First-tier Tribunal
(General Regulatory Chamber)

Appeal Reference: EA-2022-0138
Neutral Citation number: [2022] UKFTT 00463 (GRC)

INFORMATION RIGHTS

Before

DISTRICT JUDGE REBECCA WORTH
(sitting as a Judge of the First-tier Tribunal)
TRIBUNAL MEMBER RAZ EDWARDS
TRIBUNAL MEMBER PAUL TAYLOE

Between

FREDERICK LYNDON WANGLER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decided on the papers, 08 December 2022

DECISION

1. The appeal is dismissed.

REASONS

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 116 PDF pages, the Case Management Directions dated 05 September 2022 and a Closed Bundle which contained the information held by Newport City Council which is

being withheld from the Appellant (the "Withheld Information"). We have had regard to all the documents provided, even if we do not mention all of them specifically.

Background

4. The context of the Appellant's request for information and, therefore, this appeal is that a neighbour of the Appellant (referred to in this decision as the "Planning Applicant") sought retrospective planning permission about a fence which they had put on their property. Whilst we accept that to the Appellant, the situation is perhaps more complex, for our purposes – making a decision about the freedom of information – that is all that is relevant.

5. On 27 June 2021 the Appellant wrote to Newport City Council ("the Council") requesting information, the wording of his original request (see page C35 in the Bundle) was:

   5.1 "Could I also have sight of all correspondence between the applicant and the planning officers, case ref E20/0417 between date 8/1/21 and 24/3/21."

6. The Council responded by saying that no information was held, the Appellant responded to that on 01 July 2022 as follows (grammar has been silently corrected):

   6.1 "The original application form was dated 8/1/21 An Amended application with the proposed planting and painting was added on 24/3/21 If we discount telepathy there must have been some communication between the officers of the planning division and the applicant between these dates. Therefore, I formally request a copy of any communication from the planning dept to the applicant between 8/1/21 and 24/3/21".

   This communication was treated as a request for an internal review.

7. On 20 July 2022, the Council responded to the Appellant's communication of 01 July 2022 (see pages C37 and C38 of the Bundle) saying that emails were received and sent to the Planning Applicant, and they provided a link to one of the emails, as it was available online as it was "added to the application" (in other words, it was added to documents made available to the public as planning applications have a public-facing element). They withheld the information by reliance on section 40 of the Freedom of Information Act 2000 (personal information). By email sent on 09 May 2022, the Council wrote to the Appellant and amended their position to reliance on regulations 12(3) and 13 of the EIR.

8. The Appellant complained to the Information Commissioner's Office, and, following investigation, a Decision Notice was issued.

Decision Notice, appeal and response

9. On 23 May 2022 the Information Commissioner's Office issued Decision Notice reference IC-123898-K6B2. The decision was that the Council were entitled under regulations 12(3) and 13 of the Environmental Information Regulations 2004 (SI 2004/3391) (now referred to as "the EIR") to withhold information from the Appellant. The Commissioner did not require the Council to take any steps.

10. The Appellant lodged an appeal with this Tribunal which was received on 08 June 2022. The Grounds of Appeal (see pages A14 to A16 of the Bundle) submit:

    10.1 There is a presumption in favour of disclosure.

    10.2 The Appellant doubts that "junior officers" make planning decisions.

    10.3 The Planning Applicant's name and address is in the public domain and his email address is known to 5 landowners who wrote letters of objection to the development.

    10.4 The planning decision to approve ref 21/0028 was perverse and contrary to the evidence, to precedent; it was subject to a condition which was illegal and impossible to enforce; he has been given conflicting information about whether a Tree Officer was, or was not, consulted; a hedgerow was removed, and the Council has not verified that fact.

    10.5 The Information Commissioner has not acted independently.

11. The outcome that the Appellant seeks is:

    11.1 Release of correspondence between [Planning Applicant] and the Planning Officers of Newport City Council relevant to Planning Application 21/0028, …

12. The Information Commissioner's Response to the appeal is found at pages A20 to A30 of the Bundle and can be summarised as follows:

    12.1 The decision made by the Information Commissioner's Office was independent and the Commissioner strongly rejects any suggestion of bias or lack of independence in the handling of the matter.

    12.2 The Appellant having the names of Council Officers is different from publication under the EIR, which is disclosure "to the world".

    12.3 As the information is about a person's plans for their property, it is their personal data.

12.4 Whilst the Appellant does have a legitimate interest in holding the Council to account regarding the planning process, the information being withheld is not necessary for the Appellant to pursue that legitimate interest.

The Law

13. A request for information must be dealt with either under the regime of the EIR or under the regime found in the Freedom of Information Act 2000 ("FOIA"). This position is due to the operation of section 39 of FOIA (set out in the Schedule to this Decision).

14. Regulation 12(3) and 13 of the EIR are set out in a Schedule to this Decision. The questions for this Tribunal are:

14.1 Question 1: is the information withheld from the Appellant "third party personal data"?

14.2 Question 2: if so, would disclosure under the EIR contravene Article 5(1)(a) of the GDPR, namely that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.".

15. In considering Question 2, the Tribunal must consider Article 6(1)(f) of the GDPR which specifies that "lawful processing" is when it is "necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular when the data subject is a child.". The legislative regime, as explained in case law, results in a three-part test to apply when considering lawful processing:

15.1 Is there a legitimate interest being pursued ("Legitimate Interest Test").

15.2 Is disclosure of the information reasonably necessary to meet the legitimate interest in question ("Necessity Test").

15.3 Do the legitimate interest(s) and necessity override the legitimate interest(s) or fundamental rights and freedoms of the data subject ("Balancing Test").

16. If the processing is considered not to meet the test of lawful processing, we need not consider any further matters. However, if it could be lawfully processed, we must go on to consider whether disclosure would be fair and in a transparent manner.

17. The Freedom of Information Act 2000 sections 57 and 58 set out the remit of this Tribunal's jurisdiction, they are set out in full in the Schedule to this Decision.

18. This appeal is brought by the Appellant; it is for him to persuade us that the Decision Notice is wrong in law. Proof of any factual matters is to the balance of probabilities. The Tribunal will place the appropriate weight on the decision made by the Information Commissioner's Office as it is that entity which Parliament has chosen to regulate the compliance of public authorities with their duties under the EIR.

Discussion and conclusion

19. This information is clearly about something which affects the environment, the Appellant's own concerns about the planning matter include concerns about the hedgerow which is clearly an environmental matter. The parties to this appeal agree that the right information regime to consider is that of the EIR; we also agree.

20. We will first look at Question 1: is the information withheld from the Appellant "third party personal data"?

    20.1 We find that it is as it relates to and identifies the Planning Applicant and it contains names of council staff members.

21. We then turn to Question 2: would disclosure under the EIR contravene Article 5(1)(a) of the GDPR, namely that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."?

22. Firstly, we look at lawful processing, and the Legitimate Interest Test:

    22.1 We find that the Appellant has a legitimate interest in the information as the Planning Application affects his environment.

23. Secondly, we look at lawful processing and the Necessity Test:

    23.1 Much of the Planning Application is in the public domain. When the internal review took place, the Council was prompted to place further information into the public domain (i.e. on the Planning Portal).

    23.2 We consider that the Appellant has sufficient information – that which is disclosed to him (e.g. a link to a document which was provided on internal review, see page C37 of the open bundle) and that which is in the public domain to pursue any legitimate interest that he has such as challenging the decision.

24. Thirdly (even though the Necessity Test is failed) we will look at the Balancing Test)

    24.1 Even if we are wrong about our conclusion as to the Necessity Test, we consider that the Balancing Test would also result in our deciding that, when

balancing the legitimate interests of the Appellant and the fundamental rights and freedoms of the third party data subject(s) we would conclude that the information does not need to be placed into the public domain under the EIR.

24.2 When making the application, the Planning Applicant would have accepted that some of his personal data would be placed into the public domain. However, this expectation would not have been that every piece of correspondence would be available for public viewing.

24.3 The council staff members who make decisions will, we trust, expect that their names may be made public – this is part of accountability. However, that does not mean that council staff members (whether decision makers or not) should expect that all their correspondence may be made available to the public for viewing and comment.

25. We turn now to the Appellant's specific Grounds of Appeal:

25.1 There is a presumption in favour of disclosure:

25.1.1. This is correct, under the EIR. However, the request and the information still need to be properly considered before applying the presumption.

25.1.2. Even applying the presumption in favour of disclosure, and having seen the withheld information, we conclude that the Appellant (and the world) do not need to have sight of the information which has been withheld.

25.2 The Appellant doubts that "junior officers" make planning decisions:

25.2.1. The withheld information refers to the Appellant's request as set out in his correspondence of 27 June 2021 was "If we discount telepathy there must have been some communication between the officers of the planning division and the applicant between these dates" and it is that – in his words "some communication" which is withheld from him.

25.2.2. The decision-making documents are already in the public domain and available to the Appellant, indeed, available to the world.

25.3 The Planning Applicant's name and address is in the public domain and his email address is known to 5 landowners who wrote letters of objection to the development:

25.3.1. Providing documents under the EIR is different from providing documents in a planning application.

25.3.2. Just because 5 persons know the Planning Applicant's email address does not mean that it should be disclosed to the world which is what happens under the EIR.

25.3.3. When making the application, the Planning Applicant would have known that, for the purposes of that specific event, some information would be placed in the public domain. However, only that information which is necessary for that purpose can be expected to be in the public domain and the Planning Applicant cannot be required to place all personal data into the public domain just by virtue of having made an application; the EIR regime balances the rights of the public to have information and the rights of an individual to have some privacy, even when making planning applications.

25.4 The planning decision to approve ref 21/0028 was perverse and contrary to the evidence, to precedent; it was subject to a condition which was illegal and impossible to enforce; he has been given conflicting information about whether a Tree Officer was, or was not, consulted; a hedgerow was removed, and the Council has not verified that fact:

25.4.1. Even if this is true (and this Tribunal is unable to comment on the veracity of this statement) this is not a reason for the withheld information to be provided to the world. As outlined above, there is sufficient information in the public domain for the Appellant (and, indeed, anyone else) to challenge the decision should they choose to do so. The withheld information is not needed.

25.5 The Information Commissioner has not acted independently:

25.5.1. The Appellant has not provided any evidence to support this claim. If he wished to pursue such a serious allegation against a body appointed by Parliament to oversee the compliance of public authorities with the EIR, we would expect to see independent evidence setting out specific allegations which the ICO would then be able to respond to.

25.5.2. It seems that the Applicant's concern is that the ICO's intervention resulted in the Council ceasing to withhold under FOIA and relying upon the EIR. If so, then this change was to the Appellant's favour – as he identifies, there is a presumption in favour of disclosure under the EIR that does not exist in FOIA. Therefore, the change of

regimes put his request into a regime which was more likely to result in disclosure, albeit that it did not, in this particular case, result in additional information being placed into the public domain.

25.5.3. Even if the change had not been in the Appellant's favour, the ICO were right to advise the Council to reconsider under the EIR. This is an important part of being a Regulator and ensuring public authorities are abiding by their obligations under both the EIR and FOIA.

26. For all the reasons set out above, we conclude that the ICO Decision Notice was not wrong in law; therefore we dismiss the appeal.

Signed *DJ Worth*

Registrar of the First-tier Tribunal General Regulatory Chamber

Date: 08 December 2022

Promulgated :12 December 2022

SCHEDULE TO THE DECISION

THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

Part 3 Exceptions to the Duty to Disclose Environmental Information

12 Exceptions to the duty to disclose environmental information

(1) …

(2) …

(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) …

13 Personal data

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if—

(a) the first condition is satisfied, or

(b) the second or third condition is satisfied and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations—

(a) would contravene any of the data protection principles, or

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(2B) The second condition is that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(a) Article 21 of the [UK GDPR] (general processing: right to object to processing), or

(b) section 99 of the Data Protection Act 2018 (intelligence services processing: right to object to processing).

(3A) The third condition is that—

(a) on a request under Article 15(1) of the [UK GDPR] (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018,

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section, or

(c) on a request under section 94(1)(b) of that Act (intelligence services processing: rights of access by the data subject), the information would be withheld in reliance on a provision of Chapter 6 of Part 4 of that Act.

(4) . . .

(5A) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that—

(a) the condition in paragraph (5B)(a) is satisfied, or

(b) a condition in paragraph (5B)(b) to (e) is satisfied and in all the circumstances of the case, the public interest in not confirming or

denying whether the information exists outweighs the public interest in doing so.

(5B) The conditions mentioned in paragraph (5A) are—

(a) giving a member of the public the confirmation or denial—

(i) would (apart from these Regulations) contravene any of the data protection principles, or

(ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b) giving a member of the public the confirmation or denial would (apart from these Regulations) contravene Article 21 of the [UK GDPR] or section 99 of the Data Protection Act 2018 (right to object to processing);

(c) on a request under Article 15(1) of the [UK GDPR] (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in paragraph (3A)(a);

(d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section;

(e) on a request under section 94(1)(a) of that Act (intelligence services processing: rights of access by the data subject), the information would be withheld in reliance on a provision of Chapter 6 of Part 4 of that Act.

(6) In determining for the purposes of this regulation whether the lawfulness principle in Article 5(1)(a) of the [UK GDPR] would be contravened by the disclosure of information, Article 6(1) of the [UK GDPR] (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

FREEDOM OF INFORMATION ACT 2000

Environmental information

39 (1) Information is exempt information if the public authority holding it—

(a) is obliged by [environmental information regulations] to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.

(1A) In subsection (1) "environmental information regulations" means—

(a) regulations made under section 74, or

(b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing any [EU] obligation relating to public access to, and the dissemination of, information on the environment.

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(3) Subsection (1)(a) does not limit the generality of section 21(1).

Appeal against notices served under Part IV

57 (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

…….

Determination of appeals

58 (1) If on an appeal under section 57 the Tribunal considers—

(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 involved 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.