



Appeal number: EA/2019/0046

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENTAL INFORMATION RIGHTS**

UNEX GROUP HOLDINGS LIMITED

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALEXANDRA MARKS CBE
ANNE CHAFER
DAVID WILKINSON**

SITTING IN CHAMBERS IN LONDON EC2 on 31 MAY 2019

Neither party appeared as, by consent, this case was considered on the papers

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DECISION

For the reasons set out below, the Tribunal dismisses the appeal.

REASONS

Introduction

1. This appeal concerns a request to Historic England ('HE') made by the appellant under the Freedom of Information Act 2000 ('FOIA') but which HE treated as a request under the Environmental Information Regulations 2004 ('EIR').
2. Queensbury Lodge, Cottage and Stables at 196-198 High Street, Newmarket are Grade II listed buildings located within the Newmarket Conservation Area. Unex Group Holdings Limited ('Unex') has submitted planning applications for the de-listing of these buildings as well as development of the site ('Site').

Issues for this Tribunal to decide

3. We consider that the issues which the Tribunal has to decide in this case are:

Question 1: Was the Commissioner correct in law to conclude that the information which Unex requested is "environmental information" and thus falls within the EIR regime?

Question 2: If so, was the Commissioner correct in law to determine that the information withheld by HE falls within the exceptions to the duty to disclose under EIR?

Question 3: If so, should the Commissioner have exercised her discretion differently and found the balance of the public interest favoured disclosure rather than maintaining the exceptions and thus withholding the information?

Request, Decision Notice and appeal

4. On 27 December 2017, Stephen Walsh, on behalf of Unex, wrote to HE as follows:

Under the Freedom of Information Act I would like to request the following information regarding Queensbury Lodge, Cottage and Stables at 196-198 High Street, Newmarket:

1. *Copies of all correspondence, including e-mails, between English Heritage/Historic England and Forest Heath District Council, regarding this site during the past 2 years.*
2. *Copies of any minutes of meetings of English Heritage's/Historic England's officers with officers of Forest Heath District Council at which this site was discussed during the past 2 years.*
3. *Copies of any notes of meetings of English Heritage's/Historic England's officers with officers of Forest Heath District Council at which this site was discussed during the past 2 years.*

4. *Copies of any file notes of conversations, including telephone conversations, between officers of English Heritage/Historic England and officers of Forest Heath District Council regarding this site during the past 2 years.*
5. *Copies of any minutes or notes or file notes of meetings or conversations between officers of English Heritage/Historic England regarding this site during the past 2 years.*
5. On 8 March 2018, HE responded, having processed the request under EIR rather than FOIA. HE provided some of the information requested but refused to provide the remainder, relying on EIR 12(3); 12(5)(d); 12(4)(d) and 12(4)(e).
6. On 9 April 2018, having carried out an internal review requested by Unex, HE responded, maintaining its position.

Complaint to Information Commissioner, and Decision Notice

7. On 2 July 2018, Unex complained to the Information Commissioner ('Commissioner') about the way the request for information had been handled.
8. During the course of the Commissioner's investigation, HE disclosed to Unex some of the withheld information outside the EIR regime. However, HE maintained its position that exceptions from disclosure applied to the remaining withheld information.
9. The Commissioner asked Unex to consider the additional information and advise whether it wished to proceed with its complaint. On 22 October 2018, Unex confirmed that it wanted to pursue its complaint, challenge the withholding or redaction of documents and HE's reliance on "third party personal data" in respect of certain information.
10. Having reviewed all the withheld information, the Commissioner wrote to Unex, setting out the nature of the information withheld as third party personal data. The Commissioner also advised Unex that information defined as 'out of scope' did not relate to the request and would therefore be excluded from her decision notice.
11. Unex did not advise the Commissioner that it wished to pursue these matters. The Commissioner therefore considered solely whether the information sought was environmental, and whether HE was entitled to rely on the exceptions it had cited to withhold the remaining information.
12. The Commissioner's Decision Notice dated 18 January 2019 gave reasons for her findings that the exceptions relied on by HE were indeed engaged, and that the public interest weighed in favour of maintaining those exceptions.

Appeal to Tribunal

13. On 5 February 2019, Unex appealed to the Tribunal.
14. The grounds of appeal were, in summary, that the Commissioner had:
 - a. Wrongly concluded that the information was 'environmental information', misinterpreted EIR in this respect and wrongly decided that EIR was the correct

regime for handling of the request (having misinterpreted and misapplied the Information Tribunal's decision in *Kirkaldie v Information Commissioner and Thanet District Council (EA/2006/001)*);

- b. Wrongly concluded that HE was entitled to rely on EIR 12(5)(d) 'Confidentiality of Proceedings' and wrongly judged the balance of the public interest;
- c. Wrongly concluded that information could be withheld under EIR 12(5)(b);
- d. Wrongly concluded that there was a public interest in maintaining a refusal to disclose internal communications under EIR 12(4)(e).

The Commissioner's response

15. The Commissioner's response dated 22 March 2019 submitted, in summary:

- a. She had correctly interpreted the EIR definition of 'environmental information', according to the Court of Appeal's judgement in *BEIS v IC and Henney [2017] EWCA Civ 844 ('Henney')*, and thus correctly concluded that EIR was the applicable regime;
- b. The requested information covers the pre-application planning process, and the development of a statement of common ground and Local Plan. Ongoing discussions about this amount to "proceedings", disclosure of which would adversely affect their confidentiality under the exception in EIR 12(5)(d);
- c. She had correctly judged the public interest balancing test: notwithstanding the presumption in favour of disclosure, confidentiality may be needed at certain stages of the planning process to ensure that proceedings are conducted as effectively as possible. The formal planning process allows for wider public involvement at the appropriate stage;
- d. The "course of justice" exception under EIR 12(5)(b) includes information attracting legal professional privilege. Withheld information in this case fell into the category of confidential legal advice from lawyers to their client;
- e. It was legitimate to conclude that the need for HE to have full and frank discussions without fear that disclosure would take place tipped the public interest balance in favour of withholding internal communications in this case.

Legal Framework

The European provisions

16. Council Directive 2003/4/EC on Public Access to Environmental Information ('the Directive') sets out a regime for public access to environmental information held by Public authorities in the Member States. It implements the United Nations Economic Commission for Europe's (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 ('Aarhus').

17. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and Aarhus. The first recital to the Directive states that: increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.
18. The recitals to Aarhus include: citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters ... improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.

What is “environmental information”?

19. EIR 2(1) closely follows Aarhus’s provisions by defining environmental information as information 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;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(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)... as well as measures or activities designed to protect those elements.

20. In ***Kirkaldie***, the Tribunal said:

14. The Tribunal finds that for the purposes of Regulation 2(c) EIR this [section 106 Town and Country Planning Act 1990] agreement was an “environmental agreement” under the Town and Country Planning Act 1990 and Local Government Act 1972. Entering into and extending such an agreement is the sort of measure envisaged by the rule which is “likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect these elements.” In particular the elements of the environment covered by the agreement are land, air and atmosphere and the factors covered are noise and emissions. Also noise and emissions could affect the state of human health and safety.

15. It follows that we find that the request is caught by the EIR and that it is not a request under FOIA as found by the IC [Commissioner]. It should be pointed out that where a request for information is made under FOIA there is an exemption under s.39

where the EIR apply, and the public authority is obliged to deal with the request under EIR...

21. In **Henney**, a recent decision by the Court of Appeal, which is binding on this Tribunal, the Court held that:

16. *It is well established that the term "environmental information" in the Directive is to be given a broad meaning and that the intention of the Community's legislature was to avoid giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities: see Case C-316/01 Glawischnig v Bundesminister für Sicherheit und Generationen...*

...

35. *...an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal...is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.*

37. *... There is an important difference between the definition of "information" in section 1(1) of FOIA and the definition of "environmental information" in section 2(1)(c) of the EIR. The former focuses on the information itself: see **Independent Parliamentary Standards Authority v Information Commissioner** [2015] EWCA Civ 388, [2015] 1 WLR 2879 at [35] – [36]. The latter also focuses on the relevant measure rather than solely on the nature of the information itself. It refers to "any information" "on ... (c) measures ... affecting or likely to affect the elements and factors referred to" in regulation 2(1)(a) and (b)" (emphasis added). It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".*

...

41 *...[an] approach [which] effectively introduces a requirement that the information in question is directly or immediately concerned with a measure which is likely to affect the environment... in effect precludes consideration of the context, which is contrary to the general principles of construction*

42. *Furthermore... it is possible for information to be "on" more than one measure... information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole..*

43. *It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned...It may be relevant to consider the*

purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself...[so] when identifying the measure, a tribunal should apply the definition in the EIR purposively... to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

Duty to make available environmental information on request – subject to exceptions

22. EIR 5 requires public authorities that hold environmental information to make it available on request as soon as possible and no later than 20 working days after receipt of the request.

23. EIR 12(1) provides that public authorities may refuse to disclose environmental information requested if an exception applies and if:

...
(b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

24. EIR 12(2) states that public authorities shall apply a presumption in favour of disclosure but subsequent paragraphs of that Regulation provide a number of exceptions. The exceptions relevant to this case are:

(4) ...a public authority may refuse to disclose information to the extent that—

...
(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

(e) the request involves the disclosure of internal communications.

(5) ...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;

...
(d) the confidentiality of proceedings of that or any other public authority where such confidentiality is provided by law;

...
The role of the Tribunal

25. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion

Was the requested information ‘environmental information’?

26. We consider the Commissioner was correct in law to conclude that the information requested by Unex falls within the EIR regime.
27. Following the case of *Henney* (and indeed the Tribunal’s decision in *Kirkaldie*) we have no difficulty in concluding that the definition of “environmental information” applied to Unex’s request because:
- a. It related to use and development of the Site. In our view, the Site clearly contributes to the landscape which, as the Commissioner’s guidance states, may be “...in any location and of any quality – urban or rural, attractive or ugly.” In this case, we believe it significant that the Site is located within a Conservation Area and that the buildings on it are listed. It was in this context that HE (statutory consultee on all aspects of the historic environment and heritage assets) was specifically considering the Site when communicating with the local planning authority, Forest Heath District Council (‘FHDC’) about the Local Plan, and pre-application discussions about the Site.
 - b. We consider use and development of the Site as activities likely to affect the state of the land, soil, air and atmosphere (all elements referred to in EIR 2(1)(a)); and likely to affect the elements of the environment due to noise and waste (factors referred to in EIR 2(1)(b)); and hence such activities are a “measure” under EIR 2(1)(c).
 - c. We believe the information sought is “on” this measure because it relates to, or is concerned with, that measure.
28. We note that – as the Tribunal pointed out in *Kirkaldie* - section 39 FOIA obliges a public authority to treat a request for information as falling under the EIR regime if the material sought is environmental information. We observe that, from the requester’s point of view, such treatment is advantageous because – in contrast to the FOIA regime – under EIR:
- a. There is a presumption in favour of disclosure;
 - b. EIR exceptions from disclosure are more restrictive than the equivalent exemptions under FOIA;
 - c. There are no time or cost caps which would entitle the public authority to refuse a request on the grounds that it would be too time-consuming and thus expensive to respond to it.

Does the exception in EIR 12(5)(d) – Confidentiality of Proceedings – apply?

29. On the evidence before us, we find on the balance of probabilities that there were “proceedings” in this case. These proceedings comprised meetings (and notes and minutes of them) as well as other discussions to consider matters that are within HE’s

jurisdiction. HE was, with FHDC, developing a statement of common ground for the planning inspector when considering the Local Plan in relation to the Site.

30. It is not disputed that HE is a statutory consultee as regards the Local Plan process, and local authorities are required to consult HE about the historic environment and heritage assets such as the Property in this case.
31. We also accept evidence that it is deemed good practice for HE to be consulted on pre-application discussions where a listed building will be affected.
32. Unex argues that these activities were not “proceedings”, did not involve statutory decision-making or other formality, nor were they confidential or likely to be adversely affected by disclosure. Unex gives no reasons for these assertions.
33. We consider that, even if HE’s statutory decision-making powers were not engaged, the discussions, meetings and communications between HE and FHDC fall within HE’s statutory remit, and involved a degree of formality such as to qualify as “proceedings” for the purposes of EIR 12(5)(d) according to the Commissioner’s published guidance.
34. On the basis that it is the confidentiality of the *proceedings*, rather than confidentiality of the information, which must be considered (see *Chichester District Council v. Information Commissioner & Friel UKUT 491 (AAC)*) we also regard these discussions, meetings and communications as being confidential under common law. We reach this conclusion because we find they all took place in the context of two public authorities seeking to establish a common position which, once agreed, could be (and in fact was) released into the public domain and thereafter subject to challenge. Before that time, however, we consider it legitimate for public authorities to conduct confidentially their discussions about a Local Plan, and pre-application matters.
35. Having reached this conclusion, we also accept the Commissioner’s submissions that such confidentiality would – on the balance of probabilities – for the reasons she states be adversely affected were the proceedings to be disclosed before the stage when the outcome would, in any event be released for public scrutiny and challenge.
36. Unex also argues that the Commissioner was wrong to exercise her discretion in judging the public interest balance lay in favour of disclosure rather than withholding information about these proceedings. Again, Unex gives no reasons for taking this position save for stressing the statutory presumption in favour of disclosure.
37. The Commissioner clearly took into account that presumption, but still found the public interest weighed in favour of the exception. The Commissioner noted that, in favour of disclosure were transparency, accountability and openness. The Commissioner accepted that disclosure of the information would shed light on HE’s decision-making process.
38. On the other hand, the Commissioner found that in favour of withholding the information were the ongoing nature of the discussions, and the need for organisations and authorities to be able to communicate with each other freely and frankly to achieve the best possible outcome before the process is complete.

39. Applying the Commissioner’s own published guidance that there is a general public interest in protecting confidential information, and not undermining the trust between confider and confidant, the Commissioner found that weight must be placed on the ability of authorities to be able to carry out all aspects of the Local Plan adoption process effectively. This may require confidentiality at certain stages of the Local Plan process – which Plan is, however, open to wider public involvement at the appropriate stage.
40. We agree with the Commissioner’s conclusion that, on balance, there is a weightier public interest in protecting the confidentiality of proceedings by withholding the information than public interest in releasing the information.
41. Having carefully reviewed all the withheld information, we are satisfied that the Commissioner correctly applied the relevant exception. Unex has not satisfied us that the Commissioner should have exercised her discretion differently when applying the public interest test to the exception in EIR 12(5)(d).

Does EIR 12(5)(b) – the course of justice exception – apply?

42. Unex asserts that the Commissioner was wrong to conclude that information could be withheld under EIR 12(5)(b) because neither the ability to receive a fair trial nor the ability of a public authority to conduct a criminal or disciplinary inquiry apply to the information requested.
43. However, as the Commissioner points out, the exception in EIR 12(5)(b) includes also “the course of justice”. This issue was considered by the Upper Tribunal in ***DCLG v IC and WR (2012) UKUT 103 (AAC)***, where it was accepted that:

“...the course of justice includes in the case of the UK the particular strength and scope of legal professional privilege (LPP)...[and thus] the effects on the administration of justice generally by reason of a weakening of confidence in the efficacy of LPP which a direction for disclosure...would involve...”

44. The Commissioner considered that, in this case, “legal advice privilege” applies, namely confidential communications between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. In such cases, there is no need for such advice to relate to proposed or contemplated litigation.
45. Having viewed the withheld information, the Commissioner was satisfied that it falls within the scope of legal advice privilege and that EIR 12(5)(b) is engaged because disclosure of the information requested would adversely affect the course of justice.
46. We note the Upper Tribunal’s acceptance in ***DCLG v. IC and WR*** of a submission that it is irrelevant that, in some European countries, the concept of LPP may not extend to advice given by in-house advisers. We have ourselves read the withheld information in this case – and satisfied ourselves that legal advice was given by HE’s legal adviser, and that EIR 12(5)(b) was indeed engaged in respect of the information withheld under this exception.

47. Unex has not satisfied us that the Commissioner was wrong in law to find that EIR 12(5)(b) was engaged in relation to certain of the information withheld.
48. Having found EIR 12(5)(b) was engaged, the Commissioner went on to consider the public interest test in relation to disclosure of this information. She noted that the public interest favours disclosure by public authorities, like HE, so that its work as an advisory body is transparent. However, she regarded the disclosure of legal advice has “high potential to prejudice its ability to defend its legal interests”.
49. In balancing these opposing interests, the Commissioner noted the statutory presumption in favour of disclosure, and the public interest in accountability and transparency. However, she also took into account – in this case – that the matter remains live, the general public interest in maintaining legal advice “will always be strong due to the importance of the principle behind LPP...which is fundamental to the administration of justice”. Overall, the Commissioner concluded that the balance of the public interest weighed in favour of maintaining the exception, and that HE was entitled to rely on EIR 12(5)(b) to withhold the information.
50. We agree with the Commissioner’s conclusion that, on balance in this case, the public interest in disclosing privileged legal advice is outweighed by the public interest in maintaining confidence in, and the confidentiality of, LPP and thus its efficacy in the administration of justice.
51. We have carefully reviewed all the withheld information - and noted the absence of any reasons by Unex for asserting that the Commissioner erred.
52. Overall, Unex has not satisfied us that the Commissioner should have exercised her discretion differently when applying the public interest test to the exception in EIR 12(5)(b).

Should the Commissioner have exercised her discretion differently in finding the public interest weighed in favour of EIR 12(4)(e) – the internal communications exception?

53. Unex does not challenge the Commissioner’s finding that EIR 12(4)(e) is engaged. However, Unex claims that the Commissioner was wrong to conclude that there is a public interest in withholding information in this case by reason of the ‘internal communications’ exception.
54. The Commissioner noted that the public interest arguments favouring disclosure include transparency, allaying concerns that public funds may have been used inappropriately and enabling authorities’ actions and decisions to be understood and open to scrutiny.
55. On the other hand, the Commissioner took account of public interest considerations relating to internal communications such as the protection of thinking space, and the ability to hold full and frank discussions without fear that such information will be disclosed, thus undermining the confidentiality of such discussions.
56. In weighing these competing public interests, the Commissioner recognised the statutory presumption in favour of disclosure, and that there is no automatic or inherent public interest in withholding internal communication: the particular circumstances of the case,

and the content and sensitivity of the specific information in question, should be considered.

57. Applying the Commissioner's own published guidance, she concluded that in this case, the public interest in maintaining the exception (and thus withholding the information) outweighed the public interest in disclosure due to the need for HE to have private thinking space without fear that disclosure would take place.
58. Again having carefully reviewed all the withheld information - and noting the absence of any countervailing argument on this issue - Unex has not satisfied us that the Commissioner should have exercised her discretion differently when applying the public interest test to this exception in EIR 12(4)(e).

Conclusions

59. For the above reasons, our answers to the questions posed at paragraph 3 above are:

Question 1: yes, the Commissioner was correct in law to conclude that the information which Unex requested is "environmental information" and thus falls within the EIR regime rather than FOIA.

Question 2: yes, the Commissioner was correct in law to determine that the information withheld by HE falls within the exceptions to the duty to disclose under EIR.

Question 3: no, the Commissioner should not have exercised her discretion differently so as to find the balance of the public interest favoured disclosure rather than maintaining the exceptions.

60. Consequently, this appeal is dismissed.

Other observations

61. We consider that, in addition to the exceptions referred to by the Commissioner, some of the withheld information also engaged exception EIR 12(4)(d) – namely unfinished documents, including drafts.
62. We wish to add that, having read in detail all the papers in this case, we consider that HE took very seriously its responsibilities when considering Unex's request for information. In our view, HE carefully conducted the disclosure process according to statute.
63. We also observe that HE was not only diligent in complying with its statutory obligations but was also thorough when identifying material which was potentially relevant, and then assessing what should be disclosed and what withheld under EIR.
64. Though Unex may have been suspicious about extensive redactions in the case of some of the disclosed documents, having reviewed ourselves the withheld information we found that the redacted material was either irrelevant, comprised personal data or - for the reasons given above - fell within EIR exceptions cited by the Commissioner.

ALEXANDRA MARKS CBE

(First Tier Tribunal Judge)

DATE OF DECISION: 24 June 2019

DATE PROMULGATED: 27 June 2019