ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0506811

Dated: 28th. November, 2013

Appeal No. EA/2013/0276

Appellant: Department of the Environment for Northern Ireland ("DOENI")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Malcolm Clarke

and

Michael Hake

Tribunal Members

Date of Decision: 23rd May, 2014

Date of Promulgation: 2nd June 2014

Representation : The appeal was determined on written evidence and submissions.

Subject matter:

Environmental Information Regulations 2004 ("EIR")
Regs. 5(1) and 12(4)(e) - refusal to disclose internal communications.

Reported Cases: *DFES v ICO and The Evening Standard EA/2006/0006 ; OGC v ICO [2008] EWHC 774.*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in respect of the disclosure of the requested information. It does not require the Appellant to take any steps.

Dated this 23rd. day of May, 2014

David Farrer Q.C.
Tribunal Judge
[Signed on original]

REASONS FOR DECISION

The Background

1 In October, 2011 the village of Beragh in Northern Ireland experienced severe flooding. It followed earlier flooding in 2008. One of the properties which suffered damage was the Beragh GAA Club, which applied to DOENI by letter dated 2nd. November, 2011 for financial assistance to meet the costs of restoring its sports and other facilities.

2 The grant of assistance to a club would have involved a change in DOENI's policy as to relief for flood damage , since grants had previously been made only to residential occupiers. Consideration was given to a change. It involved discussion with the minister and interdepartmental consultations. In the event, these deliberations were fairly protracted, a matter to which we return later in this decision.

The Request

3 On 1st. March, 2012, Dr. R.T. William McCrea, the local M.P., requested information from DOENI as follows -

" I wish to re - apply under the Freedom of Information Act, 2000 for records of any discussions held between the Environment Minister and his officials regarding a request for the possibility of an award in respect of costs incurred due to flooding at the Beragh GAA Club following the extreme rainfall in October, 2011.

I specifically request that the following information be provided:

- *Records of the emails between the Minister and his officials*
- *Records of telephone conversations between the Minister and his officials*
- *Records of letters between the Minister and his officials*

- *Minutes of any meetings and copies of any correspondence between the Minister, his officials and Beragh GAA Club and any other records held of discussions between the Minister and/or his officials with Beragh GAA club on this issue.*
- *Minutes of any meetings and details of any telephone conversations and/or email correspondence/letters sent in relation to discussions between the Minister or his officials with any other Government department regarding this matter."*

4. In its reply of 2nd. May, 2012 DOENI disclosed correspondence with the GAA Club but invoked the exception under EIR Reg. 12(4)(e) as to everything else. It stated that the remaining information within the scope of the request was "internal communications" and that the public interest favoured withholding them. It referred to the familiar need for a "protected space" for the decision - making process. Dr. McCrea's further representations, overlooked for over ten months, eventually elicited an unchanged response. It confirmed that all correspondence with the GAA Club had been disclosed.

The Complaint and the Decision Notice

5. Dr. McCrea complained to the ICO on 3rd. May, 2013 as to the failure of DOENI to provide an internal review of its refusal. The upshot of what followed was an investigation by the ICO into the exception under Reg. 12(4)(e) as regards the other requested information. He also identified failures by DOENI to comply with the 40 - day time limit for responding to representations from the requester (EIR Reg. 11(3)) and the requirement under Reg. 14(3) to specify adequately the public interest arguments supporting the refusal. Neither of these findings is the subject of appeal but the Tribunal endorses the ICO's criticisms of DOENI's handling of this request.

6. In his Decision Notice the ICO ruled that this request was governed by the EIR not FOIA, a finding with which DOENI agrees but from which Dr. McCrea dissented. Since there is no issue between the parties to this appeal, the Tribunal need say only that the request was incontestably for environmental information as defined in Reg. 2(a), (c) and probably (f). He further found that the exception in Reg. 12(4)(e) was engaged. Reg. 12(4)(e) provides that *"a public authority may refuse to disclose information to the extent that -*

. . .

(4) the request involves the disclosure of internal communications."

By virtue of Reg. 12(8) *"internal communications includes communications between government departments."*

7. The sole issue was and is, therefore, whether the public interest in maintaining the exception outweighed the public interest in disclosing the information (Reg. 12(1)(b)), taking account of the presumption in favour of disclosure enacted in Reg. 12(2).

8. The ICO emphasised the significant public interest in disclosure where the information related to a significant current problem such as flooding and the role of central government in alleviating its effects. He referred to the "safe space" and "chilling effect" arguments advanced in favour of maintaining the exception but concluded, as in his later Response, that they were too generally expressed and failed to identify substantial reasons in this case for withholding important information. He ordered disclosure. DOENI appealed.

The Tribunal's Decision

9. Like the ICO, the Tribunal has studied the withheld documents. They reveal a live debate within DOENI and in its discussions with other public bodies, including the Local Government and Planning Departments, which was clearly continuing in the

early months of 2012. Papers on the relevant considerations were circulated and options put to the Minister. Sensitive questions were involved. Flood damage is an emotive issue. Public reaction to perceived indifference by central government can be sharply hostile. Whether, on the other hand, scarce resources should be made available to social or sports clubs and if so, on what scale, involves difficult choices and a decision to extend aid beyond homeowners would also invite political controversy. The planning history of the relevant sites may need to be considered.

10. These considerations are important, not just in identifying the public interest in disclosure but in assessing the claim that, four months after the GAA Club appeal to DOENI, time and space was needed to debate these issues within the department.

11. We observe that the documents that we have read clearly demonstrate that future policy was in the melting pot at the date of the request, which is the relevant date for our decision. In our opinion it was reasonable that policy was still undetermined at that time.

12. Taking full account of the presumption for disclosure, we find that this is a case in which the government department still needed time and privacy to hammer out a new policy or consider and explain why there should be no change. Whether this involves acceptance of the "chilling effect" argument, we tend to doubt It does involve acceptance of the "safe space" reasoning which can require consideration when examining the exemption provided for by FOIA s.35(1)(a). (*see DFES v ICO and The Evening Standard EA/2006/0006* as approved at paragraph 100 of *OGC v ICO [2008] EWHC 774.* The approach to assessing the public interest where the exception under EIR Reg. 12(4)(e) is engaged is the same, since the balancing exercise under FOIA involves the application of a similar presumption to that specified in EIR Reg. 12(2).

13. For these reasons we allow this appeal to the extent indicated. We should add, however, that the Tribunal does not intend thereby to open the door to stale claims that policy is still undetermined long after the debate began and that protracted deliberation within a department justifies a refusal to provide information for as long as government sees fit. This was a very early request. A point plainly comes, however, when the ICO or the Tribunal can justifiably say that enough is enough. When that point comes will obviously depend on the importance and complexity of the issues engaged. A protected space is justified only where it is being purposefully used to formulate policy, not where an important decision has been shelved for whatever reason.

14. These observations are prompted by the letter from Mr. Brittain of DOENI to the ICO dated 11th. September, 2013, which includes the assertion that its reliance on the exception would be as valid then as in March, 2012. We have serious doubts as to whether that would have proved to be so, had we been determining a request made at that date.

15. Our decision is unanimous.

Signed

David Farrer Q.C.

Tribunal Judge

23rd. May, 2014