



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2018/0082

**Heard at Birmingham Employment Tribunal
On 4 September 2018**

Before

**JUDGE HAZEL OLIVER
MR P DE WAAL
MR N MAKANJI**

Between

MR ROBERT VAUDRY

Appellant

and

INFORMATION COMMISSIONER

Respondent

Appearances:

The Appellant – in person

The Information Commissioner did not attend

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 27 March 2018 (reference FER0720759). It concerns information sought from Stratford-on-Avon District Council (the “Council”) under the Environmental Information Regulations 2004

("EIR") relating to communications about the appellant's address between the Council, Dorsington Parish Council and its residents.

2. On 8 August 2017 the appellant made the following request:

"I would like to make a formal Freedom of Information Request to see all correspondence and notes of telephone calls and meetings between SDC's Enforcement and Planning Officers and any Dorsington resident or Dorsington Parish Council in respect of functions at The Moat House for the period of 1st January to 31st July 2017."

3. By way of background, the appellant is the owner of The Moat House, a historic property in Dorsington. There is an enforcement notice and a stop notice from the Council from December 2014 preventing this property from being used for wedding events and functions which are not ancillary to the residential uses of the site.

4. The Council responded on 25 August 2017 and refused to provide the requested information in reliance on regulations 12(5)(b) (adverse effect to the course of justice or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature) and 13 (personal data) of the EIR. The appellant requested an internal review on 25 August 2017. This was initially refused, but after a complaint to the Commissioner the Council did conduct an internal review and upheld its original position.

5. The appellant made a complaint to the Commissioner on 16 January 2018 about the way his request for information had been handled. The Commissioner conducted an investigation and issued her Decision Notice on 27 March 2018.

6. The Commissioner decided that the regulation 12(5)(b) exception was engaged. The Commissioner found that investigations into potential breaches of legislation, such as planning or environmental law, were potentially covered by the exception. The Commissioner found that there was a live investigation into non-compliance with planning enforcement notices, which is an offence under section 179 of the Town and Country Planning Act 1990. Disclosure would reveal information volunteered by the public, which the Council relies on to investigate breaches of the law. This would affect the willingness of the public to provide such information, and so damage the Council's ability to investigate and take action. Assurances of confidentiality were provided in the Local Enforcement Plan, which applied unless disclosure was necessary for legal reasons. The Commissioner concluded that the information related to an enquiry of a criminal nature and the course of justice in general. Disclosure would adversely affect the Council's ability to investigate breaches of the law, the course of justice, and the ability of affected parties to have a fair trial.

7. In relation to the public interest test, the Commissioner found that the public interest in maintaining the exception outweighed the public interest in disclosure. Disclosure of details of a live investigation would damage its integrity and the willingness of members of the public to cooperate, which would hinder the public authority's ability to investigate future cases and take appropriate enforcement action. This would not be in the public interest, and weighed more heavily than the public interest in openness, transparency, and understanding how this matter is being dealt with and why a particular approach is being taken.

8. The Commissioner did not consider regulation 13 in light of the findings on regulation 12(5)(b), although she did note that the withheld information was a combination of the

appellant's personal data and other information, and so should have been treated as a subject access request. The Commissioner also found that the Council was in breach of regulation 11(4) by failing to carry out its internal review within 40 working days of receipt.

The Appeal

9. The appellant appealed against the Commissioner's decision on 17 April 2018. The appeal is put on the basis that:

- a. There is no "live investigation".
- b. The request relates to a possible misdemeanour by a planning enforcement officer, which officers of the Council have sought to cover up and has been subject to a police investigation for misfeasance in public office.
- c. The Council has misled the ICO by claiming that there is a live investigation when there isn't one.

10. The Commissioner's response denies that there was any error of fact or law. The Commissioner says that she was entitled to rely on evidence from the Council that a live investigation was ongoing and that disclosure would prejudice that investigation, and the appellant does not point to any evidence to contradict the Council's evidence. The Commissioner says she is unaware of any misdemeanour by one of the Council's planning officers or any cover up by the Council and, if the appellant considers that a criminal offence has been committed, the appropriate action is for him to contact the police.

11. The appellant's reply explains two grounds for the appeal. Firstly, that the Commissioner's decision involved a mistake of established fact. He says that there was in fact no "live" investigation, the Council has not provided any objective verification of this, the appellant himself is not responsible for the mistake, and this mistake did play a material part in the Commissioner's reasoning. Secondly, that the Commissioner's decision was irrational in the *Wednesbury* sense. The Council has provided no evidence of a live investigation, and the Commissioner has failed to conduct any investigation beyond simply accepting the Council's assertion.

Applicable law

12. The Tribunal is satisfied that this matter engages the EIR only, and we have dealt with the case on that basis. "Environmental Information" is defined in Regulation 2(1) of the EIR as expressly covering the state of elements of the environment including land, and measures likely to affect these elements.

13. The relevant provisions of EIR are as follows.

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

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.

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....

12(5) *For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–*

.....

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

.....

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.*

(The first and second conditions are not repeated in full here but relate to disclosure in contravention of and exceptions under the Data Protection Act 1998).

14. For the exception under regulation 12(5)(b) to be engaged, the public authority must show that disclosure “would” adversely affect the relevant matters. This requires more than a possibility of such effects.
15. In accordance with section 57 of the Freedom of Information Act 2000 (which also applies to the EIR), the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner if it considers that the notice is not in accordance with the law. This covers all errors made by the Commissioner, including errors of fact. The Tribunal may conduct a full merits review of the Commissioner’s decision, meaning it may consider all material available at the appeal and make its own decision. (**Information Commissioner v Edward Malnick and another**, GIA/447/2017 (1 March 2018)).

Evidence and submissions

16. We had an agreed bundle of open documents, which we read in advance of the hearing. We also had a small closed bundle of documents, consisting of the withheld information and an unredacted version of a letter from the Council to the Commissioner dated 7 February 2018. We heard oral submissions from the appellant in open session. We have taken all of this material into account in making our decision.

17. The appellant’s submissions at the hearing focussed on two arguments.

18. His first argument is that the Commissioner made an error of fact in finding that there was a “live” investigation being conducted by the Council at the time of the request. The Commissioner simply accepted the Council’s statement to this effect without being provided with any evidence.

19. His second argument is that the decision is irrational, again based on the lack of a live investigation. The appellant questioned the threshold for a “live” investigation, and explained that he had not been contacted about any investigation or enforcement action by the Council. He is aware that the Moat House is included on a regulatory committee list of properties with enforcement notices, and is the only one described as being under “monitoring”. He believes that a resident may have emailed about a potential breach, and this may result in an investigation. But, he has had no correspondence about this. The appellant took us through sections 5 and 6 in the Local Enforcement Plan and explained that none of the actions described there had been taken by the Council. This lack of any activity by the Council indicates that any investigation is actually closed, in the same way that a police investigation may be closed until any further information arises.

Was Regulation 12(5)(b) engaged?

20. We start with examining whether Regulations 12(5)(b) was engaged by the withheld information.

21. **The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.** We find that this part of the exception is engaged by the withheld information. The appellant’s property was subject to an enforcement and stop notice from the Council. The appellant has asked for all correspondence and notes between the Council’s planning offices, Dorsington residents and Dorsington Parish Council in respect of functions at this property for a particular time period. Certain functions at this property would have been in breach of the enforcement and stop notices, which would be a potential offence under section 179 of the Town and Country Planning Act 1990. This information would clearly be relevant to inquiries made by the Council into whether there had been a breach, which would be an inquiry of a criminal nature. Disclosure would, therefore, potentially affect the Council’s ability to conduct such an inquiry, and the course of justice more generally.

22. **Adverse effect.** We are satisfied that disclosure of the withheld information could potentially hamper the Council’s ability to investigate breaches of planning notices. We accept that the Council relies heavily on information from third parties when investigating breaches of the law. The willingness of such individuals to provide information may be affected if details of their communications with the Council were revealed to the person under investigation, or to the public at large. This is why the Local Enforcement Plan states the following at paragraph 5.3: *“The name and address of all complainants is kept confidential. It may be necessary that complainants details are required to be disclosed for legal reasons. However, prior approval will be obtained.”*

23. **Whether the adverse effect would occur.** The key issue is whether this adverse effect on Council investigations “would” occur in this case. This requires more than a possibility. It must be more likely than not that these effects would occur.

24. Having considered the material before us, including the withheld information and the unredacted letter from the Council in the closed bundle, we are satisfied that the adverse effect on the Council’s ability to investigate breaches of the law would occur in this case. The enforcement system relies on information from the public. Members of the public would be less likely to share information if the withheld information in this case were to be disclosed. Disclosure in this case would affect investigations into the appellant’s activities, as individuals

who wish to bring matters to the Council's attention may not wish this to be known by the appellant. Similarly, it would also affect wider investigations, as the public would be less willing to provide information in other cases. Individuals would be inhibited from making complaints to the Council if they believe that these communications may be shown to the subject of complaint. These adverse effects would occur in cases where the Council is actively pursuing a breach of the law. They would also occur at an earlier stage, where an individual raises an issue informally which may or may not result in a full investigation or enforcement action. In fact, disclosure of the withheld information may be particularly likely to inhibit members of the public from raising a possible breach of planning law informally – as opposed to a formal complaint, where the complainant may feel more strongly about the matter and not be so easily dissuaded by the possibility of the information becoming public.

25. The appellant's submissions focussed on his argument that there was no "live" investigation at the time of his request. This is referred to a number of times in the Commissioner's decision, and the Commissioner confirms that she has relied on information from the Council in making this finding.

26. We accept that there has not been any enforcement or other legal action taken against the appellant, and he has not been contacted by the Council in relation to any investigation into activities at his property. The emphasis given by the Commissioner to there being a live investigation could be seen as misleading, in the narrow sense that the appellant was not aware of any ongoing investigation by the Council. Although the Commissioner had seen the withheld information, she did not seek any further information from the Council as to the status of any investigation.

27. However, the appellant's property is subject to an enforcement and stop notice. This means that any third party communications with the Council about functions at the property may involve a potential breach of the law, and so involve an investigation to the extent that the Council will make further enquiries. These enquiries may not come to anything, but still amount to an investigation in a wider sense. The appellant says that he should have been advised if a case has been closed (paragraph 5.6 of the Local Enforcement Plan), but this applies to the investigation of formal planning control complaints generally. The appellant's property was already subject to an enforcement and stop notice, so any further communications about functions at the property would relate to whether these notices had been complied with.

28. Having viewed the withheld information, we are satisfied that there was an investigation in the wider sense at the time of the appellant's request. We also note that there is no requirement for there to be a "live" investigation in order for the regulation 12(5)b) exception to be engaged. The existence of an active investigation into breach of the law may make it more likely that specific adverse effects will be caused by disclosure of certain information, but this is not a necessary part of the test.

29. The appellant's submissions were directed at showing that the Commissioner's decision was wrong, in the sense of being mistaken in fact and/or irrational. He argued that the decision should be overturned on this basis. As noted above, the Tribunal's function is wider than simply looking for errors of law in the Commissioner's decision. We are able to make our own decision on the facts presented to us. Having taken all of the available material into account, including the withheld information, we find that regulation 12(5)(b) is engaged for the reasons set out above.

Public interest balance

30. Where regulation 12(5)(b) is engaged, the information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

31. The public interest in favour of disclosure covers a number of elements:

- a. There is a general public interest in openness and transparency as to how public authorities carry out their functions, and this includes planning control and enforcement action by the Council.
- b. There is a more specific public interest in understanding how a particular matter has been dealt with and why a particular approach has been taken to a planning matter, both in relation to that specific matter and how that may inform planning decisions generally.
- c. At the hearing, the appellant explained that there had been considerable public interest in this particular planning matter and his own actions, partly due to his status as a district councillor.
- d. The appellant's appeal also referred to a possible misdemeanour by a planning officer and subsequent attempts to cover this up. If the withheld information did provide evidence of such conduct, it would be in the public interest for this to be revealed so that wrongdoing could be prevented.

32. The public interest in maintaining the exception is the ability of the Council to investigate alleged breaches of planning law. As noted above, this relies heavily on information and cooperation from members of the public. An effective enforcement system is clearly in the public interest, as this is the mechanism for ensuring that planning requirements and enforcement notices are complied with. Disclosure of the withheld information would damage the willingness of the public to provide information to the Council in the future, and so significantly hinder its ability to investigate future cases. This in turn would prevent the Council from enforcing the law effectively.

33. Having balanced these interests, we find that the public interest in maintaining the exception does outweigh the public interest in disclosing the information. We find that the public interest in ensuring effective investigation and enforcement of planning law is significant. The public interests in favour of disclosure are more limited in this case. We accept that there is a genuine interest in openness and transparency, both generally in relation to planning enforcement and more specifically in relation to the appellant's property. However, these are outweighed by the damage that would be caused to the public interest by disclosure in this case.

34. In making this finding we have taken account of the content of the withheld information. This is only a limited amount of information, which would not substantially advance the public interest in understanding the operation of planning enforcement generally or how this matter has been dealt with specifically. There is also nothing in the information which indicates inappropriate conduct or wrongdoing by the Council or its employees, which might otherwise have warranted disclosure in the public interest.

Personal data – regulation 13(1)

35. Having found that the regulation 12(5)(b) exception applies, it is not necessary for us to consider this alternative exception in any detail. The appellant did accept during the hearing that he was not seeking the names of any people involved. We note that the closed material is largely comprised of personal data about third parties, and it would be difficult to redact this information sufficiently so that it was not possible to identify some or all of these individuals.

Conclusion

36. As stated above, we accept the appellant's point that the Commissioner appears to have accepted the Council's assertion that there was a live investigation at the time of the request, without conducting any further enquiries. Having viewed the closed material, it is not clear to us that there was a "live" investigation in the narrow sense of an active investigation with a view to taking actual enforcement or other legal action. However, we have made our own assessment of the material. For the reasons explained above, we find that the information can be withheld in reliance on the exception in regulation 12(5)(b) as determined by the Commissioner.

37. We uphold the Commissioner's decision and dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 17 September 2018
Promulgation date: 18 September 2018