



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**EA/2012/0105**

**BETWEEN  
DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS  
Appellant**

**And**

**THE INFORMATION COMMISSIONER  
Respondent**

**And**

**TERESA PORTMANN  
Second Respondent**

---

**Decision on Application for  
Permission to Appeal**

---

1. The Appellant applies for permission pursuant to rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”) to appeal to the Upper Tribunal against the decision of this Tribunal of 13 November 2012 dismissing the appeal against the Decision Notice of 27 March 2012 issued by the Information Commissioner, relating to a request made by the Second Respondent on 25 February 2011 for a information concerning a non-formal consultation launched on 21 February 2011 by which the Department for Environment, Food and Rural Affairs invited views on a new or revised English Scallop Order.

2. Having disclosed certain information to the Second Respondent, the Appellant withheld three pieces of information under regulation 12(4)(e) of the Environmental Information Regulations 2004 (“the EIR”) (“internal communications”). These three pieces of information form the subject matter of this appeal (“the disputed information”):
  - a. A “Proposal” document dated 26 November 2008 and marked “DRAFT – work in progress” at the top, with the name of the author and date August 2008 at the end with earlier documents attached as Annexes (“the 2008 Draft Proposal”);
  - b. A discussion paper from 2010;
  - c. An email chain from November 2010 between officials at Defra, the Centre for Environment, Fisheries and Aquatic Culture and Marine Management Organisation (“the MMO”).
3. On appeal, the Appellant further relied upon the exceptions in regulation 12(5)(b) (“course of justice”) and regulation 12(5)(g) (“protection of the environment”). The Appellant further submitted that certain of the disputed information fell outside the scope of the request.
4. The Tribunal refused the appeal and concluded that the Appellant was not entitled to withhold the information requested on the basis of the exception in regulation 12(4)(d) and / or regulation 12(4)(e) and / or regulation 12(5)(b) and / or regulation 12(5)(g) EIR and directed the disclosure of the disputed information, save for limited redactions identified. The Tribunal also concluded that some of the disputed information fell outside the scope of the request and should not be disclosed.
5. The Application for permission to appeal is dated 11 December 2012. Owing to administrative oversight, there was a delay in the application being brought to my attention.

### Grounds of Appeal

6. The Appellant raises five separate Grounds of Appeal identifying errors of law by the Tribunal in reaching its conclusions to dismiss the appeal:

*Ground 1*

The Tribunal erred in its consideration of the application of regulation 12(4)(d) to the 2008 Draft Proposal and wrongly concluded that it did not fall within that exception.

The argument advanced is that the Tribunal was wrong to conclude that the “draft” was not, in fact, a draft document at all but a finished document written to discuss the matters identified in paragraph 1. The Tribunal considered that placing the word “draft” at the top of each page (including separate annexes dated January 2007, October 2007 and February 2008) did not change its status to that of an unfinished document.

While I do not consider the Tribunal erred, I do consider that the Appellant raises cogent arguments challenging the findings of the Tribunal.

*Ground 2*

In respect of those parts of the disputed information where the exception in regulation 12(4)(d) was engaged, the Tribunal erred in concluding that the public interest in disclosure outweighed the public interest in maintaining the exception. I do not consider that the three factors raised by the Appellant in support of this ground of appeal amount to an error of law; the Tribunal properly reminded itself of the principles to consider when balancing the public interest and was entitled to come to the conclusion it did.

*Ground 3*

The Tribunal erred in its consideration of the application of regulation 12(4)(e) and wrongly concluded that none of the disputed information fell within that exception.

This ground relates to the question of whether communications with the MMO were “internal” for the purposes of regulation

12(4)(e). Again, while I do not consider the Tribunal's reasoned finding that the MMO was not internal amounts to an error of law, the Appellant advances an arguable ground of appeal and a decision from the Upper Tribunal on this point would be of general importance.

*Ground 4*

The Tribunal erred in its consideration of the application of regulation 12(5)(b) and wrongly concluded that some of the disputed information did not fall within that exception, and further wrongly applied the public interest test in relation to these parts of the disputed information that did engage regulation 12(5)(b).

I disagree that the Tribunal's decision in respect of the public interest was "wholly perverse". I do not consider that by rejecting the evidence of Mr Ross the Tribunal erred in law; the Appellant appears to be arguing that the Tribunal was bound to accept Mr Ross's judgment. However, the Appellant has a cogent argument and again a decision from the Upper Tribunal on the public interest balancing exercise would be of general importance.

*Ground 5*

The Tribunal erred in its consideration of the application of regulation 12(5)(g) in relation to the identified parts of the disputed information and wrongly concluded that the relevant information did not fall within that exception.

The Appellant submits that this ground of appeal is intimately connected to Ground 4 and for the same reasons as given above, I agree that this should be considered by the Upper Tribunal.

7. I am not satisfied that this Tribunal was wrong in law but consider that the Appellant raises cogent arguments and, in respect of Grounds 1, 3

and 4 in particular, raises important points of law of more general application. There is merit therefore in the issues being considered by the Upper Tribunal which, unlike this Tribunal, is a court of record.

8. Under rule 43(1) of the Rules I am required to consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. In this case, I am not of the opinion that I should review the decision of 13 November 2012 in light of my finding that there are arguable grounds of appeal to be considered by the Upper Tribunal.
  
9. I give leave to appeal on all grounds advanced. Subject to any decision in this regard made by the Upper Tribunal I consider that it would not be appropriate to limit the grounds in this grant of permission.

[Signed on the Original]

Annabel Pilling

Judge

25 January 2013