



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number **EA/2007/0069**

Information Commissioner's number **FER0086093**

Determined on Papers
On: 21 July 2008

Decision Promulgated
22 July 2008

BEFORE

DEPUTY CHAIRMAN

Peter Marquand
and

LAY MEMBERS

Marion Saunders
Tony Stoller

BETWEEN

DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT

Appellant

AND

THE INFORMATION COMMISSIONER

Respondent

Representations:

For the Appellant: **James Eadie QC, Counsel**

For the Respondent **Miss Jane Oldham, Counsel**

DECISION

The Tribunal unanimously allows this appeal.

Reasons for Decision

Summary Background

1. This appeal concerns a request for information surrounding a planning application. The Information Commissioner agreed with the submissions of the Appellant, the Department for Communities and Local Government (DCLG), but this appeal should be allowed.

Background

2. The Applicant for Information (“the Complainant”) wrote to DCLG requesting certain information that related to a decision to refer a planning application to the Secretary of State. The Complainant’s request for information was dated 22nd April 2005. DCLG refused to disclose the material requested in a letter dated 23rd May 2005 relying upon Regulation 12(4)(e) of the Environmental Information Regulations 2004 (EIR). That Regulation provides an exception from the obligation to disclose environmental information for internal communications.
3. The Applicant requested a review of that decision on 8th June 2005 and this was completed by DCLG on 4th August 2005. It upheld the original decision and the DCLG again refused to disclose the information requested. On 5th August 2005 the Applicant complained to the Information Commissioner. On 10th May 2006 the Secretary of State determined the planning application.

The Decision Notice

4. The Decision Notice was issued by the Commissioner, dated 25th June 2007. The Commissioner agreed with DCLG that the exception in EIR 12(4)(e) was the correct one and therefore engaged and as required, went on to consider the public interest test of whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The conclusions of the Commissioner are in paragraphs 20-21 as follows:

“20. The Commissioner agrees that the public interest in maintaining the exemption outweighed the public interest in disclosing the draft submission, final submission and pro-forma until the Secretary of State had reached a decision on the planning application.

21. However, the Commissioner considers that, once the Secretary of State's decision had been taken, the public interest in maintaining the exemption no longer outweighed the public interest in releasing the information contained in the draft and final submissions and pro-forma and that this information should now be released to the Complainant."

The Decision Notice required DCLG to provide the Complainant with the information.

The Appeal to the Tribunal

5. DCLG's Notice of Appeal was dated 24th July 2007 and including various grounds of appeal. However, the last ground was as follows:

"The Commissioner had no jurisdiction to determine that the information should be released in the circumstances in which he had held the information was exempt from disclosure at the relevant date, namely the date of the request."

6. In the Commissioner's reply dated 5th September 2007 the appeal was opposed, but the Commissioner served an amended reply dated 25th September 2007. The Commissioner conceded that he should have determined the complaint by reference to the date of the request or a date at least around that time.
7. The Tribunal held a Case Management Conference involving the Commissioner and DCLG. The conclusion of that hearing was that the Complainant should be given an opportunity to decide whether or not he wished to become involved in the Appeal, given that the Commissioner had now conceded the position. Accordingly, both the Tribunal and the Information Commissioner wrote to the Complainant. However, the Complainant did not apply to become joined to the proceedings and therefore has played no part in them.
8. The Tribunal has noted that there is no procedure within the Rules to deal with any appeal "by consent" and therefore the parties were required by a subsequent order to provide their written submissions and the Tribunal has determined this matter on the papers.

The relevant law

9. Regulation 5(1) states that:

“... a public authority that holds environmental information shall make it available on request.”

Regulation 12 provides various exceptions to that obligation to disclose information to an applicant. Those exceptions are set out in Regulation 12(4) and (5). Regulation 12(4) states as follows:

“.. a public authority may refuse to disclose information to the extent that –

...

(e) request involved the disclosure of internal communications”.

However, Regulation 12(1) requires the public interest test to be applied in addition before the exception can be claimed and this is:

“A public authority may refused 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.”

10. Regulation 18 of EIR incorporates the enforcement and appeal provisions of the Freedom of Information Act (FOIA), which are set out in section 50 and 58 of that Act. Section 50 states:

“(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Parts 2 and 3 of [EIR]”.

Part 2 includes the right to information on request and Part 3 includes the exceptions.

Section 58 includes the Tribunal’s jurisdiction and is as follows:

“(1) If, on an appeal under section 57 the Tribunal considers

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(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involves an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The Parties' submissions

11. The DCLG submitted that the obligation to provide information applies and is to be judged by reference to the decision at or around the date of the request for information. Referring to the provisions in FOIA, DCLG submitted that the reference in section 1(4) indicated that the information subject to the right of disclosure was "held at the time when the request is received" and that any public interest balancing test has to be done before a decision is reached and is based on the factors that exist at that time. The Commissioner's function and jurisdiction is then retrospective as is shown by the words "has been dealt with": see section 50 FOIA. Regulation 5(1) is materially identical to section 1(4) FOIA in requiring a public authority to provide environmental information that it "holds". Regulation 12 EIR requires the public interest test and Regulation 18 applies enforcement provisions, which are again therefore retrospective.
12. The DCLG referred to three previous Tribunal cases namely DFES v. The Information Commissioner and the Evening Standard, EA/2006/06 (19th February 2007), Guardian Newspapers and Brookes v. The Information Commissioner EA/2006/0010 and Department for Trade and Industry v. The Information Commissioner EA/2006/007. All of these cases referring to competing public interests being assessed at around the time when the request is considered by the public authority.
13. The Information Commissioner accepted that he should have determined the complaint by reference to the date of the request or a date at least around

that time. However, the Commissioner also sought to address the Tribunal on whether this time should be extended to include the completion of any internal review by the public authority. The DCLG did not have an opportunity to respond to those submissions, and the Tribunal does not find it necessary or desirable to address this issue in this Decision. As a matter of fact in this case it is not an issue because in the Decision Notice the Commissioner found that the public interest balance did not change until the Secretary of State's decision was made, but both the original request and the review by DCLG had already occurred by that time. The Tribunal does not think it is sensible to consider this argument in what would be a hypothetical situation and also in the absence of considered argument.

Discussion

14. Notwithstanding the agreement between the Commissioner and DCLG, the Tribunal has considered this issue carefully. It is the Tribunal's conclusion that the wording of section 50 is clear in that the Commissioner's remit is to consider whether the public authority has correctly applied the requirements of EIR. The reference to whether the request "has been dealt with" seems to us plain in that it refers back to the time of the request and decision to disclose (or not to disclose). This also makes sense as there needs to be a degree of certainty for any public authority and for any subsequent appeal. The Tribunal's jurisdiction also starts with the Decision Notice of the Commissioner. Although section 58 allows the Tribunal to review any finding of fact and is therefore not limited to the material that was before the Commissioner, again in the Tribunal's view, what is relevant are the facts in existence at the time the decision on whether or not to disclose.

SUMMARY

For the reasons given above, the Tribunal unanimously allows this appeal.

Signed:

Peter Marquand
Deputy Chairman

Dated: 22 July 2008

SUBSTITUTED DECISION NOTICE

The Tribunal allows the appeal in full and substitutes the following Decision Notice in place of the Decision Notice dated 25th June 2008

**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000
AND ENVIRONMENTAL INFORMATION REGULATIONS 2004**

INFORMATION TRIBUNAL APPEAL No: EA/2007/0069
SUBSTITUTED DECISION NOTICE

Dated: 21 July 2008

Public authority: Department for Communities and Local
Government
Elland House
Bressington Place
London SE1E 5BU

Name of Complainant: Mr K Humphries

Substitute Decision:

For the reasons set out in the Tribunal's Decision, the substituted decision is that The DCLG had complied with the requirement of the Environmental Information Regulation in relying upon the exception in Regulation 12(4)(e).

Action required

No action is required from DCLG.

Signed:

Peter Marquand
Deputy Chairman

Date: 22 July 2008