IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0198
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 9 July 2014
FER0527114

Appellant:	**Dr Lee Moroney**
First Respondent:	**Information Commissioner**
Second Respondent:	**Department of Energy and Climate Change**

Heard on 8 June 2015 at Field House London

Before
John Angel
(Judge)
and
David Sivers and Narendra Makanji

Date of Decision: 26 June 2015

Subject matter: Regulations 3(2) (information held), 12(5)(b) (course of justice), 13 (personal data) of the Environmental Information Regulations 2004.

Cases: *Farrand v IC & London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC);
DBERR v O'Brien and Information Commissioner [2009] EWHC 164 (QB);
DGLG v Robinson [2012] UK (AAC) 43.

DECISION

The Tribunal upholds the appeal in part and requires the Second Respondent to carry out the steps set out in paragraphs 42 and 43 of the Reasons for Decision.

REASONS FOR DECISION

Background

1. In 2013 the Department for Energy and Climate Change (DECC) amended government policy concerning the manner in which wind farm noise should be assessed and the methods used to set permitted noise levels at neighbouring residences. The relevant policy is part of the National Policy Statement for Renewable Energy Infrastructure (EN-3) which states that noise guidance should "include any successor or supplementary guidance to it endorsed by the Government".

2. Before amending the Good Practice Guidance (GPG) on wind farm noise assessment DECC contracted out to the Institute of Acoustics (IOA) the job of reviewing the GPG. The IOA set up a working group who considered a number of submissions one of which was produced by the Renewable Energy Foundation (REF). REF was not convinced that its submission had been taken into account.

3. On 5th August 2013, Dr Moroney on behalf of REF, made the following request seeking :

> *"All emails, letters, correspondence, agenda, minutes and notes of meetings, reports and data relating to the recent Institute of Acoustics (IoA) consultation and preparation of a Good Practice Guide (GPG) on the application of ETSU-R-97 for wind turbine noise assessment dated 1 October 2012 to date."*

4. Although some information was disclosed with redactions Dr Moroney was not satisfied leading to a complaint to the Commissioner and a decision notice being issued on 9 July 2014 (DN) largely upholding the complaint. Dr Moroney appealed against the decision to the FTT. During this process DECC have disclosed a large number of documents, some with redactions, in a number of tranches.

5. As a result the issues remaining for the tribunal to consider have been much reduced. In effect the first two grounds of Dr Moroney's appeal against the DN have been conceded, namely that Regulation 12(4)(e) EIR is engaged and that the public interest favours withholding the information because the information has now been disclosed by DECC.

Issues still remaining for the FTT to consider

6. In view of the disclosures already made, including another tranche at the hearing, and the new position taken by DECC, the issues before the tribunal are now limited to two matters:

    a. Whether DECC still holds information within the scope of the request which it has still not identified?
    b. Whether the redactions made to the documents disclosed have been properly made?

7. In order to consider the redactions it was necessary for the tribunal to consider evidence in relation to these in closed session. Following the session it was agreed that some of the evidence should be open and it was disclosed to Dr Moroney and is reproduced in this decision in the Open Annex below.

Legal Framework

8. Under Regulation 3(2) of the Environmental Information Regulations 2004 (EIR) "environmental information" is held by a public authority if the information –
    a. is in the authority's possession and has been produced or received by the authority; or
    b. is held by another person on behalf of the authority."

9. Environmental information under regulation 2(1)(b) includes "factors , such as …noise.."

10. It has been determined by other tribunals that the FTT may review the adequacy of a public authority's search for information answering the terms of the request. The question for the tribunal is whether, on the balance of probabilities, the public authority held the requested information at the time of the request. Although we are not bound by these decisions we consider they are appropriate for us to adopt in this case. Also we consider that our approach to this exercise can be undertaken by reference to:

        i. the quality of DECC's searches based on the request;
        ii. the scope of the searches;
        iii. the rigour and efficiency of the searches; and
        iv. the discovery of materials elsewhere which point to there being more.

11. In relation to the redactions claimed there are two exemptions which are relevant in this case. Firstly legal professional privilege (LLP). Under Regulation 12(5)(b) EIR " a public authority may refuse to disclose information to the extent that its disclosure would adversely affect… the course of justice…"

12. The Upper Tribunal in *DGLG v Robinson* [2012] UK (AAC) 43 held that, in applying Regulation 12(5)(b) to information which is covered by LLP:

> *55. The jurisprudence of the F-tT is that, where regulation 12(5)(b) is engaged by reason of an adverse effect on the course of justice arising from the fact that the information is protected by LPP*, the significance of LPP in relation to the public interest balancing test is broadly the same as where section 42 of FOIA is engaged. *See, for example,* Archer *at paragraphs 61 to 63,* West *at paragraph 13. In our judgment that is correct, subject, as Miss John reminded us, to the potentially important qualification in regulation 12(2) that in the case of environmental information a public authority must apply a presumption in favour of disclosure. That presumption is given force and significance by the recitals to the Directive which we have set out above."*

13. Under section 42 FOIA, to which the Upper Tribunal referred, the High Court in *DBERR v O'Brien and Information Commissioner* [2009] EWHC 164 (QB) confirmed the approach adopted by a long line of Tribunal authority (from *Bellamy v Information Commissioner and DTI* (EA/2005/0023) onwards) on the proper approach to considering the public interest balancing:

> "[53] **...***The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least*."

14. Under regulation 12(2) "a public authority shall apply a presumption in favour of disclosure".

15. Where an exclusion is engaged then under regulation 12(1)(b) "a public authority may refuse to disclose environmental information requested if…(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."

16. The second exemption claimed is where the information requested includes personal data of a person other than the requestor, that personal data may only be disclosed *inter alia* where to do so would be in accordance with the data protection principles outlined in the Data Protection Act 1998:

Regulation 12 Exceptions to the duty to disclose environmental information
(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 13 Personal data
(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

17. In this case it is accepted by the parties the first data protection principle (DPP) is relevant, namely

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….

and under Schedule 2 condition 6 is relevant, namely
(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.

18. Recently in *Farrand v IC & London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC) the Upper Tribunal considered how Condition 6 works:

It contains a condition that must be satisfied – that processing is necessary – to which there is an exception – prejudice to the data

subject. If the necessary condition is satisfied, there must then have to be a balance struck between that and the prejudice to the data subject. But that does not arise unless and until the necessary condition is satisfied. If it is not…prejudice does not arise and no balance is required." [29]

Does DECC still hold information within the scope of the request?

19. DECC have disclosed 231 pages of documents in 9 tranches since the request was made. Dr Moroney has pointed out that searches undertaken by DECC are not showing up information which she considers are relevant. DECC has followed up on her suggestions which have resulted in further disclosures.

20. Dr Michael Toft is an experienced well qualified physicist . He explained that there is, in his view, a fundamental misconception of the science of how noise carries in the open air which underpins the revised GPG. The practical affect of this misconception means that wind farms can now be erected nearer to dwellings than before which will have a negative effect in noise terms on those inhabiting those dwellings. Dr Toft submitted his concerns to the IOA during the course of their deliberations on the revised guide but never received a response. He also wrote by letter and email to DECC ministers and the Chief Scientific Advisor who is a civil servant in DECC. Although he received acknowledgements from functionaries there was no engagement with the technical issues he raised. The letters were not identified by DECC in its searches until brought to DECC's attention. The emails have still not been found.

21. Dr Toft considers there is a lack of clarity on whether his technical submissions have been taken into account or ignored. He believes the public is entitled to know that the revised GPG will lead, in his view, to public harm.

22. Olivia Knibbs a civil servant in the Office of Renewable Energy Development (ORED), which is part of DECC, currently holds the position of Head of Renewables Delivery explained how the searches were made using a variety of different search terms. At the time of the request the Matrix system was used to store documents. This could only be searched by title/label. Members of DECC staff decide whether to upload documents to the system based on whether they represent the final thoughts of the process, the decision, communications with ministers and his/her response. Only documents which were posted to the system would be held and under the title/label given by the member of staff. If this was not done then they could not be found by electronic search. More recently a new system, DECC Shares, has been introduced which also allows textual searches (content as well as title). This may account for the more recent disclosures. Emails are only stored if posted by a member of staff to the archived system and if not are deleted after 12 months.

23. She explained that a Government Oversight Group (GOG) was set up to oversee the IOA review of the GPG. However she says that it did not have technical expertise and only oversaw the budget (just over £8000) and timescales of the project. She reiterated that technical aspects were not within the GOG's remit. DEFRA had the overall lead on noise policy although DECC dealt with planning aspects. It emerged during questioning that it may have had an endorsement role as DECC was ultimately responsible for wind generated energy policy and the planning requirements involved.

24. Ms Knibbs could not say with 100% certainty that everything had now been disclosed to Dr Moroney. She informed us that it is possible that there is more, but does not consider this is probable because of the limited role of the GOG.

25. Dr Moroney still seems convinced that there is further information. At the hearing Dr Toft showed us that he had sent to and received letters and emails from DECC and only some had been discovered by DECC. No minutes or notes of meeting have been disclosed. There is no information to show the Chief Scientific Advisor was directly involved in the revised policy. There is no documentary evidence that the Minister/Secretary of State was briefed in relation to the revised GPG although his department was responsible for endorsing the revised policy as latest industry good practice.

26. We have to consider whether on a balance of probabilities DECC has disclosed the information it holds within the scope of the request. From the evidence before us it is clear that DECC has now used a wide variety of search criteria to undertake electronic searches of the old and new archive systems sometimes prompted by Dr Moroney, particularly where disclosure of documents pointed to there being more. There is no evidence that manual searches were undertaken, although we were led to understand that there is a destruction policy.

27. Having considered all the evidence before us we find that it is difficult to understand how the GOG had such a limited role. It would appear at least two or three of its members had technical backgrounds and are likely to have been carrying out more than just a project management role as suggested by Ms Knibbs. The disclosed information indicates that email senders and recipients also included an Offshore Wind Team, Technical Advisors and a Ministerial Team. This suggests a wider scrutiny by DECC.

28. However we accept that the ETSU-R-97, which is The Assessment & Rating of Noise from Wind Farms, is not a government standard as such but its production was facilitated by government (through the DTI at the time). However the very fact that DECC funded a review of the GPG and involved a number of civil servants in the exercise suggests a degree of scrutiny over and above mere administration.

29. We also appreciate that the narrowing of the request to a start date later than the commencement of the consultation process by the IOA will have meant that certain information will be out of scope of the request.

30. Although we consider that DECC has made rigorous efforts to search the archived systems we are not convinced on the balance of probabilities that this has been an altogether efficient search. This is because the Chief Scientific Advisor, who is likely to have the technical knowledge to understand the GPG, does not seem to have been included in the searches. It is surprising to us that a department responsible for alternative energy policies was not briefed at a higher ministerial level because of DECC's endorsement role and its policy interest in wind farms.

31. We also are concerned that the information which has been disclosed has been discovered over at least 9 search attempts over a period of time. This suggests that the approach to searching for information has been somewhat disorganised.

32. We therefore find that on the balance of possibilities that DECC still holds further information within the scope of the request which it has not yet identified. We require DECC to carry out further searches to identify any other information it holds within the scope of the request in particular:

    a. a search of the Chief Scientific Advisor's office in respect of any involvement he or his staff may have had with the revised GPG;
    b. a search for any briefing papers to senior Civil Servants, Ministers and the Secretary of State in relation to the endorsement of the revised GPG.

Were the redactions properly made?

33. Parts of a small email exchange between a DECC official seeking internal legal advice and an internal lawyer on one point was redacted by DECC on the basis that it was excepted because it was subject to legal professional privilege (LPP).

34. On examining the exchange it is the tribunal's view that regulation 12(5)(b) is clearly engaged taking into account the law as set out above.

35. We therefore need to consider the public interest test under regulation 12(1)(b).

36. It has been accepted by higher courts that there is an inherent strength in the public interest in LPP because, inter alia, of the need for a safe space to ask questions of lawyers. In this case the question was only

asked a few weeks before the request which would not suggest that the need for such a safe space had diminished in any way by then.

37. In order for us to consider disclosing the information we would need to be able to find public interests at least of equal strength for us to find that the balance of public interest falls in favour of disclosure.

38. There is a public interest in transparency and openness. However in the circumstances of this case we find that there is no evidence of advice not being taken or wrongdoing. Therefore we find that there is little strength in the weight we can attribute to this public interest.

39. We conclude that the public interest balance lies in favour of maintaining the exclusion and that DECC was entitled to redact the information.

40. As far as the redactions of personal data are concerned under regulation 13 during the course of the closed evidence a number of redactions were identified which were not personal data and these were disclosed to Dr Moroney once the hearing returned to open session.

41. As is explained in the closed annex to this decision the rest of the redactions are names and contact details of junior civil servants or outsiders. Applying the test under Schedule 2 condition 6 DPA we find that it is not necessary for Dr Moroney to have this information disclosed to her to pursue her legitimate interests in this case. In our view their disclosure will not assist her in finding out whether her organisation's representations were properly considered in the IOA consultation on the review of the GPG.

42. However there is one exception. We consider the name of one individual should not have been redacted because of his/her role in relation to the revised GPG. We explain our reasoning in the Confidential Annex to this decision. This Annex will not be disclosed to Dr Moroney with the rest of the decision.

Conclusion

43. On the balance of possibilities we are of the unanimous view on the evidence before us that it is more likely than not that further information is held within the scope of the request. We order that DECC carry out further searches within 35 days of this decision and that Dr Moroney be informed of the results within the same timeframe. We should point out that we have taken into account DECC's submission in paragraph 14 of the Open Annex but have decided that in the circumstances of this case where so many attempts at searches have been made that Mr Hopkin's offer would not be appropriate at this stage of the proceedings.

44. We find that the redaction on the ground of LLP was properly applied. In relation to the redactions of personal data following further disclosures at the hearing we find that the remaining redactions were properly made except for one name which should be disclosed and sent to Dr Moroney within 35 days of the date of this decision.

[Signed on original]

Prof. John Angel
Judge

Date: 26 June 2015