IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2019/0143**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

BETWEEN

ALAN TIPPING

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

Heard in Belfast: 29th August 2019

Date of Decision: 8 October 2019.

Before

Brian Kennedy QC

Jean Nelson

Mike Jones

Introduction

1. This decision relates to an appeal brought under Regulation 18 of the Environmental Information Regulations 2004 ('EIR') and section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 20 March 2019 (reference FER0709077).

2. The Tribunal Judge Brian Kennedy QC and lay members Jean Nelson and Mike Jones sat to consider this case on 29th August 2019.

Factual Background to this Appeal:

3. Full details of the background to this appeal, the request for information and the Commissioner's decision are set out in the Decision Notice ("DN"), a matter of Public Record, and the appeal concerns the question of whether Ards and North Down Borough Council ("the Council") was correct to refuse disclosure of the request information under Regulation 12(5)(b) of the Environmental Information Regulations.

CHRONOLOGY

18 May 2017	Request for minutes of specific meetings in 2015 and 2016
14 June 2017	Council discloses some information and withholds the rest, citing EIR reg.13 and the Health and Safety at Work (NI) Order 1978
25 Aug 2017	Appellant requests internal review
7 Sept 2017	Internal review refuses disclosure
2 Nov 2017	Appellant complains to the Commissioner
14 June 2018	Commissioner remits matter to Council, advising that the Health and Safety legislation was no bar to disclosure
16 July 2018	Council refuses disclosure, citing EIR reg.12(5)(f)
22 July 2018	Appellant requests internal review
1 Aug 2018	Council reaffirms reliance on reg.12(5)(f) and adds reg.12(5)(b)
13 Aug 2018	Appellant complains to the Commissioner
20 March 2019	Decision notice upholding refusal of disclosure

RELEVANT LEGISLATION

Environmental Information Regulations 2004

Reg. 11 - Representations and reconsideration

(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

(3) The public authority shall on receipt of the representations and free of charge—

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.

(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

(a) the failure to comply;

(b) the action the authority has decided to take to comply with the requirement; and

(c) the period within which that action is to be taken.

Reg.12. Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if

(a) an exception to disclosure applies under paragraphs (4) or (5); and

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

(2) A public authority shall apply a presumption in favour of disclosure.

(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.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

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

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

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;

(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;

(c) intellectual property rights;

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

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Reg.14. Refusal to disclose information

(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) The refusal shall specify the reasons not to disclose the information requested, including:

(a) any exception relied on under regulations 12(4), 12(5) or 13; and

(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

(5) The refusal shall inform the applicant:

(a) that he may make representations to the public authority under regulation 11; and

(b) of the enforcement and appeal provisions of the Act applied by regulation 18.

COMMISSIONER'S DECISION NOTICE

4. The Commissioner confirmed that the request fell under EIR, and the relevant time frame for the consideration of the request as of 14 June 2018. The Appellant stated that the disputed information related to a meeting on 5th May 2016 between a local golf club, its consultants, and Council Environmental Health officers in regards to a planning application that had been completed. The Council stated that the purpose of the meeting was to address and resolve health and safety concerns without having to proceed to formal enforcement action, and at the time of the submissions to the Commissioner in January 2019, the agreed remedial works on the golf club had not been completed. It stated that it considered that the investigation into health and safety compliance would not be completed until such times as the works were completed to the Council's satisfaction. The Appellant disputed this, stating that the works were now completed and the exemption would no longer apply.

5. Material that is no longer subject to legal professional privilege ('LPP') can still fall within the exemption at reg.12(5)(b), providing that disclosure would adversely affect the course of justice, the ability of person to receive a fair trial or the ability of the authority to conduct an inquiry of a criminal or disciplinary nature. This was affirmed in *Surrey Heath Borough Council v Kevin McCullen and ICO* EA/2010/0034, and the Commissioner considered that this covered investigations into potential breaches of legislation, including planning and environmental law.

6. The Council sent a copy of the disputed information to the Commissioner, who confirmed that at the time of the request, the works and health and safety investigation was still live and formal enforcement action was a *"real prospect"*. Final planning permission was not granted until August 2018, so at the time of the request the matter was still live and under investigation.

7. Considering then any adverse impact, the Council claimed that the golf club attended the meeting voluntarily and engaged frankly. It stated that disclosure of this material would discourage the co-operativeness of persons under investigation both in this instance and for future investigations. The Commissioner accepted that disclosure would have discouraged the golf club from participating so frankly, and would hinder the Council's investigations in future cases. Regulation 12(5)(b) was therefore engaged.

8. The public interest, the Commissioner considered, lay in maintaining the exception to ensure that public authorities were able to conduct investigations free from outside interference. She did, however, concede that there were compelling factors in the Appellant's argument, namely that the development of the golf club was of great interest to and had a great impact on local residents, who should be able to understand and scrutinise Council decisions that affect them. Nevertheless, the fact that at the time of the request the matter was still live, along with the more general considerations of ensuring continuing co-operation with investigations, tipped the balance in favour of refusing disclosure under reg.12 (5)(b). There was no need then to consider reg.12 (5)(f).

9. The Commissioner did note that the Council breached reg.14 (2) and (3) in failing to respond to the initial request within 20 working days and to specify a valid exception. Given that the wrong legislation was considered initially, it also breached reg.11 (3) in failing to conduct a proper internal review.

GROUNDS OF APPEAL

10. The Appellant had two broad grounds of appeal:

    i. The minutes do not concern an investigation into potential breaches of law, but rather are the record of the Environmental Services conducting their legal duty to respond to an extant planning application; and

    ii. The Council should not be permitted to rely on reg.12 (5)(b) to cover up its failings.

11. The Appellant explained that the golf club had begun works in October 2014 to construct a new tee close to local residents' properties, and then applied for retrospective planning permission. Despite numerous objections from the residents, neither the Council's Planning Service nor Environmental Service took action *"to prevent serious and sustained damage to property"*. After a year, Environmental Service officers inspected the tee and declared it unsafe, triggering a health and safety review. The Appellant took issue with the description of the golf club's co-operation as 'voluntary', arguing that it had *"little or no choice in the matter"*. The location of the tee and safety issues has still not been resolved to the satisfaction of the residents, but the new tee has been awarded planning permission. The Appellant and other residents want to see the minutes to discern why the decision was made, seemingly in the

knowledge of expert assessments that the site was unsafe. The Appellant explained that he believed that the minutes would show that there was insufficient consideration of the original tee.

COMMISSIONER'S RESPONSE

12. The Commissioner reiterated her belief that, having considered the material, it constituted information that would, if disclosed, adversely affect the course of justice. She is satisfied that the meeting was as the Council described, namely in furtherance of an investigation into health and safety compliance, a matter which was still live at the time of the determination of the request in June 2018. She confirmed that, in her view, disclosure would adversely affect future cooperation with the Council on such matters, and disclosure was not in the public interest.

APPELLANT'S REPLY

13. The Appellant clarified some aspects of the chronology, and stated that to his knowledge the meeting of 5 May 2016 was *"to discuss the outworking"* of a report that had been prepared by the golf club's consultants following the Environmental Services inspection of October 2015. He provided to the Tribunal an email from the Council on 2 May 2016 in anticipation of the meeting, which stated *"minutes, submitted technical documents and correspondence will be made available...upon request once our investigation has concluded"*. The report was disclosed to residents, but it caused them great concern about the balance and accuracy of the conclusions. The minutes have still been withheld. The planning application, to which that report referred was withdrawn, and has since been superseded by a new application. The minutes of the meeting refer to a plan for a tee that is no longer being proposed, and the new plans had been endorsed in February 2018. The previous application was therefore defunct by the time of consideration of the request in June 2018.

TRIBUNAL HEARING

14. At hearing, the Appellant attended with Dr John McCammond, witness and fellow affected resident. The Commissioner was not represented.

15. The Appellant and his witness outlined their belief that the decision to move the tee from its original location had never been properly investigated, and therefore reg.12 (5)(b) could not apply. The Council's operations were not of a criminal or disciplinary nature, and in any event the planning application to which the report referred was defunct at the time of the request and all documents relating to the concluded planning process are in the public domain. In any event, there is no evidence that the Council's investigation of the club's proposal's was in any way sufficient enough to render it a serious investigation of the matters in hand, and as such reg.12 (5)(b) should not be used as a shield to conceal ineptitude.

TRIBUNAL CONCLUSIONS

16. The information sought falls within the definition of environmental information. In order to avail of reg.12 (5)(b), we need to be satisfied that the information in question would adversely affect the course of justice or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The minutes are of a meeting conducted in furtherance of linked investigations into planning permission and health and safety pertaining to the first tee of the golf club. At the time of the remission of the request in June 2018, the planning application that was live at the time of the meeting had been withdrawn, and the Appellant informs us that a new application had been granted the previous February, although the Council told the Commissioner that the final approval was not granted until August 2018. We consider that while the original application had been withdrawn, the application that replaced it dealt with the same subject, and the Council states that the planning process had not been concluded in June 2018.

17. The Council also states that the related health and safety investigations were also live in June 2018, and that it was working with the golf club to avoid launching formal enforcement proceedings. These, we assume, would be Improvement or Prohibition Notices pursuant to Articles 22 and 23 of the Health and Safety at Work (NI) Order 1978. Failure to abide with these notices, or to discharge any other duty under the 1978 Order, could constitute criminal offences. While there was no intention to launch formal proceedings either at the time of the meeting or at the time of the remitted request, there was a process underway that could lead to formal censure by the Council by way of Notices or potentially criminal proceedings.

18. The concept of the course of justice was clarified by the Court of Appeal in *R v Selvage and Morgan* [1982] 1 All ER 96 at 103: *"a course of justice must have been embarked*

on in the sense that proceedings of some kind are in being or are imminent or investigations which could or might bring proceedings about are in progress". It is clear in this case that the health and safety investigations were still on going in June 2018, and could foreseeably lead to enforcement proceedings.

19. The Council need to show that disclosure of the material *would* adversely affect this process of investigation and enforcement. This means that an adverse impact would be more probable than not. The Council has said that disclosure would have had a chilling effect on the golf club's willingness to cooperate with the investigation. We have not seen any evidence from the golf club that it would have held back if it contemplated, that minutes would subsequently be disclosed. We have not seen any evidence from the Council that would support or explain this bare assertion. We bear in mind the caution urged by Charles J in *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC), [2017] AACR 30 when a 'chilling effect' argument is raised. The *Lewis* case concerned this argument being raised in regards to civil or public servants having policy discussions, but we consider that the principle about the need to evidence such claims applies more widely. When this argument is raised, it must be evidenced.

20. It is worth noting at this stage that the Appellant produced an email from the Council, which assured him that the minutes of that meeting would be made available at the conclusion of the investigation. It was clear at that stage that the Council did not anticipate that the meeting would touch on anything that could cause a 'chilling effect' if released to the public. The argument that disclosure would limit cooperation with the investigation must also be weighed against the Appellant's point that cooperation was in the club's best interests to avoid formal enforcement proceedings. However, from examining the disputed information in the Closed Bundle, we consider that the degree of the engagement could potentially have been limited if the participants (especially from the golf club) thought that their discussions would be made public. Whilst disclosure of the material would be to the world at large and information requests are blind to both applicant and purpose, we are of the view that seeing the material would not assist the Appellant in his investigations of the quality of the Environmental Services consideration of this matter.

21. For the reasons outlined above, we refuse the appeal and uphold the decision of the Commissioner.

Brian Kennedy QC 21 October 2019.