigation, leads us to conclude that the public interest factors in maintaining the exemption do not outweigh the, admittedly light, public interest in disclosure. Our conclusion is also consistent with the presumption in favour of disclosure required under EIR 12(2) in circumstances in which the public interest factors for and against disclosure are so delicately balanced.
25. We conclude, therefore, that the Council should have disclosed the withheld information and that the Appeal therefore succeeds.
26. Our decision is unanimous

Judge C Ryan
2nd March 2016

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