



Tribunals Service

Information Tribunal

Appeal Number: EA/2007/0048

Freedom of Information Act 2000 (FOIA)

Ruling made on the papers

BEFORE

INFORMATION TRIBUNAL

DEPUTY CHAIRMAN

David Marks

Between

WILLIAM YOUNG

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

THE DEPARTMENT OF THE ENVIRONMENT

Additional Party

Ruling

1. This is a ruling as to whether the hearing of this Appeal should be determined on the papers without an oral hearing, or whether there should be an oral hearing.
2. The Appellant's Appeal is against the terms of a Decision Notice issued by the Information Commissioner ("the Commissioner") dated 21 May 2007. The Appellant made a request on 1 January 2005 to the Department of Environment for Northern Ireland ("the Department") for a

copy of a planning enforcement file relating to his planning application in respect of a residential home. The Appellant lives in County Down.

3. As confirmed by the Decision Notice, the Department allowed the Appellant to view the file but withheld some of the information contained on the file. The Department then sought to apply various exemptions under the Freedom of Information Act 2000 ("FOIA"). Later, after exchanges with the Commissioner, the Department proceeded to rely on two exceptions in the Environmental Information Regulations 2004 ("EIR") being first the exception in Regulation 12(5)(b) and, secondly in Regulation 13(1). The former deals with the disclosure of third party personal information which might be unfair to the individual or individuals involved. The latter deals with legal professional privilege. However, the Commissioner found that in relation to exchanges between the Department and its external legal advisers, the exception in Regulation 12(5)(b) was not engaged and that in any event, the privilege in the information sought had been waived in favour of the Appellant.
4. The request sought, in effect, the following information:
 - (a) the personal data of individuals who provided the Department with information relevant to an enforcement notice it had taken against the Appellant with regard to the construction he had undertaken of a private dwelling;
 - (b) correspondence between the Department and its in-house solicitors known as the Departmental Solicitors Office, i.e. the DSO, relating to the Department's request for advice; and
 - (c) correspondence between the Department and the external solicitors who services were retained in relation to the enforcement action taken against him.
5. The information sought under (a) includes personal information which identifies those individuals by their names and addresses, as well as information which reflects or embodies their opinions and views in relation to the actions carried out by the Appellant in relation to the subject matter of the enforcement action. The Commissioner stated he was satisfied that such data constituted personal data within the meaning of the Data Protection Act 1998. Overall, the Commissioner concluded that to disclose the third party information would contravene the so-called "fairness" requirement of the first principle of the Data Protection Act. The exception in Regulation 13(1) was therefore engaged. Since it is an absolute exception, the Commissioner stated he did not need to consider the question of the extent to which public interest affected the application of the exception.

6. The request under (b) attracted the application of Regulation 12(5)(b) which justifies a public authority in refusing 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 and inquiry of a criminal or disciplinary nature; “

The Commissioner found that that exception was engaged and in assessing the competing public interests, the Commissioner found that the argument in favour of disclosure, e.g. the need for transparency was sufficiently outweighed by the public interest in maintaining the confidentiality of the information insofar as request (b) was concerned.

7. As to request (c), the Commissioner found in effect that any privilege had been waived by virtue of the Department having allowed the Appellant to view the information so that the exception was therefore not engaged. In summary, the Commissioner therefore ordered the Department to make available the information sought under request (c).
8. The Appellant appealed by way of a Notice of Appeal received by the Tribunal on 5 June 2007. He expressly indicated he wanted “an oral hearing” in a section headed “Type of Hearing and Venue” although he also stated that “any” venue would be acceptable. He appealed against the decisions that had been made in respect of the withheld personal data and the correspondence between the Department and its in-house solicitors. The Appellant identified certain individuals who he claimed had provided the relevant information to the Department. In his Reply, the Commissioner reaffirmed the relevant portions of his Decision Notice regarding personal data which was sought, as well as the in-house legal advice. In his Reply, the Commissioner expressly stated that he considered the Appeal could be dealt with on paper.
9. By an Order of Joinder dated 18 July 2007, the Department was joined as an Additional Party to the Appeal. The Department also opposes the appeal and also expressed the view that the appeal could be dealt with on paper.
10. Directions were made on 21 September 2007. Those directions dealt with the preparation of documents, including disclosure of the disputed information to the Tribunal alone, as well as the exchange of witness statements. Paragraph 8 of the Directions stated:

“A further telephone directions hearing to deal in part with the desirability of there being an oral hearing to determine this appeal is to be listed in the week commencing 12 November 2007.”

11. In the wake of these Directions, the Department submitted evidence in the form of two sets of witness statements. The first is submitted with regard to the Department's policy and procedures in relation to the publication and disclosure of personal information as those procedures apply to members of the public who make representations to the Department about applications for planning permission. The same evidence also dealt with how the views of members of the public are dealt with insofar as they report to the Department regarding the concerns about possible unauthorised developments. The second piece of evidence concerned the role of the DSO. In addition, the disputed information was provided to the Tribunal as previously directed.
12. On 12 November 2007, there was a further directions hearing held on the telephone. In effect, this was a pre-hearing review. The Appellant represented himself and contended that he wished to have an oral hearing of the appeal. This contention was again contested by the other parties. The Tribunal therefore directed that by 19 November 2007:-

“... the Appellant shall provide to the Commissioner and the Department any materials relating to his allegations that there have been any misrepresentations made by the Additional Party with reasons as to why an oral hearing of this appeal would be justified.”

13. It was further directed that by 26 November 2007, the Commissioner should notify the Tribunal and the other parties why in his view an oral hearing of the appeal would, or would not, be justified and the reasons for this.
14. The Appellant filed a three-page statement dated 16 November 2007. In it at paragraph 4, he stated:

“It is my opinion that the Planning Service withheld material both from myself and the Information Commissioner. I am particularly concerned about copies of notes taken by Planning Officers some of which were in relation to telephone conversations from two members of the general public. I believe notes of these conversations were subsequently removed from the enforcement file and were not disclosed to myself nor the Information Commissioner. “

Reference to the Planning Services is in effect a references to the Department.

15. He then refers to incidents which, as he admits, occurred after the date of the Decision Notice, which was as stated above, 21 May 2007. The facts of the incidents as he describes them involved exchanges between the Nationwide Building Society in and from early June 2007. The Appellant claims these exchanges were followed by the provision of what the Department subsequently admitted was incorrect information. On the most generous view of this narrative, it is impossible to see the relevance of these incidents to the subject matter, let alone the issues in the present appeal.
16. The Appellant seeks to point out that “a complaint to the Northern Ireland Ombudsman’s Office in 2003 concluded that the Planning Service was guilty of mal-administration.” In particular, he says that part of that finding related to important documentation “going astray” from files. The Appellant continued at paragraph 18 in the following manner:
 - “18. It is my firm belief that the actions of the Planning Service have been unlawful and that numerous documentation have [sic] and are being deliberately withheld from all other parties.
 19. It is my belief that if information has been withheld from both myself and the Information Commissioner then it is of vital importance to this Tribunal that the facts are established. I believe that the facts can only be obtained through an oral hearing.”
17. He concludes by stated that the two individuals whose statements have been provided in the form of witness statements on behalf of the Department would, in one case “be expected to know if information had been removed from the file, if any internal investigations had been carried out and should be able to stand over any assurances given by or on behalf of the Department.”
18. Much the same point is made about the evidence regarding the DSO. At paragraph 22, the Appellant merely stated “I would expect both parties [relating to the DSO] to be aware of any inappropriate conduct by the Department and have the knowledge to give evidence in this respect.”
19. Since its inception, the Tribunal has made many decisions. It is very common to find that such decisions are made on the basis of the consideration of a papers alone. Such is the case when the issues are largely, if not wholly, legal issues and invariably where there is no disputed question of fact. Indeed, it is fair to note that there have been decisions made by the Tribunal, either during or after an oral hearing, where it transpired that little, if any, of the relevant factual material was contested.

20. Rule 16 of The Information Tribunal (Enforcement Appeals) (Amendment) Rules 2005 provides as follows:

- “(1) Subject to the Rules, the Tribunal may determine an appeal without a hearing.
- (2) Where a party makes a request for a hearing, the Tribunal shall grant the request unless it is satisfied that the appeal can properly be determined without a hearing.
- (3) Where the Tribunal decides to refuse a request for a hearing, it shall send written notice to the party making the request either before or at the same time as it makes its decision.
- (4) A notice sent under paragraph (3) shall specify the Tribunal’s decision for refusing the request.”

21. Having considered the Appellant’s reasons as summarised above in support of his application that there be an oral hearing, the Tribunal is entirely satisfied that the appeal can be determined without such a hearing and can be determined purely on the papers.

22. The reasons can briefly be stated as follows:

- (1) the matters related by the Appellant in his witness statement of 16 November 2007 do not bear any factual connection with the factual background to the appeal as described and set out in Decision Notice; indeed, the facts related in the witness statement are stated to occur in a different time period after the date of the Decision Notice;
- (2) on any reading of the witness statement put in by the Appellant, the Appellant in effect admits that he has no basis for alleging that the witnesses put forward in this case have themselves been party to any withholding of documentation or any form of misrepresentation in the way he has alleged: indeed the Appellant nowhere states what type or nature of document or documents might be said in this case to have been withheld or otherwise and properly dealt with;
- (3) it follows that the Appellant has failed to produce any evidence which in the circumstances of the appeal as a whole would justify any cross-examination of the Department’s witnesses; and
- (4) in the light of the matter set out in the preceding paragraphs, namely (1), (2) and (3), the Tribunal can properly infer that the Appellant would use the oral hearing as

a means of conducting what is sometimes called a fishing expedition which on no basis can justify the holding of an oral hearing

23. In the circumstances, the Appellant's request for an oral hearing is declined.

Deputy Chairman

Date 30 November 2007