



Neutral citation number: [2023] UKFTT 01032 (GRC)

Case Reference: EA-2023-0023

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

**Heard: On the papers
Heard on: 23 October 2023
Further panel deliberations: 5 December 2023**

Decision given on: 18 December 2023

Before

**TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER PAUL TAYLOR**

Between

MALCOLM REEVES

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Decision: The appeal is dismissed

REASONS

Introduction

1. There is a short closed annex to this decision. It is necessary in order not to defeat the purpose of these proceedings.
2. This is an appeal against the Commissioner’s decision notice IC-203475-K8W6 of 22 December 2022 which held that Wiltshire Council (‘the Council’) was correct to withhold the requested information in accordance with reg 5 (3) (the requestor’s own personal data) and 13(1) (other personal data) of the Environmental Information Regulations 2004 (EIR) and that that Council complied with regulation 5(1) in relation to data falling outside the scope of the request.
3. There has been some delay in providing a decision since the paper hearing date. This is because the tribunal requested an unredacted copy of items 5 & 6 (see table below) and this was provided to the tribunal by the Commissioner on 13 November but not forwarded to the panel until 27 November. The tribunal then carried out further deliberations and reached a decision in the light of that unredacted document.
4. The unredacted copy of the email (items 5 & 6) is held by the tribunal pursuant to Rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (‘the GRC Procedure Rules’) on the basis that it will not be disclosed to anyone except the Information Commissioner. To do otherwise would defeat the purposes of the proceedings because it either consists of or refers to the content of closed information.

Factual background to the appeal

5. The information relates to applications by Stanton St Quintin Parish Council to register certain land as a town or village green. Mr. Reeves has concerns that if the land in question is designated a village green, it will affect his ability to receive utilities on his property.
6. Mr. Reeves has made a number of requests under the Data Protection Act (subject access requests) and EIR/the Freedom of Information Act 2000 (FOIA) and in response the Council has disclosed a number of emails. The emails are referred to by the parties by item number, and the tribunal has adopted this for the purposes of this decision. The Commissioner provided a table in the annex to the Commissioner’s response which it is helpful to reproduce here (in slightly amended form). The tribunal has used this numbering in this decision:

* = Commissioner considers within the scope of the appeal	Item number	Details	Commissioner’s position
	1	Emails of 22.09.20 at 7:59 from Howard Greenman to Janice Green	Disclosed in full – not relevant to this appeal
*	2	Email 18.08.20 at 12:14 from Peter Cullen to Janice Green	Redactions for Mr. Reeves’ personal data and third party personal data

*	3 & 4	Email 04.08.20 from Peter Cullen to Janice Green	Redactions for Mr. Reeves' personal data and third party personal data
*	5 & 6	Email 03.08.20 at 13:45 from Howard Greenman to Janice Green	Redactions for Mr. Reeves' own personal data (item 6 forwards item 5)
	7	Email 07.04.21 at 13:08 from Adrian Andrews to Rights of Way (and the reference to a deleted email therein)	This matter was not referred to the Commissioner and lies outside the scope of this appeal.
*	8	Email from HC to Adrian Andrews referred to in email 17.11.20 at 14:32 from Janice Green to Adrian Andrews.	Commissioner decided that this was not in scope of the request.

Request and Decision Notice

7. Mr. Reeves made the request which is the subject of this appeal on 14 June 2022:

“I request copies of all photos, maps, forms, documents, emails, notes of conversations, etc. relating to the Town and Village Green applications of Stanton St. Quintin Parish Council, 2018/01 (30 April 2018) and 2019/01 (26 April 2019).

I am only interested in documents I do not have hence:

- 1) You may exclude documents already sent to me under my FOI request of 7 May 2020.
- 2) You may exclude any other documents already sent to me.
- 3) You may exclude all documents written by me (these would be from this email address if that helps).
- 4) You may exclude all documents published with the agenda for the NAPC meeting of 25 May 2022.

Please include documents received up to 13 June 2022 inclusive.”

8. The Council replied to the request on 6 July 2022 and provided some information. The Council stated that it was providing some of the data under the data protection act because it was Mr. Reeves' personal data.

9. Mr. Reeves wrote to the Council on 7 July 2022 to ask for unredacted copies of 6 emails that had been provided.
10. On 15 August 2022 Mr. Reeves wrote to the Council identifying information that he said was in scope of the request and had not been provided.
11. In its internal review response dated 30 August 2022 the Council:
 - 11.1. removed some of the redactions
 - 11.2. relied on regulation 12 (5)(f) (confidential information)
 - 11.3. relied on regulation 5(3) (requestor's own personal data)
 - 11.4. stated that it did not hold some of the requested information
12. Mr. Reeves referred the matter to the Commissioner on 10 August 2023.
13. In the course of the Commissioner's investigation the Council confirmed that it relied on regulation 5(3) (personal data of the requestor) and regulation 12(3) (personal data of a third party). It stated that the rest of the withheld information was outside the scope of the request.
14. In a decision notice dated 22 December 2022 the Commissioner decided that the Council correctly applied regulation 5(3) and regulation 13(3) to withhold the personal data of the complainant and a third party and that, in relation to information identified as falling out of the scope of the request, it complied with regulation 5(1). The Commissioner did not require the Council to take any steps.
15. The Commissioner viewed the withheld information and was satisfied that:
 - 15.1. some of the information was not within the scope of the request
 - 15.2. some of the information was Mr. Reeves's personal data
 - 15.3. Some of the information was third party personal data
16. In relation to the third-party personal data the Commissioner accepted that Mr. Reeves was pursuing a legitimate interest. The Commissioner was satisfied that the individual concerned would have the reasonable expectation that their personal data would not be disclosed to the wider world in response to an EIR request. Disclosing their personal data would be likely to cause them harm or distress. The Commissioner has not seen any evidence of any wider public interest in disclosure of the withheld information.
17. Based on the above factors, the Commissioner determined that there was insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms.

The grounds of appeal

18. The grounds of appeal are:
 - 18.1. The Council did not carry out an adequate search
 - 18.2. The withheld information is within the scope of the request
 - 18.3. The withheld information is in the public domain
 - 18.4. It is in the public interest to disclose the withheld information
 - 18.5. The third party has consented to disclosure of their personal data

- 18.6. The Commissioner have upheld the Council's decision to refuse to release some data in response to a subject access request. It is inconsistent to allow them to withhold the same data under regulation 5(3).

The Commissioner's response

Regulation 5(3)

19. The Commissioner submits that the tribunal only has jurisdiction to consider whether any information is personal data of Mr. Reeves.

Regulation 13(1)

20. The test in relation to third party personal information is not 'the public interest'.

Out of scope

21. The Commissioner stands by his decision that this information is out of scope.

Mr. Reeves' item 7

22. This does not appear to have been referred to the Commissioner in Mr. Reeves' complaint. The tribunal does not have jurisdiction to consider it.

Mr. Reeves' reply

23. Mr. Reeves submits that the inconsistency of the Commissioner means that he cannot exercise his right under the DPA to have personal data about him corrected. He asserts that he is denied knowledge of what the data is, so it is impossible for him to correct false data, although from the context the data is clearly about him. He argues that the only way that he can view the data is to agree that it can be put into the public domain, which would make the data subject to FOIA.
24. Mr. Reeves submits that the public interest test does apply. He notes that it is on the Commissioner's website and in their guidance.
25. The public interest in disclosure is in exposing the Council's reliance on false/defamatory statements and what this says about the decision making processes and integrity of the Council.
26. In relation to item 8, the item containing HC's comments, Mr. Reeves submits that these comments relate to HC's statement included with TVG application 2018/01 as Janice Green says in her email (17 November 2020). The TVG application, form 44, contains a warning that all data in and submitted with the form will be in the public domain. HC's statement is thus in the public domain.
27. Mr. Reeves submits that the public interest tests of upholding standards of integrity and ensuring justice and fair treatment for all apply. Emails say HC wished to withdraw her statement but was persuaded not to. Why did she wish to withdraw her statement? What

was said to persuade her not to? When the subject is a sworn statement of truth then this is clearly a Public Interest matter.

28. HC's comments must be in scope because Janice Green says that they relate to the statement included with the TVG application.
29. Mr. Reeves submits that item 7 was included in the appeal data package as file 5. It was mentioned to the Commissioner in the emails to the ICO case officer when Mr. Reeves asked why it had not been addressed in the decision notice.
30. Mr. Reeves submits that item 7 shows that either data was being deliberately deleted or the deleted email and the reminder emails should have been released.
31. Mr. Reeves submits that this shows that the Council is hiding data and therefore the Commissioner should have carried out a thorough investigation.

Mr. Reeves' final submissions

32. There is a contradiction between what Mr. McConaghy says at p D161 and what Janice Green says at P D160 as to whether the comments of HC relate to the village green application. Mr. Reeves submits that the comments are clearly in scope.
33. Mr. Reeves refutes Mr. McConaghy's implication that Mr. Reeves' use of FOIA to get at the truth is excessive. Mr. Reeves submits that any rational person would instead be asking why Wiltshire Council behaved so unreasonably in accepting the village green application in the first place.

Legal framework

34. The relevant provisions of the EIR are regs 5(1) and (3), 12(1) to (3) and 13(1) and (2A):

Reg 5 Duty to make available environmental information on request

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

...

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Reg 12 Exceptions to the duty to disclose environmental information

(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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

...

Regulation 13 Personal data

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if—

(a) the first condition is satisfied, or

(b) the second or third condition is satisfied and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations—

(a) would contravene any of the data protection principles, or...

35. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

36. ‘Identifiable’ means a living individual who can be identified, directly or indirectly. It must be possible to identify an individual using all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer. Identifying a pool that contains or may contain a person is insufficient. It is not sufficient to say that a person is reasonably likely to be covered by the data (**NHS Business Services Authority v Information Commissioner and Spivak** [2021] UKUT 192 (AAC)).

37. Article 5(1) GDPR states that personal data must be processed ‘lawfully and fairly’. In order to be lawful, one of the lawful bases of processing in article 6(1) GDPR must apply. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

38. The case law on article 6(1)(f)’s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

The task of the Tribunal

39. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

The issues

40. The issues we have to determine, with reference to the item numbers in the table set out in the introduction above, are:

- 40.1. Is the information redacted from items 2, 3 & 4 and 5 & 6 the personal data of Mr. Reeves?
- 40.2. Is item 7 within the scope of the appeal?
- 40.3. Is item 8 outside the scope of the request?
- 40.4. Is the information redacted from items 2, 3 & 4 and 5 & 6 the personal data of a third party?
 - 40.4.1. Would disclosing the information be fair?
 - 40.4.2. If so, are the conditions in 6(1)(f) met i.e.
 - 40.4.2.1. Is the data controller or the third party or parties to whom the data is disclosed pursuing a legitimate interest or interests?
 - 40.4.2.2. Is the processing involved necessary for the purposes of those interests?
 - 40.4.2.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Evidence and submissions

- 41. We have read and an open and a closed bundle of documents, which we have taken account of where relevant. For the benefit of Mr. Reeves we note that the closed bundle consists of the withheld information, and an unredacted version of the letter from the Council to the Commissioner.

Discussion and conclusions

- 42. It is not in dispute that the requested information is environmental information.

The public interest test

- 43. Mr. Reeves refers to the public interest test, and questions why the Commissioner has objected to this, given that the Commissioner has produced guidance on the public interest test. Whilst the public interest is relevant to most exceptions to the duty to disclose environmental information, it does not apply where that information is the personal data either of the requestor or a third-party (see regulations 5(3), 12(1) and 12(3) EIR).

Scope of the appeal – item 7

- 44. Item 7 relates to an email dated 7 April 2021 at 13:08 from Adrian Andrews to Rights of Way. This email has been released to Mr. Reeves with one of the senders' names redacted, but the issue does not relate to that redaction. The subject of the email is 'Village Green Stantonst (*sic*) Quintin' and the body of the email reads:

“URGENT
Trying to contact Department no Joy
Have agreed a extension with Janice Green, have deleted email Cllr Andrews”

- 45. On 15 August 2022 Mr. Reeves emailed the Council to say that information was missing from the EIR response. In relation to item 7 he stated:

“What email has Cllr Andrews deleted at his end and where is the matching email in Wiltshire Council records?”

46. The Council replied on 30 August 2022 in its internal review stating:

“We have no record of the e-mail which Cllr Andrews refers to as deleted, and I am therefore satisfied that this information is not held by Wiltshire Council.”

47. The Commissioner says that item 7 lies outside the scope of this appeal, as it was not referred to the Commissioner and therefore was not dealt with in the decision notice. Mr. Reeves says that item 7 was included in the appeal data package as file 5. It was mentioned to the Commissioner in the emails to the ICO case officer when he asked why it was not addressed in the decision notice.

48. There is no doubt that Mr. Reeves has raised this issue in this appeal and has raised it in correspondence with the Commissioner following the decision notice. Further it is referred to in the internal review, so it would have been included in documents sent to the Commissioner.

49. The section 50 complaint to the Commissioner contains the following details of complaint:

“Wiltshire Council as the Commons Registration Authority (CRA) is processing a Town or Village Green (TVG) application to make the land between my property and the roadway into a TVG. This has the potential to make my house worthless and sterilise the land it sits on for development. Pipes, cables, etc. in a verge become criminal if the land is made TVG. Wessex Water have go so far as to ask to be treated as an objector too. As you can see full disclosure either by FOI or SAR is clearly important in the public interest. The CRA has refused to keep me informed on and indeed has failed to do so, hence I need to submit regular FOI request to know what is being claimed and to fact check these claims. The recent FOI response included 6 emails which were partially redacted. I submitted a FOI review request and also an SAR request for these 6 emails as from the unredacted sections it seem more than likely that the redacted sections referred to me, my family, or my property. I asked that both FOI review and SAR were processed in parallel. No unredacted emails have been released. Neither the FOI review nor the SAR have explained why this is taking so long for 6 short emails which have all found. I believe that these emails are being deliberately withheld because they contain information that could be useful in the coming public inquiry. They are also stopping me correcting any false information about me in these emails.”

50. It is clear from this section that Mr. Reeves is complaining about the redactions to 6 emails that have been released to him. He makes no reference to any further information that he says is held but has not been provided. The fact that the Commissioner was sent the internal review documentation relating to those 6 emails which also included reference to item 7 is not sufficient to constitute a section 50 complaint about that issue.

51. On the basis of this the Commissioner limited the scope of his investigation and her decision notice to the question of whether or not the Council was entitled to withhold the information redacted from those 6 emails.

52. As the question of whether further information was held by the Council (specifically the deleted email referred to in item 7) was not raised in the section 50 complaint, has not been investigated by the Commissioner and did not form part of the decision notice, the tribunal has no jurisdiction to deal with this part of the appeal.

Adequate searches by the Council/adequate investigation by the Commissioner

53. The question of whether or not further information was held by the Council is outside the scope of this appeal for the reasons set out above. The tribunal therefore does not have jurisdiction to consider the adequacy of the Council's search.

54. The question of whether or not the Commissioner's investigation was adequate is outside the jurisdiction of the tribunal in any event.

Item 2 (email of 18 August 2020 at 12:14 from Peter Cullen to Janice Green) and items 3 & 4 (email of 4 August 2020 from Howard Greenman to Janice Green)

55. Items 2 and items 3 & 4 have been provided to the tribunal in unredacted form at p 8 and 9 of the closed bundle. 'Items 3 & 4' is, in reality, just one document/one email. The information highlighted in yellow is said to be third party personal data and the information highlighted in blue is said to be Mr Reeves personal information. The redacted versions are at p 24, 26 and 27 of the open bundle.

56. The Council has confirmed that some of the original redactions were house numbers but makes clear at p 160 of the open bundle these should not have been redacted because it is quite clear from the remainder of the e-mail which addresses are being referenced. As it is quite clear from the e-mail which addresses are being referenced it is not necessary to deal with the redactions of the house numbers, because the claimant already has that information.

57. In relation to the redaction of third-party information, the only redactions are of Peter Cullen's personal e-mail address. This is clearly personal data of a third party and there is no legitimate interest in the disclosure of his personal e-mail address. This information is therefore exempt under regulation 13. We note that Mr. Reeves has indicated in any event that the Council is entitled to redact email addresses.

58. We find that the remaining redactions are Mr. Reeves' personal data. The information is obviously about him and he is identifiable either from the redacted section or from the rest of the email, because he is referred to as the owner of 29A. That information is therefore exempt under regulation 5(3).

59. Whether or not Mr. Reeves consents to the disclosure of his personal data is not a relevant consideration for this tribunal. Regulation 5(3) simply takes any personal data of the requestor outside the scope of EIR. It is intended to be dealt with under a separate regime. Once we have determined that the information is personal data of the requestor, there is no duty to provide it under EIR.

60. It is not a matter for this tribunal to determine whether this information should have been released in relation to the subject access request.

Item 5 & 6 – email from Howard Greenman to Janice Green 3 August 2020 at 13:45.

61. The Commissioner indicates in the table attached to its response that the Council was entitled to withhold this information on the grounds that it was Mr. Reeves' personal data.
62. The email was initially redacted under EIR on the grounds that it contained Mr. Reeves' personal data. Most of the email was subsequently released to him in response to a subject access request in August 2022 and there remains only one small redaction. We have been provided with an unredacted version of the email, and the remaining redacted information is the name of an individual.
63. Mr. Reeves' argument is that the remaining redaction must either be his personal data, and should have been released in the response to the subject access request, or it is someone else's personal data, in which case it should be released under EIR (if disclosure is fair and the relevant conditions are met).
64. We agree with the Commissioner that the email is Mr. Reeves' personal data. It is obviously about him. The entire sentence starting 'his behaviour', looked at as a whole and including the redacted section, is clearly about Mr. Reeves. That entire sentence is therefore not within the scope of EIR by virtue of regulation 5(3), even though it also contains the personal data of someone else.
65. Under regulation 5(3) there is no duty to provide environmental information that is the personal data of the requestor. That is so even if it is also someone else's personal data. Mixed data still falls under regulation 5(3) and is properly dealt with as a subject access request under the data protection regime.
66. Under the Data Protection Act a public authority faced with mixed personal data must consider whether they can disclose the third-party data to the requestor. In this case the Council, we presume, determined that they could not. The question of whether they were right to withhold that information under the DPA is not within our remit.
67. We appreciate that this may be an unsatisfactory answer for Mr. Reeves, but the data protection regime is intended to be a separate regime. Mr. Reeves might be assisted by reading the Commissioner's guidance on mixed personal data.¹

Was item 8 outside the scope of the request – email from HC to Adrian Andrews (referred to in email from Janice Green to Adrian Andrews on 17 November 2020 at 14:32).

68. The email from Janice Green to Adrian Andrews on 17 November 2020 at 14.32 is at p 36 of the bundle. That email includes the following statement:

'Thank you for your email, attaching comments from HC regarding her statement in application no.2018/01 to register land as a town/village green off Seagry Road, Lower Stanton St Quintin.'

¹ Personal data of both the requester and others (section 40 FOIA and regulations 5(3) and 13 EIR)

69. The Council has provided to the Commissioner an email from HC to Adrian Andrews, that had been forwarded to Janice Green from Adrian Andrews. This is what the Commissioner terms 'item 8' and it appears at p 10 of the closed bundle.
70. The Council submits in its letter to the Commissioner dated 21 December 2022 that the email from HC does not relate to the village green application and therefore does not fall within the scope of the request. The Commissioner accepted this.
71. Mr. Reeves submits that these comments must be within the scope of the request because Janice Green, in her email of 17 November 2020, says that they are HC's comments 'regarding her statement in application no. 2018/01 to register land as a town/village green off Seagry Road, Lower Stanton St Quintin'.
72. The Council's application to register land as a town/village green included a statement from HC. This is a handwritten document which appears at p A55 entitled 'THE POND NOT THE VILLAGE GREEN'.
73. The request was for 'copies of all photos, maps, forms, documents, emails, notes of conversations, etc. relating to the Town and Village Green applications of Stanton St. Quintin Parish Council, 2018/01 (30 April 2018) and 2019/01 (26 April 2019)'
74. We accept that Janice Green's email describes those comments as 'comments regarding her statement in application no. 2018/01 to register land as a town/village green'. If we had not seen the comments, and had simply seen that description by Janice Green, then we would also have assumed that the email/comments from HC related to the town and village green application by the Council. Having read the email it is clear to us that they do not relate to that application.
75. We cannot provide any further explanation without referring to the content of the email, which would defeat the purpose of the appeal. We have therefore provided a short closed annex dealing specifically with this point.
76. For those reasons, we conclude that item 8, the email containing comments from HC, is not within the scope of the request and does not need to be disclosed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 11 December 2023