

**EIR Reg 12(4)** – to what extent a public authority may refuse to disclose information

**EIR Reg 12(5)** – reasons for refusing to disclose information due to adverse affects

## ***Benjamin Archer v IC & Salisbury District Council***

**EA 2006/0037**

**9<sup>th</sup> May 2007**

### **Cases:**

Kirkaldie v IC and Thanet District Council (EA/2006/001)

Bowbrick v IC and Nottingham City Council (EA/2005/0006)

Bellamy v IC (EA/2005/0023)

### **Facts**

The Appellant's wife had permission to redevelop a listed building ("the Footes"). During redevelopment, there was a fire. The Council claimed that instead of making the remains safe, they were completely cleared. Various enforcement notices were issued, including a Listed Buildings Enforcement Notice ("LBEN"). The Appellant's wife appealed but before the appeal was heard, the Council withdrew the LBEN. The Planning Inspectorate held that the Council's decision to issue the LBEN was unreasonable. To ascertain why the Council had issued and then withdrawn the LBEN, the Appellant requested the Minutes of the Council's Southern Area Committee Meeting. Since these were already public, the Council took the Appellant's request to be for the report of the Head of Development Services and the Head of Legal and Property Services (the "Joint Report"). However, disclosure was refused under FOIA, sections 30, 31 & 42.

The IC found that the exemptions in sections 30, 31 and 42 of FOIA were engaged and had been properly applied. The Council was entitled to withhold the Joint Report.

### **Findings**

Did the Appellant's request extend beyond the Joint Report?

The Tribunal considered whether the documents referred to in the Joint Report, and other documents relating to the Council's withdrawal of the LBEN came within the scope of the Appellant's request, but decided they did not. A person seeking information may not always be able to identify or describe precisely the document containing the information he is seeking. Here, however, the Appellant had requested a specific document and had not disagreed when the Council interpreted this to mean the Joint Report. The fact that there may be other documents which might be of interest to him or relevant to the same subject does not automatically bring them within the scope of the request. As to whether procedural fairness required that the Appellant should have copies of these additional documents that now formed part of the evidence, disclosure would thwart the proper consideration of whether he would

be entitled to them pursuant to a request he might make under the appropriate legislation. Accordingly, the Tribunal did not require those documents to be provided to the Appellant.

#### FOIA or EIR?

The Tribunal held that the information comes under the EIR. Following **Kirkaldie**, this makes it exempt information under the FOIA and it must be dealt with under the EIR. The Council was in breach of the procedural requirements of the EIR, in particular Reg 14(3) (requirement to specify the reasons for refusal including the EIR exceptions relied on).

#### Can exceptions be relied on at the appeal stage if not relied on previously?

The Tribunal's jurisdiction is not limited to considering issues dealt with in the Decision Notice. It can consider matters, including exceptions, even if they were not considered by the IC. Whether it should, depends on the facts of each case (**Kirkaldie** and **Bowbrick** considered). In this case, the EIR exceptions could be relied on. At the time of the Appellant's request, the FOIA and EIR had just come into force, and the Council's experience will have been limited. Although the IC's Decision Notice was not issued until June 2006, it was before **Kirkaldie**. The Appellant had not been prejudiced because he had an opportunity to make submissions before the Tribunal on the EIR exceptions. The Tribunal's view might be different were the same situation to arise today.

#### Whether Reg 12(5) (b) is engaged

The Tribunal decided that disclosure of the Joint Report would adversely affect the Council's ability "*to conduct an inquiry of a criminal ... nature*". There was insufficient evidence to show that disclosure *would* adversely affect the Council's position in future cases where it may wish to adopt a similar strategy. However, disclosure would reveal the Council's strategy and the strengths and weakness of its position. This would cause the adverse effect asserted, although only in respect of the second part of the Joint Report. The regulations only require that disclosure should have an adverse effect; the extent of the adverse effect is not relevant at this stage (although it may be relevant when applying the PI test). The position had not changed since the date of the request. Although the Council had not brought prosecutions with respect to the demolition of the listed building, that was not time barred. Also, certain requirements in the enforcement notices remained outstanding, and so enforcement action was still a possibility. The PI in maintaining the exception outweighs the public interest in disclosing the information. The second part of the Joint Report contains legal advice to enable the Council to decide on the appropriate action(s). The EIR does not contain a specific exception for LPP. However, per **Bellamy**, the strong PI in maintaining LPP means that strong countervailing considerations need to be adduced to override that PI. That was not present in this case. Also, the advice had not become 'stale' because the issues were still 'live'. The Tribunal could not say whether the Joint Report should be disclosed at some future date.

#### Whether Reg 12(5)(d) is engaged

The Tribunal held Reg 12(5)(d) did not apply to the Joint Report. The EIR contains no definition of "proceedings", but it would include legal proceedings and also a formal meeting of the Council. To the extent that the proceedings here are legal proceedings, confidentiality is provided for by common law in relation to LLP. To the extent that

the proceedings here are the deliberations at the Council's meeting, the Minutes are in the public domain. It was not clear on the evidence, however, that the Joint Report qualified as "proceedings".

Whether Reg 12(4)(e) is engaged

This is a class-based, not a prejudice-based exception. It is only necessary to show that the information comes within that class (here, internal communications), not that any adverse effect would arise from its disclosure. The Joint Report is clearly an internal communication, and so comes within the scope of 12(4)(e). The public have a legitimate interest in assessing the workings of PAs and the basis on which they apply policy and make decisions, particularly where as here, the implementation of the decisions involve the use of public funds, and are on matters of public concern. However, the PI in maintaining the exemption which are the same as in relation to regulation 12(5)(b), outweigh the PI in disclosure.

**Conclusion**

The IC was wrong to have made its decision under the FOIA. The Council had failed to comply with the procedural requirements of the EIR, in particular, Reg 14(3). The EIR exceptions in Regs 12(5)(b) and 12(4)(e) were engaged as regards the second part of the Joint Report, and the PI in maintaining the exception outweighed the PI in disclosure. However, the first part of the Joint Report must be disclosed.