



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0048
Information Commissioner's Ref: FER0082261

Determined on the papers

Decision Promulgated
12 December 2007

BEFORE

DEPUTY CHAIRMAN

DAVID MARKS

and

LAY MEMBERS

JENNI THOMSON

ROGER CREEDON

Between

WILLIAM YOUNG

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

**DEPARTMENT OF THE ENVIRONMENT FOR
NORTHERN IRELAND**

Additional Party

DECISION

The Tribunal upholds the Decision Notice dated 21 May 2007 and dismisses the Appeal.

REASONS FOR DECISION

General

1. This appeal involves two issues which arise under the Environmental Information Regulations 2004 (EIR). The first concerns the operation and applicability of Regulation 13 which in broad terms permits a public authority not to disclose environmental information to the extent that the information requested includes personal data of which the Applicant is not the data subject. The second concerns Regulation 12(5)(b) which entitles a public authority to 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; ...”

in a case where the undisclosed information consists of correspondence between the public authority and its in house solicitors or at least solicitors who are in the regular business of providing legal advice to the public authority. Regulation 12(5)(b) is subject to a public interest test.

The facts

2. By a letter dated 1 January 2005 the Appellant requested sight of a “full copy of the enforcement file” in connection with the planning application he had made with the public authority. The public authority is known as the Planning Service which is an agency within the Department of the Environment for Northern Ireland. For the sake of convenience the Tribunal will refer to the public authority in this case as the “Department”. The application concerned the building of a residential property undertaken by the Appellant in County Down. The Department replied saying that it had written to all third parties to require their permission to release information which related to this. Subsequently, the Department sought to rely on certain exemptions in the Freedom of Information Act 2000 (FOIA) which are no longer in issue on this

appeal for reasons set out below. The Appellant then asked for an internal review. The review upheld the original decision not to disclose the information.

3. In late 2005 the Appellant lodged a complaint with the Information Commissioner (the Commissioner). The Commissioner pointed out that the request should be dealt with under the EIR. There is no issue between the parties as to this decision. In May 2006 the Department confirmed that it was relying on two exceptions in the EIR referred to at the beginning of this judgment. In effect the information requested consisted of first communications between the Department and its legal advisers and secondly personal data, ie the names and addresses and particulars of those who had lodged complaints with the Department regarding the making and subsequent history of the Appellant's building development.
4. The Appellant had originally submitted an application to construct a private residence in 2000. No initial decision was taken until early 2002. The Planning Appeals Commission as part of the Department ruled that the application should be granted subject to certain conditions. The Appellant began building work in early summer 2003. However, complaints were received that the construction was not in accordance with those conditions. When such was found by the Department to be the case, enforcement proceedings were commenced. In late 2004 the Appellant submitted a further application for approval of the construction as actually built. That application was refused but the decision was subsequently quashed by the High Court. There followed a fresh determination in July 2006 which refused the planning application on the basis of a breach of the earlier conditions. Until mid September 2006, well past the date of the request, the enforcement action was stayed. The reason it seems as will be restated below is that the Department has lodged an appeal against the High Court's decision to quash the determination with the Court of Appeal. The Tribunal assumes that this appeal is still pending.
5. What is called the in house legal advice requested by the Appellant consisted of exchanges with the Departmental Solicitors Office (DSO) in relation to the Department's position and powers. The Department claimed and still maintains that at the time of the request such information was justifiably withheld since at that stage legal action in connection with the failure to comply with the enforcement action was still pending. The original request also sought information comprising similar

correspondence between the Department's external solicitors but no issue arises as to that request on this appeal.

6. As for the personal data which was requested the Department confirmed that while objectors to proposed planning applications would be and are aware that their correspondence is open for public inspection, such is not the case with regard to those who make complaints in enforcement matters. The only circumstance in which disclosure of such data could be made was, and is, if consent is forthcoming from the data subject himself or herself.

The Decision Notice

7. The Decision Notice is dated 21 May 2007. In it the Commissioner refers to the fact that having received the Department's response to the Commissioner's view that the EIR applied the Commissioner then discussed with the Department the possibility of an informal resolution. Up to the date of the Decision Notice the Department had not adopted that course.
8. In paragraph 22 of the Decision Notice the Commissioner sets out the definition of environmental information found at Regulation 2(1) of the EIR. The Commissioner's determination that he was satisfied that the withheld information fell within the definition in the EIR is accepted by all the parties. This is principally because an enforcement notice such as that ordered by the Department constitutes environmental information.
9. With regard to the exception that relates to the personal information of third parties as reflected in Regulation 13, the Commissioner expressed his satisfaction with the fact that the information in question being the names and addresses of the individuals as well as their opinions with regard to the enforcement action constituted personal data. The Commissioner noted that the Department had stated that it did seek the consent of the individuals concerned as to the release of the information in question but that such consent had not been refused but had not been given. Section 7(6) of the Data Protection Act 1998 provides as follows, namely:

“(6) in determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard should be had, in particular, to –

- (a) any duty of confidentiality owed to the other individual,
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual,
- (c) whether the other individual is capable of giving consent, and
- (d) any express refusal of consent by the other individual.”

10. The Commissioner expressed his view that the opinions and views of third parties in this case were provided in circumstances which gave rise to an obligation of confidence and that that information at the time of the request was not accessible to the public.
11. Regulation 13 of the EIR allows for certain exceptions to the disclosure of environmental information. The relevant exception includes a case where the personal data of which the party requesting the information is not the data subject, ie so called third party data. Regulation 13 provides that such information must not be disclosed where its disclosure would breach any of the so called Data Protection Principles as set out in Part I of Schedule I to the Data Protection Act; in particular the first Data Protection Principle that personal data shall be processed “fairly and lawfully” and in particular that such data is not to be processed unless one of the conditions in Schedule 2 is met. Further reference will be made to this Schedule below.
12. As pointed out above, objectors to any proposed planning application can have their details made available for public viewing. The same is not true of complaints with regard to enforcement proceedings and which alert the Department to possible breaches.
13. The Commissioner’s determination was that to disclose such third party information would contravene the “fairness” requirement of the first Data Protection Principle set out above. The reason given was that to effect such release would be unfair and

against the reasonable expectations of those individuals. The exception being absolute the Commissioner made no determination regarding the applicability or otherwise of any relevant public interest.

14. With regard to the legal advice which was sought from the DSO, the Commissioner referred to the wording of Regulation 12(5)(b) which provided as follows, namely:

“12(5) For the purposes of paragraphs (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.”

15. One important aspect of a “fair trial” is the ability to receive legal advice free from premature disclosure. Here the legal advice related to the enforcement action. The Department contended, and the Commissioner duly accepted, that the advice in question was sought in order to obtain advice with regard to the enforcement action and that such was the dominant purpose of seeking the legal advice. To have disclosed it would have adversely affected the course of justice and by implication the ability of the public authority to receive a fair trial. Regulation 12(5)(b) was therefore engaged.
16. The Commissioner then turned to the competing public interests for and against disclosure. Overall the Commissioner concluded that the arguments in favour of disclosure in the present case such as the transparency of advice received by a Government Department in how enforcement proceedings are conducted coupled with the public interest in calling a public authority to account were sufficiently outweighed by the public interest in maintaining the confidentiality of the information.
17. The Decision Notice made findings as regards the legal advice sought from the Department’s external solicitors but as indicated above no further issue arises on the Appeal with regard to those findings.

Notice of Appeal

18. The Appellant's Notice of Appeal is dated 2 June 2007. With regard to the requested personal data the Appellant stated that the withheld information was "primarily" in respect of written correspondence received from 2 individuals whose names and addresses he provided and as he put it a "a firm of Architects Unknown". He contended that the Department did not intend that the information requested should be included in an enforcement file. He added that the information provided by both parties was "incorrect and malicious". He went on to say that it was "now clear that the information was factually incorrect" and that he had been denied access to it and had "suffered severe consequences notwithstanding the fact that he had been denied the opportunity to properly defend the allegations during enforcement proceedings." No details were given as to how the information referred to was in any way incorrect and/or malicious.
19. As for the exchanges between the Department and the DSO whom the Appellant characterised as "in house" solicitors, although the Appellant drew a distinction between such information and legal advice obtained from an outside adviser, the Appellant failed to spell out the form and content of such distinction but merely contended that the entire file including both in house and external advice should be made available. He added that he was "severely disadvantaged" during the enforcement proceedings "due to the fact that the Department withheld information that would have been advantageous" to him in defending those enforcement proceedings.

Additional Party

20. The Department was joined to the Appeal by an Order of Joinder dated 18 July 2007. In support of the Commissioner and with regard to the non disclosure of the personal data, the Department confirmed that:
 - (a) there was a distinction as referred to earlier between disclosure to the public of the nature and content of objections to advertised planning applications as well as the objectors' identities on the one hand and on the other an expectation by members of the public that their complaints about enforcement actions would remain confidential;

- (b) in the latter case, whenever data was requested by a third party, the Department would seek consent;
- (c) in the absence of such consent, the Department would not disclose such information as the same was regarded as being in breach of the first Data Protection Principle;
- (d) in the case of the Appellant, the Department undertook to consult with the persons who submitted complaints against the construction and advised the Appellant that it was so doing;
- (e) of the responses received, some complainants expressly stated that they did not wish their data to be disclosed whilst one complainant did not express an objection to the disclosure;
- (f) no information which contained the substance of the complaints was withheld;
and
- (g) there was no public interest test in relation to the engagement of Regulation 13.

21. In relation to non disclosure of the advice sought from the DSO the Department maintained and drew no distinction “in status or effect” as between the legal advice obtained from the DSO and that obtained from an external source.

The evidence

22. The Tribunal has had the benefit of considering two witness statements provided on behalf of the Department. The first is from Christopher Wilson, Principal Officer of the Department’s Planning Service, which he confirms is an agency within the Department of the Environment. In his statement he describes the procedures regarding the lodging of objections to the applications for planning permission. He exhibits the Department’s publications which make it clear that any representation made including objections are “publicly available” on the planning application. However, it is fair to point out that this requirement with regard to planning applications was introduced only as from 19 November 2001 and therefore after the decision of the Appellant’s planning permission in this case which was made in 2000. That Planning Application bore a planning reference Planning Application

X/2000/311/F. It is to be noted, however, that the request initiated by the Appellant was for sight of a “full copy of the enforcement file”.

23. In a section headed “Persons who report unauthorised developments to the Planning Service” Mr Wilson explains that even though the source of the initial complaint will often be “anonymous” and notwithstanding the Data Protection Act, the Department “considers disclosing the personal details of complainants would be unfair and contrary to their expectation of how it [i.e. the Department] would behave.” This is understandably because if it became known that the Department would or might disclose such information “it might dissuade others from making similar reports in the future” which “would considerably reduce the Department’s ability to investigate breaches of planning control”. Therefore, even prior to the introduction of FOIA and the EIR, enforcement files “were not available for public inspection” (emphasis in original).
24. Since 1 January 2005, certain information has been made available in relation to the enforcement files provided no breach of the Data Protection Act can be said to have occurred insofar as the revelation of the complainants identity is concerned. The practice is reflected in the Department’s leaflet entitled “A Guide to Planning Enforcement in Northern Ireland”.
25. Given the fact that the Department deals with about 28,300 planning applications per year and has only 48 of its 250 staff dealing full time with enforcement activity, Mr Wilson stresses first that it is “essential” that the public continue to provide information about alleged breaches of planning notices and permission and secondly, that once a complaint has been made by an individual he or she plays no further part in the process. It is the Department itself which later takes the case further. The same practice of anonymity, Mr Wilson adds, exists with regard to the reporting of alleged benefit fraud to the Social Security Agency.
26. Mr Wilson concludes his statement by confirming what has already been set out above, namely that no distinction exists between those cases or instances where the Department will consult the DSO on the one hand and on the other external solicitors and that advice can be taken at any stage of the enforcement process.

27. The second witness statement submitted by the Department is from a Brian Doherty, acting Deputy Head of the DSO. He explains that the DSO is an “independent directorate” of the Department of Finance & Personnel which provides legal advice to all 11 departments of the devolved Government in Northern Ireland. He asserts that to characterise DSO as “in house” solicitors to the Department does not reflect the relationship that truly exists between the Department and the DSO.

The issues on the appeal

28. Schedule 1 to the Data Protection Act 1998 provides as follows:

“The Principles.

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met ...”.

Schedule 2 provides:

“Conditions Relevant for Purposes of the First Principle: Processing of any Personal Data

1. The data subject has given his consent to the processing.

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

29. There has been no consent by those individuals who are members of the public who have been involved in the enforcement proceedings in relation to this appeal. The key question is whether the conditions in 6(1) have been met. This in turn involves a consideration of whether the Appellant as the third party has a legitimate interest in the information being disclosed and if so, whether the disclosure would

be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the members of the public concerned.

30. As indicated above, the Appellant has made a wholly unparticularised allegation that the information provided by members of the public regarding his planning application is “incorrect and malicious”. The Tribunal agrees with the Commissioner in his written submissions when he contends that the inability of the Appellant not to be able to defend himself against those members of the public who might be concerned in that respect cannot in any way be viewed as giving him any “legitimate interests” in disclosure.
31. Mr Wilson’s evidence makes it absolutely clear that once a member of the public has lodged a complaint it is the Department which will then initiate and later prosecute any proceedings invariably in the wake of carrying out its own investigations. The Appellant will then have every opportunity to defend himself. The Appellant has made no allegation in the context of these proceedings or this appeal that the Department itself has been actuated by malice. If such were the case it is neither expressly set out, as it should have been, nor is there any evidence before the Commissioner or the Tribunal to support such an allegation.
32. In any event even if the Tribunal were to hold that the Appellant had a legitimate interest in disclosure of the information, it is clear that prejudice would be caused to the rights and freedoms or the legitimate interests of the members of the public concerned since, as the uncontradicted evidence shows with regard to enforcement proceedings, the Department does not disclose the identity of a complainant without the latter’s consent. It necessarily follows that those members of the public who are directly affected retain a strong legitimate interest in continued anonymity. The Tribunal agrees with the suggestion in Mr Wilson’s evidence that necessary revelation of a complainant’s data would only serve to discourage from making future complaints.
33. Finally, in relation to this issue, the Tribunal agrees with the Commissioner that the fact that the Appellant may have guessed the identity of one or more of the complainants does not in any way itself justify the disclosure of the data sought.

Disclosure cannot be justified if its purpose is either to confirm or deny the alleged content of the information.

34. With regard to Regulation 12, which is recited above at paragraph 1, it is clear that the Tribunal has to address 2 issues, namely first and in the context of this appeal, whether the ability of a person to receive a fair trial would be adversely affected and coupled with that whether the course of justice would be so affected and secondly, where the appropriate public interest lies.
35. At the moment it appears from the Department's reply that the Magistrates' Court has determined it should not proceed with the enforcement action. However, again according to the reply, the Department has lodged an appeal in the way mentioned above against the lower Court's decision that the Department's decision to refuse the renewed application should be quashed. As indicated above, the Tribunal assumes that the Department's appeal remains pending and therefore it follows that enforcement proceedings could be instituted at any stage.
36. In any event, as at 1 January 2005, the Additional Party's legal action in the enforcement proceedings was merely deferred.
37. In the Tribunal's view there can be no doubt that at the time of the request disclosure of the legal advice provided to the Department by the DSO would risk undermining its position in relation to those proceedings as well as being likely to interfere with the course of justice generally.
38. Insofar as the respective public interests are concerned the Tribunal agrees with the Commissioner that in all the circumstances of this case the public interest in non disclosure clearly outweighs the public interest in disclosure. The Tribunal therefore endorses the Commissioner's findings in his Decision Notice which are summarised above at.
39. For all these reasons the Tribunal dismisses the Appeal.

David Marks

Date 12 December 2007