



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0216P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 11 January 2021**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
Mr Paul Taylor

Between

Keith Sullens

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 92 and a closed bundle.

THE REQUEST AND RESPONSE

4. The case concerns a request for information from the Appellant to the Mid Sussex District Council Borough Council of Wellingborough ("the Council") about the decision-making process which led to the selection of certain land sites for development.
5. On 17 September 2019, the Appellant wrote to the Council and requested a range of information relating to the decision to select certain sites in the region for development. The request comprises multiple parts and is reproduced in full at the annex to the Commissioner's decision notice FER0903369.
6. The Council responded on 10 October 2019 and disclosed some information. On 14 October 2019 the Appellant submitted a supplementary request for "...all minutes, correspondence, notes or discussions or site visits etc relating to the working group and its decision-making process."
7. On 15 November 2019 the Council initially invoked s.36 FOIA to claim exemption from disclosing the information and confirmed this on review

on 5 December 2019. Following the Appellant contacting the Commissioner on 16 January 2020 about the request, the Commissioner communicated with the Council who in turn confirmed that it was in fact relying on regulation 12(4)(e) EIR as the basis for withholding the information, and it is not now disputed that the request concerns environmental information as defined by reg 2(1)(c) EIR.

THE LAW

8. The EIR implement Directive 2003/4/EC on public access to environmental information (the Directive). The Directive includes the following two Recitals:-

Recognising that, in the field of the environment, 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,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment...

9. Reg 5 EIR provides for a specific duty to make environmental information available on request. There are exceptions to this general duty. The relevant exception in this matter is set out in regulation 12(4)(e) EIR which states:-

12 (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
(e) the request involves the disclosure of internal communications.

10. The rationale which underpins the reg12(4)(e) EIR exception is illustrated by the European Commission's proposal document in relation to Directive 2003/4 (COM/2000/0402 final). It states:

“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns ... internal communications”.

11. The definition of ‘internal communications’ is broad, covering all communications made within one public authority. In order to engage the exception all that is required to be shown is that requested information falls into the category defined by the exception. However, the exception is subject to a public interest test (reg 12(1)(b) EIR), and the EIR also requires authorities to apply a presumption in favour of disclosing information (reg 12(2) EIR).

THE DECISION NOTICE

12. The Commissioner considered the case in a decision notice dated 8 June 2020. The Commissioner set out what she had been told by the Council as follows:-

24. The council explained that it is in the process of preparing a Site Allocations Development Plan Document (DPD), with the aim of allocating sites for dwellings.

25. It confirmed that the formal governance, in accordance with the council’s Constitution is a Cross Party Member Working Group and oversight by a Scrutiny Committee with decision making by full council. The council explained that the Scrutiny Committees and the council are formally constituted and the meetings are held in public. It confirmed that the Scrutiny Committee has debated the methodology, site selection process, draft Sites DPD and the response to consultation. The council explained that it has also debated the Regulation 19 Sites DPD. And that the final decision on the Regulations 19 draft Sites DPD is to be made by full council in July.

26. The council explained that the Scrutiny Committee agreed to establish the Site Allocations Member Working Group (the

“Working Group”), comprising 9 Members drawn from across the district. It confirmed that the role of the working group, was to advise the Scrutiny Committee on the content and direction of the DPD, consider the evidence base, and report back to the Scrutiny Committee.

27. The withheld information consists of a number of detailed meeting agendas produced by/for the Working Group.

13. On the basis of this information the Commissioner concluded that the exception in reg 12(4)(e) EIR was engaged, and therefore the public interest test should be considered to ascertain whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information, bearing in mind the presumption in favour of disclosure.

14. In favour of disclosure the Commissioner listed general public interest factors such as transparency and accountability, particularly where, as in this case, decisions made by public authorities are likely to have a significant environmental impact on a local community. The Commissioner set out the Appellant’s specific concerns as follows:-

34. The complainant has argued that the Working Group was disbanded in September 2019 and that its recommendations were made and accepted by the Scrutiny Committee and the full council. The complainant, therefore, argues that the Working Group’s work has concluded and that it no longer needs a safe space for deliberation as it no longer exists and it is not deliberating.

34. The complainant has further voiced concerns that the Working Group may have acted improperly at one of its meetings and argued that disclosure would promote scrutiny of these genuine misgivings about the council’s governance and practice.

15. Against this the Council told the Commissioner that:-

36... the DPD process is still in progress. The Regulation 19 document has not yet been signed-off by council. Releasing confidential discussions about the merits and demerits of sites, which were made before due diligence and final evidence base confirmed would put the Sites DPD at risk, which is not in the public interest.

37. The council confirmed that the Working Group only carried out their work in the full knowledge that its discussions would remain confidential and this was emphasised at every stage of the process. The council has stated that the Working Group would only be effective if the detailed discussions remained confidential due to the type of information (including commercially sensitive information) that they were party to.

38. The council clarified that the Working Group are not the decision-making body in this context and that its deliberations were subject to further due diligence, evidence testing, and formal debate at the Scrutiny Committee and council. It confirmed that the meetings and papers for these are all in the public domain.

39. The council has argued that releasing the deliberations of this Working Group could mislead stakeholders including promoters/developers and residents. Of particular risk, the council has identified, is developers reading too much into the discussions and submitting a speculative planning application for their site. The council considers that this would result in it being subject to determination and potential appeal cost, something which would not be in the public interest.

16. In considering the case the Commissioner accepted that, despite the ever present public interest in transparency and accountability:-

43.... a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.

17. The Commissioner had been told that a final decision in relation to the DPD had not been made at the time of the request and therefore decided that the need to maintain the safe space gave more weight to the argument

for maintaining the exception. She also noted that she had been told that 'all information related to final decision making (such as site proformas including non-confidential information, full evidence base and Topic Papers/Documents setting out the methodology and site selection approach) are in the public domain and have been scrutinised in public'. The Commissioner said that she had no direct evidence to support the Appellant's concerns about the integrity of the process followed by the Council.

18. The Commissioner decided that the public interest was currently weighted in favour of maintaining the exception.

THE APPEAL

19. The Appellant's appeal is quite a discursive document setting out the issue with which he is concerned in some detail. The Appellant comments that he had been expecting to have had an opportunity to respond to information the Commissioner had received from the Council before the decision notice was finalised but was not afforded such an opportunity.
20. The manner in which the Commissioner chooses to investigate complaints is beyond our jurisdiction. However, we would comment that it would seem sensible for the Commissioner to seek the views of Appellants on information received from a public authority before finalising a decision notice, unless there is a specific reason why this cannot or should not be done.
21. The Appellant recognises that he can raise his points before the Tribunal and that is what he has done.

22. In the Commissioner's response to the appeal, she has distilled a number of points from the Appellant's appeal document. The Commissioner comments that the primary focus of the appeal is whether it is in the public interest to disclose the documents sought. We adopt the Commissioner's description of the appeal points and the Appellant has not taken issue with the description (although he does disagree with the Commissioner's arguments in relation to the appeal). The appeal points are described as follows:-

- (a) The Commissioner did not consider the fact that the Working Group's decision-making process was potentially unsound.
- (b) The Commissioner should not have placed any weight on the Council's 'chilling effect' argument.
- (c) As the Working Group disbanded in September 2019, the issues it addressed were no longer 'live' at the time of the request.
- (d) Disclosure of the withheld information would shed light on allegations of possible conflicts of interest.
- (e) The Council has not released into the public domain all information relating to the Working Group's decision-making process.
- (f) The Commissioner should not have placed any weight on the possibility that disclosure of the withheld material would provoke costly and time-consuming speculative planning applications.

23. The Commissioner's Response to the appeal provides a detailed explanation of the Commissioner's position in relation to the points made by the Appellant which is more detailed than that included in the decision

notice. The Respondent has replied in writing to the points made, and we have interpolated his comments as we move through the arguments.

24. The Commissioner begins by explaining in more detail about the Council's decision-making process, and we have drawn on that description below.
25. As part of the process of preparing a Site Allocations Development Plan Document (Sites DPD), which would locate housing development sites, the decision-making procedure and the decisions on which sites are selected are overseen by a Scrutiny Committee which meets in public.
26. The Scrutiny Committee established a Site Allocations Member Working Group (the Working Group), with nine Council members, to advise the Scrutiny Committee on the content and direction of the Sites DPD, consider the evidence base, and report back to Scrutiny Committee. It appears to be common ground that the Working Group disbanded in September 2019, having delivered its recommendations to the Scrutiny Committee.
27. Once the Scrutiny Committee's recommendations are then made to the full Council the ultimate decision is taken by way of the following procedure. The Council adopts a draft Sites DPD and invites public consultation on this draft pursuant to reg 18 Town and Country Planning (Local Planning) (England) Regulations 2012 (Local Planning Regulations). The Council then adopts a refined draft Sites DPD and invites further public consultation pursuant to reg 19 Local Planning Regulations.
28. The Commissioner noted that this public consultation opened on 3 August 2020 and continued to 28 September 2020.

29. In his reply the Appellant notes that:

The reason for my continuing to pursue the release of the papers, now identified as internal communications, is to seek a rerun of the site selection process which I believe was flawed. I think that sight of the papers would help to confirm (or deny) my concerns.

30. The Commissioner addresses each of the six appeal points.

(a) The Commissioner did not consider the fact that the Working Group's decision-making process was potentially unsound

31. The Appellant's case is that:-

(a) the Working Group was not politically balanced following the elections in May 2019;

(b) the Working Group was not then geographically balanced; and

(c) Cllr Sue Hatton, the only councillor from Burgess Hill, was not present at the Working Group's final meeting on 27 August 2019, which was only announced on 7 August 2019.

32. The Commissioner accepted that these points added weight to the public interest in disclosure, and noted that Cllr Hatton shared the concerns of the Appellant. But the Commissioner is of the view that there are a number of reasons why disclosure would not significantly promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision-making.

33. Firstly, the Commissioner notes that Cllr Hatton had vigorously contested and raised these points in the Council and Scrutiny Committee meetings, having had access to the withheld material in this case (as a member of the Working Group). Cllr Hatton and others would be able to raise concerns about the Working Party's decision making as the planning process continues. Thus, argues the Commissioner, it is unlikely that disclosure of the withheld information will further the objectives of the Directive by contributing to public awareness and debate.
34. Secondly, the Commissioner pointed out that any recommendations of the Working Party are subject to further consideration by the Scrutiny Committee and the full Council, both of which meet in public. There are two rounds of consultation, the need for approval from an independent planning inspector, and a public planning inquiry. The Commissioner says that the Appellant's overall concern appears to be with the rationale for the selection of the Burgess Hill Sites over the Haywards Heath Golf Course Site and that this rationale will be fully scrutinised during the planning process.
35. The Commissioner contrasts this case with the situation described in Coppel on Information Rights 5th ed. (2020), at p.494:

“... internal communications may represent the only indication of an intention to make a decision on a matter affecting the environment before a public authority formally takes that decision. Where there is no publicly-available means, or only limited means, of discovering an intention to make a decision on a matter affecting the environment, the stated public interest in disclosure of the environmental information (namely, public participation in that decision-making process) may in some circumstances compel the disclosure of internal communications that would reveal that intention and the bases for it.”

36. In response to these points the Appellant comments that disclosure would demonstrate both transparency and accountability, and that failure to disclose has had the opposite effect. He says that public awareness of the likely environmental and quality of life damage resulting from the development of Sites SA12 and SA13 are already understood by many local residents, and that the release of the requested information would help to show the extent that the Council and Scrutiny Committee, (who have accepted the Working Group's recommendations), are aware of and understand environmental matters. Adding these sites to the list of sites for development at the very last minute at the final Working Group meeting attended by less than half of the Working Group members is a huge cause for concern, and enough to justify the release of the withheld papers in the interests of transparency. He says that significant weight should be attached to the unbalanced nature of the final Working Group meeting which recommended the final list of Sites to the Scrutiny Committee.

37. The Appellant argues that in practice things have not worked in the way the Commissioner has described. The Appellant states that:-

....the Cabinet member for Housing told the Council meeting that considered the development list it was " too late to change anything" - so much for what they say and what they do and taking account of public consultation.

38. He states that he is aware of the final stages of the process and that is why he is keen to know the full reasoning for including the two Burgess Hill sites. He argues that he will not know this without seeing the withheld papers. He does not agree that the proposed decision is the result of a transparent and full rationale. While he is sure that the Planning Inspector will make a fair decision based on the evidence submitted the Appellant argues that the preceding scrutinises have left a lot to be desired.

39. He notes that Council members were given copies of all the representations regarding the proposed development list except for those of two organisations, the South of Folders Lane Action Group (SOFLAG) and the Wellhouse Lane Residents Association. Single copies of their extensive representations were available only in the reading room prior to the Council meeting. As SOFLAG represents more than 600 local supporters the Appellant argues that public participation has been paid lip service only.

(b) The Commissioner should not have placed any weight on the Council's 'chilling effect' argument

40. The Commissioner notes that she did not put significant weight on this aspect of the case, but it does have some weight in the public interest balance where (a) the issues were still live at the time of the request and internal review, and (b) members of the Working Group were also members of the Scrutiny Committee and full Council.

41. The Appellant responds that the work of the Working Group had been completed and it had been disbanded. He states that 'Even if the Scrutiny Committee or the Council had decided to change the list there would have been no reconvening of the Working Group', and that in any event most of the Working Group lost their seats in the September election.

(c) As the Working Group disbanded in September 2019, the issues it addressed were no longer 'live' at the time of the request.

42. The Commissioner accepts the internal review concluded on 5 December 2019 after the Working Group disbanded and that this is the latest date for considering the public interest. However, the Commissioner notes that the

request was not made to the Working Group but to the Council. At the time of the request and internal review, and well into 2020, the Council was still considering the issues addressed in the withheld information. The Commissioner notes that in the appeal document (6 July 2020) the Appellant states that the information he seeks is 'time critical', and it is in the public interest for it to be released before any final decision on sites is made, and 'because it has a bearing on the propriety of the decision making process'. The Commissioner submits that this argument is clearly premised on the basis that the issues are still live, and that as of 5 December 2019 there were still a number of stages of the planning process still to be concluded.

43. In reply, the Appellant complains that he could not make the request to the Working Group as it had disbanded, and reiterates his point that he needed to have the information before the Council signed off the development list to enable him to make further representations to the Council if necessary and to get the whole site selection exercise re-run with a properly constituted Working Group.
44. The Appellant accepts that public authorities should have the space to think in private. However he argues the thinking of the Working Group was concluded once the Group disbanded so that all the results of its thinking and the processes and data that led up to those results, in this case the list of development sites, should be available for public scrutiny.
45. The Appellant objects to the argument that the whole process is incomplete as a way to justify non-release of the requested information which could have a bearing on the next stage of the process. He does not think he is able to make a comprehensive representation to the Planning Inspector without access to all the information known to the Council.

(d) Disclosure of the withheld information would shed light on allegations of possible conflicts of interest

46. In his appeal document the Appellant has referred to a possible donation of £100,000 from one of the developers to Burgess Hill Town Council in return for planning permission, and to a photo which allegedly shows the former leader of the Council “in a swimming pool in Spain with the Managing Director of Fairfax Homes”, who are the promoters of the Haywards Heath Golf Course Site.

47. The Commissioner invited the Tribunal to consider the withheld information to form its own view of whether it provides any evidence as to conflicts of interest and noted that the Appellant has not provided the photograph referred to.

48. In reply the Appellant notes that the offer of the funding was made before the final meeting of the Working Group and the Town Council’s Chairman’s refusal to accept it came after that final meeting of the Working Group. He says he does not pursue the point about the photograph.

(e) The Council has not released into the public domain all information relating to the Working Group’s decision-making process

49. In the appeal document the Appellant criticises paragraph 47 of the decision notice which stated:

“...the council has also confirmed that all information related to final decision making (such as site proformas including non-confidential information, full evidence base and Topic Papers/Documents setting out the methodology and site selection

approach) are in the public domain and have been scrutinised in public.”

50. He points out that the technical papers which informed a study by the company SYSTRA on transport modelling have not been released.

51. The Commissioner accepts that there may be a very limited exception to the Council’s statement that all information relating to the final decision has or will be released into the public domain. However, the Commissioner queries why the absence of only the technical papers from the public domain would make any material difference to the public interest balance in this case.

52. The Appellant replies that he is only aware of the withheld Working Group papers and the withheld SYSTRA technical papers, but there might be other significant papers of which he is unaware and that if ‘I don’t ask the right questions I will not necessarily be offered anything helpful’.

(f) The Commissioner should not have placed any weight on the possibility that disclosure of the withheld material would provoke costly and time-consuming speculative planning applications.

53. The Commissioner and the Appellant disagree on the importance of this issue, with the Appellant arguing that it is open for any non- selected site to be put forward in the normal way for planning permission, and that it is difficult to see a circumstance that would alter that and give encouragement to non-selected sites to be put forward for planning permission.

DISCUSSION

54. This case is about whether the balance of public interest favours non-disclosure over disclosure, in the EIR regime where there is a presumption in favour of disclosure.
55. We understand that it can often be helpful for there to be disclosure of documents relating to the early part of a planning process to enable members of the public to prepare fully for and to understand properly the points being made later in the process. We also understand that often the planning process provides limited time for public participation and that disclosure of preparatory documents can mean that representations are more considered and fully developed.
56. However, although the Appellant has made important points (as set out above) about the public interest in disclosure in this case in the interests of accountability and transparency, it is our view that the public interest in non-disclosure is stronger.
57. First of all it is common ground that the Council should have a safe space to discuss the potential planning issues in this case. The way the Council chose to do that was initially through the Working Party which met frequently over a period of two years to prepare recommendations for the Council, and it is accepted that the product of this meeting amounted to internal communications which engaged the exception under the EIR.
58. The Appellant made his request to the Council shortly after the Working Party disbanded, but at a time when the planning process was very much live and final decisions had not been made. Although the Working Party was no longer meeting at the time of the request (and consideration by the Council), the members of the Working Party were all members of the Council and that the work of the Working Party continued to be under consideration by the Council after it had disbanded. The concept of a safe

space would be undermined, in our view, if the contents of the Working Party minutes were to be made public while the subject matter of their discussions was still very much under active consideration.

59. Secondly, although we do not think that the ‘chilling affect’ argument in this case is strong, we note that the members of the Working Party were volunteers and it may be that in future similar Working Parties, it would be more difficult to secure volunteers and for members to discuss matters frankly if it is thought that minutes might routinely be disclosed.
60. Third, the Tribunal can see that very tight deadlines were placed on absent members of the Working Group commenting on what was discussed in the meeting on 27 August 2019, and of course this was during a holiday period. However, we accept the point made by the Commissioner that Cllr Sue Hatton, a member of Working Group and the full Council, who was absent from the Working Group meeting of 27 August 2019, would have had access to all the Working Group papers to make any protest against the procedures adopted and the documents in the bundle indicate that is indeed what happened.
61. Fourthly, while not being complacent about the efficacy of the planning process, we agree with the Commissioner that in this case there were a number of opportunities when the planning decisions and recommendations would be further discussed and public participation actively encouraged through consultation periods. It does not seem to us that access to the Working Party minutes would have significantly improved the ability of local people to make representations on the eventual recommendations formed by the Council. As the Commissioner noted (see paragraph 17 above), ‘all information related to final decision making (such as site proformas including non-confidential information, full evidence base and Topic Papers/Documents setting out the

methodology and site selection approach) are in the public domain and have been scrutinised in public.'

62. Lastly, the Tribunal has had sight of the undisclosed material. There is nothing in the material which indicates any support or otherwise to the Appellant's arguments about conflicts of interest relevant to the process or all.

CONCLUSION

63. We take into account the principle enunciated in the Directive that:-

...in the field of the environment, 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..

64. But we also consider the rationale which underpins the reg12(4)(e) EIR exception as illustrated by the European Commission's proposal document in relation to Directive 2003/4 (COM/2000/0402 final). It states:-

It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns ... internal communication".

65. Our view, for the reasons set out above and agreeing with the Commissioner, is that the public interest in disclosing formative internal discussion minutes part way through a lengthy planning process is

outweighed by the need to protect the private space for the Council to develop its proposals through internal communications.

66. Finally, we apply the presumption in favour of disclosure to our considerations, but conclude that the strength of the public interest in favour of non-disclosure, in this case, is not affected by that presumption.

67. On that basis, this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 8 February 2021.