Case Reference: EA/2022/0152

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: remotely by video conference
Heard on: 1 December 2022
Decision given on: 12 December 2022

Before

TRIBUNAL JUDGE OLIVER
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER EMMA YATES

Between

ANDREW DUNLOP

Appellant

and

(1) INFORMATION COMMISSIONER
(2) KIRKLEES METROPOLITAN COUNCIL

Respondents

Representation:
For the Appellant: In person
For the Respondent: Did not attend
For the Second Respondent: Mr Oliver Mills, counsel

Decision: The appeal is Dismissed

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 19 May 2022 (IC-140122-V8G2, the "Decision Notice). The appeal relates to the

application of the Environmental Information Regulations 2004 ("EIR"). It concerns information contained in User Evidence Forms ("UEFs") about the long-term use of a claimed right of way requested from Kirklees Metropolitan Council (the "Council").

3. Public rights of way for each local area are legally recorded in a Definitive Map and statement. Individuals who want a claimed public right of way to be added to the map can apply for a Definitive Map Modification Order. They can submit UEFs in support of these applications. These are standard forms that are filled in by individuals with evidence about their use of the claimed right of way. The information requested in this case relates to UEFs supporting an application dating back to 2011 for a public bridleway to be added to the Definitive Map in the Kirklees area.

4. In July 2021, the appellant asked for and was provided with copies of UEFs by the Council. These UEFs all had personal details redacted from them. On 16 July 2021, the appellant wrote to the Council and requested the following information (the "Request"):

> *"Thank you for this… I look forward to receiving the documents, however I insist that all UEFs must be un-redacted for the following reasons:*
>
> *It is a fundamental right to know ones accusers.*
>
> *See*
> *https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/davis-2.htm*
>
> *I spoke this morning with the ICO. They can see no justification for withholding the information under GDPR and indeed noted, with amusement, the fact that the UEFs explain that the forms may be revealed. You may wish to contact them yourself for confirmation.*
> *https://ico.org.uk/*
>
> *PINs already has already published guidance on this.*
> *See https://www.gov.uk/government/publications/planninginspectorate-privacynotices/*
>
> *If you continue to refuse to reveal your witnesses then their "evidence" is not admissible and your argument, such as it is, fails and you should withdraw. If you do not wish to withdraw, please treat my request for un-redacted UEFs as a Freedom of Information request."*

5. The Council responded on 16 September 2021 and withheld the requested information under regulation 13 EIR (personal data). The Council confirmed this decision in an internal review outcome on 11 November 2021.

6. The appellant complained to the Commissioner on 11 November 2021. The Commissioner decided:

a. The requested information (names, dates of birth, and contact details (including full addresses) of individuals who gave written evidence about the long-term use of a claimed public right of way) was personal data.

b. There were legitimate interests in disclosure – in particular, the appellant's interest in trying to determine the veracity of witness statements, as he believes that some of the witness statements may be false.
c. Disclosure was not necessary to satisfy these legitimate interests, taking into account the information already provided and details from the Council about how the information would be used.

The Appeal and Responses

7. The appellant appealed on 15 June 2022. His grounds of appeal are:

a. The Commissioner was confused about when and why he asked to see the information, which was to prepare a defence for a public inquiry.
b. The Council did not seek permission from the people named to release the forms.
c. It was clear from the redacted forms that some witnesses were giving information that was untrue or misleading. It was important to check ages of witnesses, if they were family, if they had private rather than public rights, and if the period of use claimed was true.
d. Recent caselaw supports his claim.

8. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner says he did not accept that UEFs should be provided unredacted once an inquiry was to be held. Although he accepted there were legitimate interest in disclosure, this was not necessary as the interests had already been satisfied by other information provided by the Council.

9. The Council was joined as a party to the proceedings. The Council maintains that its decision was correct. The response repeats the Commissioner's reasons.

10. The appellant submitted a reply which makes some additional points:

a. An Order was made, objected to and heading for a public inquiry when the request was made. Schedule 15 of the Wildlife and Countryside Act 1981 applies. Paragraph 3(8) gives a right to inspect and take copies of documents. The Council did not provide the information requested under this Act, so he made a freedom of information request.
b. Regulation 3(3) EIR states "*These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity*." The Council was acting in this capacity when it made a statutory based Order.
c. To not be able to identify the witnesses against a person is contrary to Article 6 of the Human Rights Act and Common Law (referencing ***R v Davis***).
d. Witnesses sometimes lie, overegg their experiences or leave out pertinent information and these failings can only be discovered if their name, age, and address is known. The public interest in a fair hearing meant this information should be provided. Individuals were warned of this on the UEF form.
e. This is the first time he has experienced a refusal to share evidence, and in a previous Kirklees inquiry he was able to interrogate evidence on UEFs and show that a number contained false evidence.

Applicable law

11. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

> *2(1)* *…"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;*
>
> *……*
>
> *5(1)* *…a public authority that holds environmental information shall make it available on request.*
>
> *……*
>
> *12(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.*
>
> *……*
>
> *13(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…*
>
> *……*
>
> *13(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…*

12. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC.

13. Section 3(2) of the Data Protection Act 2018 ("DPA") defines "personal data" as "*any information relating to an identified or identifiable living individual*". The "processing" of such information includes "*disclosure by transmission, dissemination or otherwise making available"* (s.3(4)(d) DPA), and so includes disclosure under EIR.

14. The data protection principles are those set out in Article 5(1) of the UK General Data Protection Regulation ("UK GDPR"), and section 34(1) DPA. The first data protection principle

under Article 5(1)(a) UK GDPR is that personal data shall be: "*processed lawfully, fairly and in a transparent manner in relation to the data subject".* To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) UK GDPR.

15. The conditions include where "*processing is necessary for compliance with a legal obligation to which the controller is subject*" (Article 6(1)(c)).

16. The conditions also include where "*processing 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 where the data subject is a child*." (Article 6(1)(f)). This involves consideration of three questions (as set out by Lady Hale DP in ***South Lanarkshire Council v Scottish Information Commissioner*** [2013] UKSC 55):

(i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
(ii) Is the processing involved necessary for the purposes of those interests?
(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and UK GDPR. This should now reflect the words used in the UK GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

17. In ***Goldsmith International Business School v Information Commissioner and the Home Office*** [2014] UKUT 563 (AAC), Upper Tribunal Judge Wikeley set out eight propositions taken from case law as to the approach to answering these questions.

a. Proposition 1 – Condition 6(1) requires the above three questions to be asked.
b. Proposition 2 – the test of necessity under stage (ii) must be met before the balancing test under stage (iii) is applied.
c. Proposition 3 – "Necessity" carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.
d. Proposition 4 – The test is one of "reasonable necessity", reflecting European jurisprudence on proportionality.
e. Proposition 5 – This involves the consideration of alternative measures, so the measure must be the least restrictive means of achieving the legitimate aim in question.
f. Proposition 6 – Where no Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage.
g. Proposition 7 – Where Article 8 privacy rights are in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question.
h. Proposition 8 – the Supreme Court in *South Lanarkshire* did not purport to suggest a test which is any different to that adopted by the Information Tribunal in *Corporate Officer (Information Tribunal).*

Issues and evidence

18. The issues to be decided are:

a. Does EIR apply to the Request?
b. Is the requested information personal data? This is agreed by the parties.
c. Does Article 6(1)(c) UK GDPR apply – was the processing necessary for compliance with a legal obligation?
d. Does Article 6(1)(f) UK GDPR apply -
    i. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
    ii. Is the processing involved necessary for the purposes of those interests?
    iii. If so, are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?

19. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

a. An agreed bundle of open documents.
b. A closed bundle containing the withheld information (this contained unredacted UEFs and it was not necessary for us to read this in any detail or refer to it during the hearing).
c. A witness statement and oral evidence from Mr Philip Champion, Definitive Map Officer in the Public Rights of Way Team at the Council.
d. Oral submissions from the Appellant
e. Written and oral submissions from the Council.

Evidence from Mr Champion

20. We had a detailed witness statement from Mr Champion. He is a Definitive Map Officer in the Public Rights of Way Team at the Council, which means his main duty is maintaining the legal record of public rights of way. The key evidence relevant to our decision can be summarised as follows.

21. The legal record of public rights of way is shown on the Definitive Map and Statement ("DMS"). The Council has a duty to keep the DMS for its area under constant review. Any person can apply for a Definitive Map Modification Order ("DMMO") to modify the DMS. An application must be accompanied by evidence, which may be from users about their use of the way to which the application relates. The procedure for dealing with such applications is set out in Schedules 14 and 15 of the Wildlife and Countryside Act 1981 (the "1981 Act").

22. Mr Champion explained the process in this case. In 2011 an individual made a DMMO application to add a public bridleway between Bridge Lane and Sands Recreation Ground, Holmfirth, West Yorkshire. The application included 85 completed UEFs. More UEFs were sent later. Investigation of the application began in 2017, including an informal consultation exercise which resulted in further UEFs. Individuals who had completed UEFs were invited to complete a supplementary evidence form. In total there were 118 completed UEFs, and 45 people answered the supplementary questions.

23. A DMMO was made after a planning sub-committee meeting on 4 January 2018. The final Order was made on 14 May 2018, and was advertised 18 May under 1981 Act. Three landowners made objections, including two represented by the Appellant. As the Order was opposed, in June 2020 the Order was referred to the Secretary of State for Environment Food and Rural Affairs, via the Planning Inspectorate.

24. The Inspector appointed by the Secretary of State decides whether to hold a public inquiry. The Inspector consulted the people who had made objections or representations, and none of them indicated they wished to be heard. The Inspector therefore chose to consider the matter by exchange of written representations. The DMMO was confirmed on 2 February 2022.

25. Mr Champion also explained the usual process relating to the personal details of people who have submitted UEFs. A UEF contains a set of standardised questions. The UEFs at the time included the standard wording - *"…This information you give will eventually become public and may be used as evidence at a public enquiry [sic]".* This wording is in the form after the personal details section on the form, and before the section asking for details of route.

26. No personal data from UEFs is provided before an application is decided (following the decision of this Tribunal in ***Dainton v IC & Lincolnshire CC*** (EA/2007/0020). After a DMMO has been made, copies of the UEFs with personal details redacted are made available for inspection for six weeks (in accordance with paragraph 3(8) of Schedule 15 of the 1981 Act). The individual's full postcode is not redacted. In this case, nobody asked to inspect the documents during this period. If an opposed DMMO is accepted by the Secretary of State, the UEFs are again available for inspection with same redactions. If public inquiry held, the Council will normally contact some individuals who submitted UEFs to ask if they were willing to be called as witness. If they were not, their personal data will not be disclosed. In this case, no witnesses were called as the matter was considered by exchange of written representations.

27. Mr Champion confirmed in cross-examination that when he worked at a different authority they had released UEFs without redacting personal details, as they had different advice at the time. He also confirmed that the Council had previously released unredacted UEFs, but their practice then changed based on advice.

Discussion and Conclusions

28. We have dealt with the issues in turn.

29. ***Does EIR apply to the Request?*** The Appellant says that it does not, because of Regulation 3(3) EIR. This says, "*These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity*." The Appellant argues that the Council is acting in a legislative or judicial capacity when it makes a DMMO under schedule 14 of the 1981 Act. The Council says that it is acting in an administrative capacity and exercising a power set out in primary legislation when it makes a DMMO. The Council also says that by the time of the request it was the Secretary of State who was the decision-maker, not the Council.

30. We find that EIR does apply to the Request We are satisfied that the nature of the information requested falls within EIR as it is about use of paths across land. We do not agree that the Council is acting in a legislative or judicial capacity when it makes a DMMO. This is too wide a reading of these terms. "Legislative capacity" does not mean exercising a power conferred by primary or secondary legislation, which is what the Council was doing here. A DMMO under the 1981 Act is not legislation. We also do not agree that the Council is acting in a judicial capacity when it makes such a DMMO. It is amending a record of public rights of way based on information provided on it, not adjudicating a dispute between parties in the same way as a court or tribunal. We also agree with the Council's submission that, even if this exception could apply to the making of a DMMO, by the time of the Request the Council was

no longer acting in this capacity and was instead a party to proceedings being conducted by the Secretary of State.

31. ***Does Article 6(1)(c) UK GDPR apply – was the processing necessary for compliance with a legal obligation?*** This is an issue because the Appellant says the Council was required to provide the information under paragraph 3(8) of Schedule 15 of the 1981 Act. This is the requirement to allow inspection of documents for a period of six weeks after a DMMO is made. We can deal with this point quite briefly. Firstly, this paragraph does not necessarily prevent the relevant documents from being redacted in order to keep personal information private. Secondly, this obligation is to allow inspection for a limited period of six weeks. That is very different from permanent disclosure to the world at large under EIR. We therefore find there was no legal obligation on the Council to provide the requested information in response to the Request.

32. The next issue is, ***Does Article 6(1)(f) UK GDPR apply?*** This requires us to consider the following questions.

33. ***Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*** The Appellant explained at the hearing his reasons for wanting the name, address and date of birth of the individuals who had completed UEFs. This is so he can check on behalf of his clients whether what they have said is valid about using a claimed right of way for the required 20 years. He gave a number of examples. It is important to know someone's age, as use of claimed rights of way does not count if the person is a child. Names and addresses can be used to verify whether someone has lived in the area for as long as they have claimed, and other matters such as whether they are a tenant on the relevant land or all members of one family. Social media searches may show that there have been arguments over paths claimed to be rights of way. He gave one specific example from another matter where he was able to trace someone's history in order to show that they had moved from the relevant area at a young age, spent a long period of time away in the armed forces, and had only lived in the area for a total of 10 years.

34. We accept that the Appellant and those he represents are pursuing legitimate interests by asking for this information. Questions about rights of way are important issues that relate to the ownership of land, and landowners have a legitimate interest in being able to check evidence provided in UEFs for accuracy. Although there is some unredacted information that could assist with this (e.g. exact postcodes), personal details of names, addresses and dates of birth make this task easier. We accept that the Appellant has used this information to assist his landowner clients in other cases.

35. During his submissions, the Appellant confirmed that in this case he obtained the unredacted UEF forms from the planning inspectorate (although they have now changed their policy on this). This happened after he had complained to the Commissioner about how his Request had been handled. This means he did not have the information at the time of the Request, and so the fact he obtained it later form another source does not remove the legitimate interest because we look at matters at the time of the Request.

36. ***Is the processing involved necessary for the purposes of those interests?*** The Commissioner found that disclosure of personal details was not necessary, because the Appellant could use the information already provided on the forms for the same purposes. Having heard the Appellant's explanations of why he wanted the information, we do not agree.

We find that disclosure of name, full address and date of birth is reasonably necessary for the purposes of the legitimate interests in checking the accuracy of the information provided in UEFs. The Appellant confirmed that other personal details (such as email address and telephone number) are not necessary for this purpose.

37. We have applied the test of reasonable necessity. The information is more than simply desirable. These specific details may be the only way that the Appellant and his clients (and other interested parties) can check the accuracy of some of the information in a UEF – such as whether they were a child for some or all of the period claimed, or whether they are being untruthful about how long they have lived in the area. We are not sure whether many people would deliberately provide false information on UEFs, and in this case we note that a high proportion responded to additional questions from the Council. However, we also accept that people may unwittingly make mistakes, for example by not realising how their age or status as a tenant may affect the information that they have provided. We would hope that the planning inspectorate would notice obvious errors, but accept that the Appellant and landowners may be able to challenge accuracy through their own research.

38. The Council submits that the unredacted information on the form provides sufficient information to enable the Appellant and others to challenge what had been said. We do not agree, for the reasons explained above. The Council also said that the Appellant had the opportunity to ask for a public inquiry to be held, and witnesses who were to be called at the would be named. There is some merit in this point – this is not a situation where all individuals who completed a UEF would definitely remain anonymous. However, we note that this would only apply to individuals who were both willing to be a witness and were summoned by the Planning Inspector. The Council also submits that the fact the Appellant obtained the information from the planning authority means it was not reasonably necessary for the Council to disclose the information themselves. However, this happened much later in the process. At the time of the Request, the Appellant was not aware he could obtain the information another way.

39. The Appellant also argued that not being able to identify a witness against a person and test their evidence is contrary to Article 6 of the Human Right Act (the right to a fair trial) and Common Law, and he referred to ***R v Davis*** [2008] 1 AC 1128. We agree with the Council's submissions that this case involved a very different issue about evidence in a criminal trial. The requirements of a fair hearing are not the same in a civil trial or contested planning inquiry. We also note that the Appellant and the relevant landowners had the option of requesting a public hearing with questioning of named witnesses. We do not agree with the Appellant that the fact some UEFs would remain anonymous infringes the right to a fair trial. The Appellant also submitted that the process of decision by written representations should be treated the same as a public inquiry hearing, but we do not agree because there is the option to ask for a hearing at which witnesses can be called.

40. ***If so, are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?*** We have looked at this carefully, and find that the legitimate interests in disclosure are overridden by the privacy rights of the individuals who completed UEFs.

41. Although we have found that there are legitimate interests in disclosure and it is reasonably necessary, these interests are not overwhelmingly strong ones. The interests relied on by the appellant are the private interests of landowners during a rights of way process. The Appellant

did not present any arguments about a wider public interest in the information. The redaction of personal information does not prevent the Appellant and his landowner clients from challenging the UEFs altogether. The redacted UEFs do contain information that could be used to verify accuracy, such as complete postcodes and the other written details/descriptions provided by the individuals. There is also the option of requesting a public inquiry hearing, involving named witnesses.

42. We have balanced these interests against the effect on individual privacy rights. We find that disclosure of the personal details of name, address and date of birth to the world at large under EIR would potentially cause significant prejudice to their privacy rights. This is for the following reasons.

43. The individuals who completed UEFs had a reasonable expectation that these personal details would not be disclosed under EIR without their consent, unless they agreed to appear as a witness at a public hearing.

44. The Appellant says that the UEF tells people that the information they give will be made public. We have looked at the complete wording on the form, which says, "*The object of this questionnaire is to reach the truth of the matter, whatever it may be. You are therefore asked to answer the questions as fully as possible and not keep back any information, whether for or against the public claim. This is important if this information is to be of any real value in establishing the status of the route. The information you give will eventually become public and may be used as evidence at a public enquiry*". This wording refers to the information "eventually" being made public, and the public inquiry stage. It does not warn individuals that their personal information may be disclosed at any stage after they have submitted the UEF, or that it may be released under EIR.

45. We have also looked at where this wording appears in the form. It is after the section where individuals fill in their personal details. The form itself then begins with Section A. The Council submits that this wording clearly relates to the form itself, not the personal details section. We find that this is not clear. But, similarly, it would not be clear to individuals that the wording about information becoming public would apply to their name, address and date of birth. The positioning of this wording in the document would not give the individual a reasonable expectation that these personal details would be made public, as opposed to the content of the form itself.

46. We have also taken into account the nature of disputes over rights of way. These often involve close neighbours and may become heated. Individuals may have good reason to not want their personal details disclosed, for fear of challenge or retaliation. Although they may be called as a witness at a public hearing, the UEF gives an option to say they would not be prepared to attend a hearing to give evidence. People may have different reasons for not wanting to give evidence - but one reason may well be that the individual does not want to be publicly identified.

47. We have also taken into account the Appellant's description of what he would do with the personal information. Essentially, he uses it to conduct detailed research into the relevant person in order to check matters such as their age, background, family relationships, housing status, history of where they have lived, social media posts, and (in this case) membership of the cricket club on the land. This is potentially very intrusive. We do not criticise the Appellant for this – he is doing a job on behalf of his landowner clients. However, we find that this is the

likely effect of disclosure of these personal details to the world at large under EIR. It opens the individuals up to intrusive research in the context of a contested application for a DMMO. Individuals who fill in a UEF would not reasonably expect a combination of full name, address and date of birth to be released and used in this way.

48. These findings mean that we disagree with the Commissioner's decision that disclosure of the information was not reasonably necessary (in relation to name, address and date of birth). But, we have gone on to find that the privacy rights of the data subjects outweigh the legitimate interests in disclosure in this case.

49. We therefore find that the Council was entitled to withhold the requested information under regulation 13 EIR. We dismiss the appeal.

Signed: Judge Hazel Oliver Date: 10 December 2022