



Neutral citation number: [2024] UKFTT 00393 (GRC)

Case Reference: EA/2022/0477.

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

**Heard on the papers on 03 May 2024.
Decision given on 15 May 2024.**

Panel: B. Kennedy KC & Specialist panel members Dr. Aimée Gasston & Stephen Shaw.

Between:

STORM NUTTALL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant as a Litigant in person in his written Grounds of Appeal dated 06 November 2023.

The Respondent: Sapna Gangani by way of written Response on 25 January 2024.

Result: The appeal is dismissed.

REASONS

Introduction:

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 (“FOIA”), against the Decision Notice with reference IC-228711 – V5X6 dated 28 September 2023 (the DN) issued by the Information Commissioner (the Commissioner). In the DN the Commissioner concluded that the South Hams District Council (“the Council”) had successfully engaged Regulation 12(4)(e) of the EIR and the public interest balance is in favour of withholding the requested information (DN §1-3).
2. As required by rule 23(3) of the 2009 Rules, the Commissioner states that he opposes the Appellant’s appeal and thereby invites the Tribunal to dismiss it.

Factual Background to this Appeal and Decision Notice:

3. On 16 February 2023, the complainant made the following request for Information from the Council :

”1. Could we please see the officer report recommending approval of planning application (redacted) sent to Ward Councillors (names redacted) on or around 20.01.2023.

2. Could we also have copies of all emails and correspondence at LPA level relating to this application (i.e. between members of the planning team, consultees, Ward members and the Parish Council).”

4. The Council responded on 16 March 2023 as follows:

” Thank you for your request for information...which has been considered in accordance with the Environmental Information Regulations (2004) (EIR).

External correspondence between Officers and the planning agent, Members and the Parish Council and other correspondence with external consultees is released (please see the attached).

However, in accordance with Part 3, (12)(4)(e) correspondence sent to or from Officers and Ward Members, Including the Officer Report you have requested, constitute internal communication and are therefore considered exempt from release. Whilst the application has been determined, the application is within the time period for an appeal to be made to the Planning Inspectorate and therefore the Council considers the planning application to be live and release of these emails and other internal records could inhibit planning officers from carrying out their work. In this case, there is a need for officers to work in a ‘safe space’ to allow a free and frank debate and reach decisions without being hindered by external comment, without the ‘chilling effect’ which is likely to flow from the disclosure of emails. Protecting the integrity of the decision-making process is important. Releasing the emails and experiencing the ‘chilling effect’ would likely lead to poorer quality advice and would produce less well formulated decisions.

In accordance with 13(1) of the Environmental Information Regulations (2004) the names of junior officers operating in an administrative capacity have been redacted”.

5. As the complainant was dissatisfied with the Council’s response, he requested an internal review on 17 March 2023 stating that:

‘In the case of -(redacted). Prima facie it appears that the influence of the ward members views following referral of the recommendation to approve culminated in a revised officer delegated report. Should this be the case it would represent an unreasonable deviation from due process, suggesting non planning matters were considered in order to refuse the scheme. FOI request (redacted) seeks to clarify in this respect. It is for the public good that public authorities are held to account. Where there is a plausible suspicion of wrongdoing, this creates a public interest in disclosure. As this FOI request relates to matters of probity within the planning process then the public interest case outweighs (name redacted) argument that potential harm in terms of a chilling effect might occur amongst members of the planning office.

Therefore, the internal communications and the original case officers report both fail the test for qualified exemption on the grounds of public interest’.

6. The Council carried out an internal review and upheld its original decision. The Appellant contacted the Commissioner in March and April 2023 to complain about the way the Council had responded to their request. The Commissioner investigated the complaint and the context, and the response from the Council are set out in the DN and not repeated in substance here.

Grounds of Appeal:

7. The Appellant wishes to challenge the Commissioner’s finding that, upon the Council receiving the request for correspondence on a planning application, the public interest in maintaining the exception 12(4)(e) EIR (internal communications) outweighed the public interest in disclosure. The Appellant does not seek to challenge the Commissioner’s finding that 12(4)(e) EIR applies, and the grounds of appeal are focused solely on the public interest balance and can be summarised as follows:
 - i. *The Commissioner’s balancing of the public interest in this matter is contrary to his approach in previous decision notices;*
 - ii. *The Commissioner did not consider the Council’s underperformance and accepted their claims.*

The Commissioner’s Response:

8. The Commissioner resists the appeal. Generally, the Commissioner relies on the DN as setting out his findings and the reasons for those findings, and repeats the matters stated

therein. The Commissioner nonetheless set out below his observations in respect of the Appellant's Grounds of Appeal.

i. The Commissioner's balancing of the public interest in this matter is contrary to his approach in previous decision notices;

9. The Commissioner argues that this ground can be dismissed, as Decision Notices are not binding, and each Decision Notice is made on its own merits. The Commissioner's findings on previous Notices, whilst helpful are not determinative.

ii. The Commissioner did not consider the Council's underperformance and accepted their claims.

10. The Commissioner argues he was entitled to take what the Council was saying at face value and none of the additional information provided by the Appellant dislodges the Commissioner's view taken in the DN that 12(4)(e) EIR applies and the public interest is in maintaining the exemption. In addition, any dissatisfaction the Appellant has with the Council or their practices, or the planning decision is outside the scope of this Tribunal's jurisdiction.

The Legal Framework:

11. : Regulation 2(1) of the EIR – definition of environmental information:

Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."

12. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

13. The Council has dealt with the Appellant's request under the EIR and having seen the requested information the Commissioner is satisfied it is environmental within the definition of Regulation 2(1)(c) of the EIR.

Regulation 5 – duty to make environmental information available on request and regulation 12(4)(a) of the EIR.

14. Under Regulation 5(1) of the EIR and subject to a number of EIR provisions and exceptions, a public authority that holds environmental information shall make it available on request.

Regulation 12(4)(e) – internal communications:

15. Regulation 12(4)(e) states that information is exempt from disclosure if it involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
16. However, Regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the disputed information.
17. The Commissioner's guidance on Regulation 12(4)(e) defines the concept of communications as: *“broad and will encompass...letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others”*.
18. The information which has been withheld under Regulation 12(4)(e) comprises internal email exchanges between officers, councillors and administration staff discussing the planning application. The Commissioner viewed the withheld information and was satisfied that it constitutes internal communications and is therefore covered by Regulation 12(4)(e) of the EIR.
19. Having satisfied himself that the requested information was covered by Regulation 12(4)(e), the next step for the Commissioner was to consider the public interest test.
20. The Commissioner's guidance for public authorities confirms that public interest arguments should focus on the protection of internal deliberation and the decision-making processes. This reflects the underlying rationale for the exception which is to protect a public authority's need for a *‘private thinking space’*. This needs to be weighed against the competing public interest factors in favour of disclosure. The Commissioner considered the relevant factors in favour of disclosure at DN §§32 – 36 and in favour of withholding the information at (DN §§37 – 41) and considered both the Appellant's and the Councils' arguments as set out in his conclusions at (DN §§42-49).

Conclusions:

21. The Tribunal, on the facts and in the circumstances of this case, understand and are sympathetic in relation to the frustration and concern experienced by the Appellant, but on considering the background and material factual matrix we make the following findings;
22. Although the Planning application involved the Appellant personally and was a procedural process which may have had no obvious tangible impact on the environment, we find it has properly been accepted that Reg. 2(1)(c) of the EIR is engaged. We agree with the Commissioner that this is particularly important when a Council is refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions), and there are some procedural differences affecting how requests should be handled.
23. Reg. 5 EIR creates a duty on the Council to make environmental information available on request and Reg. 12(4)(a) provides an exception if it involves “*the disclosure of internal communications*”. The Tribunal have considered the withheld information, and we are satisfied that it constitutes internal communications and is therefore covered by Regulation 12(4)(e) of the EIR. but this exception is subject to the Public Interest test. As to the Public Interest timing, we accept it is to be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the Council (the public authority) reviewing a refusal decision it has made on the request (see Montague - UA-2020-000324-GIA).

The Public Interest Test:

24. The Tribunal recognise under EIR (unlike FOIA) the starting point is a presumption in favour of disclosure. Like the Council, we also acknowledge the general public interest in transparency in the Council’s decision-making processes to promote openness and we acknowledge that disclosure of the requested information would allow the public a better understanding of how the planning process operates and how public finances are spent. However, each case must be decided on its merits.
25. While we can understand the concern of the Appellant with an apparent difference of views of decision makers within the Council on their planning decision, we have no reason to challenge the explanation given by the Council to the Commissioner during his investigation. There is no evidence in Open or Closed material before us to support any concerns of any external interference, or of misconduct, maladministration or improper procedure by anyone to suggest malfeasance of any sort. On the contrary the Tribunal are of the view that a professional assessment was made, despite apparent conflict of opinion between Council employees in the course of their internal decision-making process. This is

evidence of debate that can, and often does occur in circumstances such as this and which is precisely the reason for the need of space.

- 26.** This safe space occupied in the internal communications, remained “*live* “ at all material times. The ultimate decision was made by a senior and experienced member of staff, and it was made in circumstances where we accept entirely that the safe space argued for is justified. These are professional personnel within the Council who have expertise in the planning area under discussion. If these discussions were hampered by scrutiny from the world at large it could not be said to be in the public interest. We find there would be a chilling effect on Council employees in such circumstances and it would not be in the public interest at all to have such burdens made on decision makers in such circumstances as pertain on the merits of this case.
- 27.** Further, we find the space arguments attract significant additional weight in light of the timing of the request which was during the appeals window (of the Planning Refusal). The Public Interest in non-disclosure of the withheld information in this case we find is greatly enhanced by the planning appeal process that remains post planning decision.
- 28.** The Tribunal find that the public interest weight is significantly in favour of allowing the Council to properly marshal resources and conduct planning procedures appropriately, with space for internal deliberation as part of an effective decision-making process.
- 29.** For all the above reasons we find the Public Interest significantly favours non-disclosure of the withheld information. For the avoidance of doubt, we then reflect on the reasoning in Commissioner’s DN, we find that we accept and adopt his reasoning on the application of the exception and thereafter in his comprehensive reasoning on the public interest test as set out in the DN at §§32 - 49 inclusive. It follows therefore that we can find no error in law, nor in the exercise of his discretion, in the DN and we must dismiss this appeal.

Brian Kennedy KC

Date: 15 May 2024.