IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0279**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50587356
Dated: 12 November 2015

Appellant:	**Robert Manson**
Respondent:	**The Information Commissioner**
2nd Respondent:	**Pembrokeshire County Council**
Heard at:	**Cardiff Civil Justice Centre**
Date of Hearing:	**11 April 2016**

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and **Gareth Jones**

Tribunal Members

Date of Decision: **16 April 2016**

Date Decision Promulgated: 18 April 2016

Attendances:

For the Appellant: in person

For the Respondent: no attendance

For the 2nd Respondent: no attendance

Subject matter:

Freedom of Information Act 2000

Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 12 November 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings, Mr Manson, is involved with a campaign by local residents to stop a small housing development within the Pembroke Coast National Park. He is concerned with what he feels is a change of stance of the local highways authority, Pembrokeshire County Council, (the Second Respondent in these proceedings, "the Council") between 2008 (when one planning application was made) and a more recent planning application where the proposed road access solution was different. He assisted the campaign in making a request for environmental information to the Council and then sent a request for similar information in his own name on 18 May 2015 under FOIA:-

   "All correspondence (including by email) regarding highways, access and other material planning matters, held by your Authority, and concerning development of new housing on land north of Feidr Eglwys, Newport Pembrokeshire – including especially as between PCC Highways Development Control or Planning Liaison and Harris Design and Management, or anyone else representing any prospective developer, or any such prospective developer or developers themselves in relation to this site

   All minutes, notes and other records in relation to the holding of meetings and /or telephone conversations as between the same said parties in relation to the same said proposed development

   All file records, folders and other documentation held by your Authority, in relation to the same said proposed development site, including correspondence as with other authorities (in particular the Pembrokeshire Coast National Park Authority) and other statutory planning consultees, created since 1 January 2008"

2. The Council responded promptly on 26 May confirming that it held the information and it was available for viewing at the County Hall, he was invited to ring to arrange a viewing and informed that if he could not attend he could arrange for photocopies to be made but, since the material was in the public domain he would have to pay for the copies since s. 21 FOIA allowed such charging. Mr Manson disputed this and the

Council reviewed its decision. On 15 June the Council confirmed that it continued to rely on FOIA, and gave the contact details of a relevant officer to arrange a viewing, or photocopying and indicated that the officer "was prepared to meet you at a venue of your choosing to show you the file." The file had already been seen by members of the public at County Hall and the officer had offered to take the file to meet residents at a public meeting "which demonstrates that the Council is not seeking to restrict access to the file." Mr Manson responded to the named officer specifying that he was not seeking the planning application and supporting documents (16 June 2015 bundle pages 126-128 at 127):-

"details of which have already been fully supplied by the National Park Authority", "[documents from objectors] who, unlike your authority, I have found place all their materials online –

or (c) equally any other materials which you yourself are able to find online.. "

3. He went on to state that he had found a reference to a document which appeared to be a formal highways assessment made in 2008 and referred to in a National Park Authority memo 5 February 2013. He argued that the officer's department would have made such assessments in relation to scores or hundreds of potential sites for housing developments; however he wished only to "be provided with a copy of only the single relevant page on which this particular Assessment appears".

The complaint to the Information Commissioner

4. Mr Manson complained to the ICO about the failure to provide the information electronically, the reliance on s21 FOIA and expressing concern as to whether the Council had identified all the information within scope of the request.

5. In his decision notice the ICO concluded that the information was environmental information and then considered whether the Council had complied with its duty to make environmental information available. The ICO considered the Council's explanation that the Highways Department was consulted on many potential sites by the two Planning Authorities (the Council itself and the National Park Authority for its area) most of these sites were not in the adopted plans of these authorities and the Highways Department had no reason to keep its comments since they were kept by the planning authority. The Council confirmed that all the information within the scope of the request had been provided to him in response to a request submitted to

the National Park Authority and it could not provide information that it did not hold (decision notice paragraph 15). The Council confirmed that all documents and emails within the scope of the request was held on a general correspondence file on the Local Development Plan and there was no single document such as was identified by Mr Manson. An email between the Highways Department and the National Park Authority of 14 April 2015 was available for inspection (decision notice paragraph 19). The ICO concluded that the Council had made the information available.

6. The ICO then considered whether the Council had complied with its duty under Regulation 6(1):-

*"**Form and format of information***

6.—(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a)it is reasonable for it to make the information available in another form or format; or

(b)the information is already publicly available and easily accessible to the applicant in another form or format."

7. The ICO noted Mr Manson's preference for electronic communication. He referred to his guidance on the broad interpretation of regulation 6 to include inspection as well as the provision of copies and noted that regulation 8 which provides for charging for environmental information does not allow charging for the inspection of public registers of environmental information. He therefore concluded that the offer of inspection of publicly available material was a form of access envisaged by regulation 8, a form of publication and this was consistent with the ICO's guidance on discharge of a public authority's duty under regulation 6.

8. The ICO concluded that the Council had complied with its obligations under Regulation 6.

9. Mr Manson was dissatisfied and in his lengthy statement of grounds of appeal, Mr Manson argued that the ICO should have considered his complaint on the basis of FOIA not EIR.

10. In the alternative, that EIR was the relevant legal basis of the request, he argued that the offer of inspection was not a genuine offer and he doubted that the information

which it was proposed he should inspect was the whole of the information within the request held by the authority.

11. He argued that the finding of the ICO that the offer of information in a different form than what was asked was reasonable (decision notice paragraphs 23-26) was unsustainable. He submitted that the comment at paragraph 25 that Mr Manson had not provided any arguments as to why the proposed inspection of the documents was impracticable had placed the onus on him rather than on the public authority to show that the proposed inspection was reasonable in the circumstances.

12. Mr Manson contended that even if the correct legal regime was EIR the effect of section 39(3) of FOIA was that if the proposed inspection of the documents made the information "easily accessible" under rule 6(1) (b) EIR they could not be "reasonably accessible" under section 21(1) of FOIA. He also argued that the application of EIR had derogated from existing rights to information under FOIA and therefore the implementation of the Regulations had not complied with the Aarhus Convention.

13. He made detailed submissions as to the nature of publication and inspection, bringing in by way of comparison a number of statutory provisions to demonstrate that inspection could not be a form of publication as stated in the ICO's decision notice.

14. In resisting the appeal the ICO argued that the information was environmental information and noted that Aarhus Convention implementation guide (ECE/CEP/72, 2000) noted that "information relating to planning in transport or tourism would in most cases be covered by this definition".

15. It was reasonable of the ICO to accept that making the material available for inspection was making the information available in another form or format. He reaffirmed his view that the information which could be freely viewed at County Hall in Haverfordwest was "publicly available and easily accessible to the applicant" under Regulation 6(1)(b) and Mr Manson had given no indication why it was not. He further relied on the alternatives proposed by the Council which would have brought the information and assistance nearer his home.

16. He argued that since the public authority had stated that no other information had come into existence the ICO was entitled to accept that assurance and that clear and cogent evidence of deceit by a Council officer was required for it to doubt that assurance. The ICO noted Mr Manson's intention of providing a witness statement

(Mr Manson's Statement of grounds Part II page 4) of further relevant materials held by the Highways department and not forwarded to PCNPA.

17. The Council in its response confirmed that the option of obtaining photocopies of the file remained. It noted that it was aware that he held a copy of the PCNPA information and since much of its file was a duplicate it had been helpful to him in offering inspection so he could identify any non-duplicated material and so reducing his costs. It re-affirmed that it had made the various offers in good faith and had offered the support of Council professionals to assist with the contents of the file. It confirmed that all the information that it has identified is in a file for public inspection. It agreed with the ICO's position that the matter fell within EIR not FOIA.

18. In oral argument Mr Manson recapped his detailed written submission. A witness statement by a fellow campaigner Ms McGarry gave details of her request for similar information from the Council, the Council's reliance on FOIA s.21 and her attendance on the officer of the Council's Highways department to inspect the file on 29 May 2015 when she copied some documents, and her subsequent attendance at the National Park's offices where she found that "some, but by no means all, of these documents were duplicated on the file by that Authority."

19. In his closing submissions Mr Manson affirmed that he could have driven to County Hall and taken photocopies and that was what two of his associates did. However he had argued the issue on the basis that the information should have been sent to him electronically because to have done otherwise would have been to betray many thousands of other people throughout England and Wales who had to make such journeys every year to obtain information instead of a few buttons being pressed.

Questions for the tribunal

20. Despite the length and complexity of Mr Manson's arguments the issues for the tribunal may be briefly stated:-

    - Whether the correct statutory regime is EIR or FOIA
    - If it is EIR whether FOIA gives additional or different rights to a complainant seeking environmental information

- Whether there was more information held by the Council than has been offered to Mr Manson
- Whether the various offers made by the Council to Mr Manson properly discharged its obligations to him

Consideration

The statutory regime

21. Environmental information is defined by Regulation 2(1) as:-

> *"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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;*
>
> ….
>
> *(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;*
>
> …."

22. The information requested by Mr Manson was for correspondence "*regarding highways, access and other material planning matters"* and for notes records and documentation of various sorts relating to that development site. Any new housing and associated highway development in a rural area will affect the soil, the material submitted as part of Ms McGarry's witness statement deals (inter alia) with hedgerows. The information requested is for plans likely to affect "the state of the elements of the environment". The ICO's approach is clearly correct.

The relation between FOIA and EIR

22. In his submissions Mr Manson has argued that even when EIR is the correct regime, FOIA applies. S. 39 FOIA provides an exemption from disclosure under FOIA for environmental information. It provides:-

*" **Environmental information.***

(1)Information is exempt information if the public authority holding it—

(a)is obliged by environmental information regulations to make the information available to the public in accordance with the regulations,

…..

(3)Subsection (1)(a) does not limit the generality of section 21(1)."

23. Section 21(1) provides:-

"(1)Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

24. While Mr Manson seeks to argue that s.39(3) re-imports FOIA rights for environmental information after those rights have been excluded by s39(1)(a); this is a misinterpretation. Section 39(3) re-states that all information reasonably accessible by other means is exempt from disclosure under FOIA while s39(1) specifically states that information disclosable under EIR is exempt from disclosure under FOIA. It underlines, rather than undermines, the legal separation between the two regimes. Mr Manson is unable to rely on provisions of FOIA to advance his arguments under EIR.

<u>The information held</u>

25. The ICO accepted the explanation of the Council that, since the planning authority for this proposed development was the National Park Authority the Council's Highways Department kept a correspondence file in which its dealings on the issue of the Local Development Plan were kept. The Council has confirmed that all the material it has been able to identify has been placed in a file for public inspection. The witness statement provided by Mr Manson criticises the Council for its record keeping but adds nothing to indicate that there is more information than is kept in the file for public inspection. There is no evidence that the information held by the Council has

not been made available to Mr Manson or would not be if took up their offer of inspection.

Whether the Council discharged its duty by its offers of access to the information

26. Regulation 5(1) requires a public authority to make environmental information available on request. Regulation 6(1) requires a public authority to make information available in a particular form or format unless:-
"(a)it is reasonable for it to make the information available in another form or format; or

(b)the information is already publicly available and easily accessible to the applicant in another form or format."

27. The information requested was held in a file at County Hall where it was available for inspection and a number of other offers were made to Mr Manson to facilitate inspection. He has contested the reliance on 6(1)(b) and argued that the ICO has improperly placed the onus of proving accessibility on Mr Manson and, by stating in the decision notice (paragraph 25) that Mr Manson:-

"has not provided any arguments to either himself or the Council which suggests that inspecting the information is impracticable either in terms of cost or of accessibility."

28. This argument is unsustainable. The Council has proposed access by means of inspection of its file at County Hall. This is a common arrangement which Ms McGarry used (admittedly under protest) and is a standard practice in planning matters. While it may not be the most convenient means for all people it is reasonable for the Council to argue that it is "easily accessible to the applicant" (particularly when coupled with the other offers it has made) in the absence of evidence of the contrary. In his oral submissions Mr Manson accepted that he could go to the County Hall and gave no indication that it would be inconvenient or difficult for him so to do. He stated "Absolutely I could have done it; it is not the end of the world." As he acknowledged he was advancing the argument to support a cause, that such information should be available electronically, but he provided no evidence that the information at County Hall was not easily accessible to him. The approach of the Council and the ICO in this matter is entirely justified.

29. He has further argued (in his submissions with respect to "publication") that that the actual inspection of documents is not compliance with the Regulations. The regulations themselves clearly envisage that inspection of documents will be one way in which access to environmental information will be given; Regulation 8 (which deals with charging for information) provides;-

    "8.—(1) Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

    (2) A public authority shall not make any charge for allowing an applicant—

    (a)to access any public registers or lists of environmental information held by the public authority; or

    (b)to examine the information requested at the place which the public authority makes available for that examination."

30. The prohibition on charging for inspection of registers or of information deposited at a place for inspection demonstrates that these means of giving access may comply with the Regulations. This argument is again without foundation.

Conclusion and remedy

31. The grounds for this appeal are without foundation. The ICO's decision notice is correct in law and the appeal is dismissed

32. Our decision is unanimous

Judge Hughes

Date: 16 April 2016