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Case Reference: EA/2023/0120

**First-tier Tribunal
General Regulatory Chamber
Information Rights
DN IC-166299-B9T4**

Considered on the papers by CVP

**Heard on: 8 January 2024
Decision given on: 20 February 2024**

Before

**TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER SUSAN WOLF**

Between

ANDREW HERMAN

Appellant

and

INFORMATION COMMISSIONER

Respondent

Cases

Dransfield v IC and Devon CC, Craven v IC and DECC [2015] EWCA Civ 454

For factual background to the present proceedings:

EA/2020/0138 Wardlaw v Information Commissioner and Milton Keynes Council

Decision: The appeal is Allowed

Substituted Decision Notice: Milton Keynes Council within 35 days disclose Mr Dorfman's emails and notes relating to the three named officers

REASONS

1. Much of the factual background to this case is set out in *Wardlaw* in which the tribunal order MKCC to disclose further information accordingly it is unnecessary to set out in extenso the full history of this request arising out of the mishandling of the planning application discussed in *Wardlaw*. One of the issues canvassed in *Wardlaw* was the issue of the retention and deletion of emails by the Council as well as whether all the material within the scope of that request was disclosed. The tribunal reproduced a public apology by the Leader of the Council on 15 December 2020:

'The incomplete record keeping and processes of Milton Keynes Council at the time did not reach a standard I would expect from this authority. The inability of this council to be able to provide proper case notes on important internal management decisions and the subsequent failure to maintain or retain important records means that we are unable to fully satisfy, to a standard I would expect, reasonable questions on how we managed or operated our processes'.

2. The tribunal is also assisted by a detailed witness statement supported by a statement of truth submitted by the Appellant. Despite MKC being given the opportunity to serve "such submissions or evidence as it considers appropriate addressing issues relevant to the issue of whether the request is manifestly unreasonable in particular the burden of the request, the value and purpose of the request, harassment, the extent to which issues raised by the requester have been explored and explained in public and such other matters as the public authority deems appropriate" by a case management decision from this tribunal it declined to do so indicating that it was content to rely on the Information Commissioner's DN.
3. The mishandling of the planning application resulted in the launching of a judicial review (with which Mr Herman was involved) and subsequently the commissioning of an independent expert report by a Mr M Dorfman which in turn led to the commissioning of a report by Mr Straker QC. This involved a significant budgetary allocation and a member of the legal department was allocated responsibility for liaison with the QC. A progress report was made to the Council's Audit Committee towards the end of 2021 where some of the matters raised were debated. On 21 December 2021 Mr Herman wrote to the legal officer of the Council with whom he had had dealings seeking information.
4. The Commissioner's DN records the request and its subsequent handling as:

"2. The complainant made the following information request to MKCC on 21 December 2021:

"I am just following up with you over the information provided by [redacted] to MKC. I have noted from the correspondence published that MKC retained copies of [redacted]'s documentation that was also provided to [redacted].

I would like to request that you publish all of [redacted]'s documentation provided to MKC as part of [redacted] review. In particular, I would like to see any emails or notes with [redacted]

I would hope this can be done without the need for a FOI/EIR request, although please consider this in the alternative to prevent the deletion of any such documentation currently held by MKC."

3. MKCC disclosed a large amount of relevant information, with some withheld under different EIR exceptions: namely those for personal data, draft or unfinished material, and the interests of the person who provided the material. At internal review MKCC indicated it

now considered the request to manifestly unreasonable under regulation 12(4)(b) of the EIR. MKCC confirmed that was its final position in its submissions to the Commissioner.

Reasons for decision

4 This reasoning focusses on whether, at this point, MKCC is entitled to refuse to consider the request further under regulation 12(4)(b) of the EIR. It will also consider the timeliness of MKCC's responses. The Commissioner has considered the exceptions that MKCC relied on to withhold some information under 'Other Matters' but he has not made a formal decision on those exceptions.

5 By way of background, the Commissioner understands that the request concerns a contentious planning application for a warehouse scheme at Blakelands. MKCC's Planning Services department was subsequently subject to an investigation by an external consultant that was itself then scrutinised. Requests about the planning application have been the subject of other complaints to the Commissioner and at least one appeal to the First-tier Tribunal (Information Rights)."

5. This presentation of the request indicates that the Commissioner failed to critically appraise the arguments and information supplied by the Council. The request was made by the Appellant in an email to a lawyer with whom he had been dealing in connection with QC's review – the lawyer responsible for supporting the QC. The internal review from April 2022 (bundle page) is rather more informative than the version set out in the DN:

"Your original request was received, through communication with our legal department, on 21 December 2021 and stated "I would like to request that you publish all of Marc Dorfman's documentation provided to MKC as part of Mr Straker QC's review. In particular, I would like to see any emails or notes with [3 planning officers]. I would hope this can be done without the need for a FOI/EIR request, although please consider this in the alternative to prevent the deletion of any such documentation currently held by MKC"

6. The Appellant had met and contributed information to Mr Dorfman and it was mentioned in the course of correspondence with the lawyer about Mr Herman's evidence to Mr Straker's review. The terms of the exchanges mean that his deep involvement in the issues would be known to the lawyer who received the request. The request was made against a background of public assurances as to transparency with respect to the Dorfman and Straker investigations which had been given by MKC. The request was made of a disclosure to an individual who had access to and a degree of control over the information.

On 22 November 2021 the Appellant wrote to the solicitor

Thanks for the email and update.

I am endeavouring to have completed my submissions and evidence by the end of this week.

I will send everything to you in parts as it is easier for me this way.

I am happy with what [Council officer] has said in her response over the publication of communication. If this can be online, it would be ever so helpful and save a lot of printing.

I have a few of questions for you which I would be grateful if you could look into and answer:

1. Marc Dorfman's notes/records: Does the Council have these, have they been passed to Mr Straker QC and will they be publicly available?

2. *The missing conditions: The Council stated in the JR that it was in the process of writing to [two planning officers] regarding the missing conditions to fully understand the sequence of events from their perspective. Have [two planning officers] ever responded to this letter and if so, will it be published?*

3. *Marc Dorfman said that [planning officer] would apparently only speak to him via a solicitor or with a solicitor present in a meeting. Are you aware of whether that was the case or not, and if so, did the Council pay for this?*

On 29 November 2021 the Lawyer wrote to the Appellant

1 Yeoman's Drive independent investigation - updates

Dear Mr Herman,

Could you please advise when your submissions and evidence will be sent through?

In response to your questions below:

1. *Mr Straker QC was passed on all of the documentation provided by Mr Dorfman. Mr Dorfman collated the documents and we sent them to directly without reviewing and checking. We assume many of the documents are in the public domain. Mr Dorfman also met with Mr Straker QC as part of his investigation.*

2. *I have queried this with those involved in the judicial review matter for you and will update you when I hear further.*

3. *As this was Mr Dorfman's investigation, I do not know if this is the case. I will ask Mr Dorfman and update you when I hear back.*

Kind regards,

Solicitor

7. The Appellant had emailed the lawyer in the following terms:

"In relation to Mr Dorfman's notes and records, these are not in the public domain. There is certain information that I know Mr Dorfman was told which he has never reported. I have also never seen the responses provided to Mr Dorfman by [3 planning officers]. I would like to see, for example, the email from [planning officer] where [pronoun] alleges [pronoun] was coerced into recommending approval for the warehouse."

8. The request which was then made on 21 December 2021 was explicitly not in the first instance made under EIR/FOIA except as a means of ensuring that material would not be inappropriately deleted (given the previous history of deletion of material recorded in *Wardlaw* which had been considered by the tribunal on 21 December 2020 and issued in February 2021). It is also important to note that while the request is phrased as "all of Marc Dorfman's documentation provided to MKC as part of Mr Straker QC's review" it is made in the context of discussions around arrangements the Council had in place for the publication of material online (paragraph 6 above) and specific questions about the evidence of a small number of planning officers interviewed by Mr Dorfman. The documentation provided by MKC to Mr Dorfman or accessed by him from MKC sites may have been very substantial, however material originating from him, his e-mail exchanges, notes of discussions, analyses and working drafts etc may have been substantial but far smaller in extent than publicly available material, further the exchanges and notes relating to the small number of planning officers will have been even smaller in extent.

9. The original request was made outwith EIR/FOIA in expectation of a Common Law disclosure with a subsidiary statutory access request to seek to ensure the protection of the requested material in the context of a shared knowledge and understanding of the material between the requester and the direct recipient of the request and a shared knowledge of previous failures by the Council with respect to records.
10. The Common Law disclosure was not given and the request accordingly was processed as a statutory request; in that transition the request was severed from the contextual knowledge of the individual to whom the request was sent.
11. MKC replied to the EIR with a link to material it was in the process of publishing and citing EIR exemptions with respect to other material:

“Some information has however been withheld or redacted and this response should also be considered a Refusal Notice. The information is subject to exceptions to disclosure under the following regulations:

- Regulation 12(3) – personal data*
- Regulation 12(4)(d) – draft or unfinished material*
- Regulation 12(5)(f) – the interests of the person who provided the information*

No public interest test is required in respect of Regulation 12(3). As per guidance issued by the Information Commissioner’s Office, we may combine the public interest tests applicable to other qualified exceptions which are engaged.

There is undoubted public interest in disclosing the material withheld under Regulations 12(4) and 12(5), due to the general principles of transparency and scrutiny of the authority. Particular to environmental information, there is also an interest as it supports the right of everyone to live in an adequate environment. The scrutiny aspect is particularly apt given the issued highlighted by the controversial nature of the matter involved. It’s noted however that Marc Dorfman ceased work on his report before it was finalised and also resigned his commission. Although a preliminary report was circulated, there is considerable draft material (including that used as an aide-memoire). The exception under Regulation 12(4)(d) is engaged as draft material remains unfinished, as determined by the Information Tribunal case of Secretary of State for Transport v the Information Commissioner (EA/2008/0052, 5 May 2009).

Mr Dorfman and his interviewees were also under no obligation to provide the council with the withheld information. The review was not a judicial or quasi-judicial process and there was no compulsion to engage.

The witnesses and Mr Dorfman himself also could not be compelled to agree to its being made public. Indeed, while Mr Dorfman has graciously agreed to some material being disclosed, we have written confirmation that he supplied much of it in the expectation that it would not be. We also have no recorded consent or agreement from any interviewee in this respect either, and no evidence of any such agreement is in the public domain nor has been provided to us. There is material that would cause undue adverse effects (ranging from annoyance and vexation to embarrassment, harm or distress) to the individuals if disclosed. Some of this material is also withheld under Regulation 12(3).

On balance, we find the public interest is in withholding the material not included in the disclosure.”

12. The refusal notice was based on an interpretation of the request which by separating it from its context (ie the knowledge of the recipient of the request – with whom the Appellant had also discussed the council’s arrangements for the publication of material paragraph 6 above) on this issue was unreasonable. Even without the knowledge of the recipient the request

was clearly for the core material collected and prepared by Mr Dorfman in the course of his investigation. Given the focus of the controversy and the amount of material which had already been published by MKCC the request was from its phrasing clearly narrow. If there had been uncertainty as to what was requested clarification should have been sought. It was not. The Appellant responded by querying the use of exemptions on 18 February:

My reasons are as follows:

Regulation 12(4)(d) – I am confused how this exemption has been applied because Mr Dorfman produced two reports in which he reached conclusions. It is largely the information surrounding that which I am requesting. It should also be noted that although Mr Dorfman resigned, Mr Straker QC did complete the work on the basis of Mr Dorfman’s own conclusions. As such, I consider Mr Dorfman’s work complete.

Regulation 12(5)(f) – I believe you have erred in law in applying this exemption on the basis that it has to be applied to the person who supplied the information to the Council, i.e. Mr Dorfman, as opposed to the person who might have supplied the information to Mr Dorfman. The emails already disclosed show that Mr Dorfman was very willing to disclose everything he had to both the Council, as well as Mr Straker QC who should be noted is not a Council employee. As the information was provided openly, without any caveats and it has been publicly reported on, I do not believe you can maintain this exemption.

13. He asked for an internal review and there was further correspondence. On 13 April MKCC indicated the view that the scale of the request rendered it manifestly unreasonable but that it was continuing with the process it had started of reviewing material and that it intended to make a final response by 30 June but it would not be possible to make a final response before then. He replied on the same date:

Thank you for your response.

Could you please clarify why you are not able to fulfil this part of the original request (“In particular, I would like to see any emails or notes with [planning officers.]”)? I do not believe this part of the request is manifestly excessive as Mr Dorfman has already admitted he had only limited communication with the individuals mentioned.

14. On 20 April MKC wrote:

Dear Mr Herman

Thank you for your patience in awaiting a response over the Easter period.

If you are only seeking information regarding “any emails or notes with [planning officers] [and Marc Dorfman]” then we would propose that you refine your request to enable us to respond without an unnecessary burden on the Council. To respond to only this part of the request would require review of over 300 documents, this is on top of the over 300 documents which have already been reviewed for disclosure. If you wish to refine your request MKC can comply with this within 10 working days of receiving your confirmation of a refined scope of the request.

From the documents already reviewed I can advise that much of the information within the scope of your refined request will fall under exceptions Regulation 12(3) (personal data) and Regulation 12(5)(f) (interests of the persons providing the information). However, I cannot provide a full response until a full review is complete. Although MKC cannot and is not seeking to push you to refine your request, we would point out that to refine your request would reduce the unnecessary burden on the Council as we will not be reviewing hundreds of documents which are not in fact the information you are looking for.

MKC is unable to provide a prioritised response to only the above part of your request, as this would create unnecessary additional work

15. Mr Herman replied on 21 April:

I wish to retain my original request as was submitted to [lawyer] on 21 December 2021 but I would be grateful if you could deal with the specific part of the request relating to the emails and notes with [planning officers] in the interim.

I would make the point that I estimate more than 90% of what has already been disclosed is information which is readily and publicly accessible from either MKC's CMIS and planning portal websites. This includes Audit committee reports, background papers and minutes, in addition to planning application documentation such as plans, drawings, assessments and DCC reports. It is an unnecessary task to spend a significant amount of time duplicating this information in response to my request when I am already aware of its existence and how to find it. It was also never my intention that such information would be provided.

16. By an email of 13 April 2022 MKC announced and justified a significant change of stance. It repeatedly criticised Mr Herman for the speed of response to the Council's emails; stating that in responding to the January 21 email from the Council seeking more time:

"You responded on the same day (ten minutes later), confirming receipt of our email, and stating "Thank you for the response. I am somewhat confused by which exemptions you are referring to in your response. Could you please clarify the specific exemptions? If it helps, for example, I do not require or want to see personal information such as email addresses and telephone numbers which can be easily redacted. I would also make the point that the information held has been reported on and those reports are in the public domain. There is also a resolution from the Audit Committee requiring the release of all this information which was subsequently passed on to Mr Straker QC. It was my understanding that both Mr Dorfman and MKC have already requested from third parties whether they consented to the release of information, and no one appears to have objected to this."

Later in the response from MKC

"The original EIR response was sent at 19:05 on 18 February 2022 and your internal review request was received at 19:42 that same evening, only 37 minutes later.:"

The response used this material as a building block towards deciding that:

Page B112 *"The finding of my internal review, as I alluded to by email on 13 April 2022, is that on review of the volume of information requested, the information already made publicly available outside of this request, and judgement of whether the information within the scope of this request adds anything to the information already publicly available, this request is considered to fall within the definition of manifestly unreasonable as per Regulation 12(4)(b) of the Environmental Information Regulations 2004. Evidence that this request falls within the scope of Regulation 12(4)(b) is strengthened by your emails dated 21 and 22 April 2022. In these emails you state that you recognise that there is a substantial amount of information covered by the request already in the public domain, and you have knowledge of where to find it. You additionally make clear that the true focus of your request is "emails and notes with [3 planning officers]" and that you "only ever expected to*

be provided with Mr Dorfman's notes, his records of interviews and meetings, as well as any electronic correspondence between himself and the parties involved in his review." Despite this you have made a blanket request for all documents provided by Mr Dorfman to MKC as part of Mr Straker QC's review and have refuted my attempts to assist you with refining your request, with my most recent email of 25 April 2022 going unacknowledged. Instead, you have attempted to push MKC to prioritise a small part of your request, the information which MKC has cause to believe is the only information you seek. This is suggestive of a request formulated too generally, with the intention of inflicting an undue burden on the Council. Furthermore, the speed of your responses and comments on what has been released are evidence that the disclosures have not been reviewed prior to requests for an internal review."

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That said, I recognise that MKC have not handled this request as well as it could have. As per ICO guidance on internal reviews I was not involved in the handling of the original request, including any decision made or responses provided. I can therefore not comment further than that it is my understanding that the original handling of the request had deemed certain documents out of scope, whereas I have taken a much broader interpretation of your request, in line with ICO guidance

Consideration

17. The comment on page 113 encapsulates one of the two basic errors made by the Council in handling the Appellant's request for information. It stripped it of its context and meaning. At the review stage, in a desire to create a justification for refusal (in the face of clear explanations from the Appellant as to what his concerns were) the Council extended the scope of its unreasonable interpretation of the request still further.
18. In the Dransfield/Craven decision of the Court of Appeal the Court found that the tests for "vexatious" s14(1) FOIA and "manifestly unreasonable" EIR were in essence similar (paragraph 78):

"..if I am right that the approach to section 14 should primarily be objective and should take as its starting point the approach that "vexatious" means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public or any section of the public, then the difference between the two phrases is vanishingly small. It is difficult to see how they would differ in practice..."
19. The Court was clear that this was a high threshold and it endorsed the approach adopted by the Upper Tribunal in taking into account the matters listed by the Information Commissioner's guidance relating to the burden, purpose, motive of the request and any harassment of staff. It is clear that the Council and the ICO paid scant regard to these factors; rather they appear to have rushed to a conclusion that the request is manifestly unreasonable based on their own manifestly unreasonable interpretation of the request and the fact that the Appellant responded quickly.
20. In addressing the criteria it is clear that the Council contributed to the burden, there is undoubted serious value to this request, the Appellant is not motivated by any desire to misuse the statutory regime; and there is no evidence of harassment.

21. The request is clearly focused on putting into the public domain the accounts of individuals closely involved with a significant and expensive error in the handling of a planning application relating to a significant development. There is a value to the public in the request.
22. Furthermore there is an extra barrier to the refusal to disclose environmental information on the grounds of unreasonableness, in that the public authority needs to demonstrate that, in all the circumstances of the case, the interest in maintaining the exception outweighs the interest in disclosure (EIR regulation 12):

Exceptions to the duty to disclose environmental information

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) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

...

(b) the request for information is manifestly unreasonable;...”

23. In its initial refusal notice the Council identified some exceptions to disclosure in EIR, it did not develop them and did not subsequently rely on them.
24. At all times while characterising the arguments against disclosure the Council failed to properly consider the weighty issues involved and the substantial costs and harm arising from the errors the Council made in this planning case which resulted in judicial review proceedings and two external reports at considerable expense. In essence the Council treated all the exceptions as absolute; they are not and should have been properly weighed. Instead, as it stands, the main justification put forward for claiming that the request is manifestly unreasonable is that the Appellant responded quickly to MKC’s response – this was an entirely unreasonable approach – the Appellant replied quickly because he was well acquainted with the material sent to him which on a proper interpretation of the request he had not sought; this comes nowhere near meeting the high bar for invoking this exception.
25. Different issues arise with respect to each of exceptions identified but not properly explored in context by the Council. The Information Commissioner’s comments not having considered the exceptions, the material or the public interest arguments was unwise. The Council was given the opportunity to provide more substantial justifications for not disclosing information but chose not to do so. It should now disclose the information

Signed

Hughes

Date: 19 February 2024