



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2012/0082

B E T W E E N:-

IAN McCULLOUGH

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

NORTHERN IRELAND WATER

Second Respondent

Tribunal

**Judge Kennedy QC
Jacqueline Blake
Malcolm Clarke**

Subject matter: Freedom of Information Act 2000 - Section 42(1),
Environmental Information Regulations 2004 Regulation 12 (5) (b).

DECISION OF THE FIRST-TIER TRIBUNAL:

Appeal Allowed.

REASONS

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (**“the FOIA”**) as incorporated by regulation 18 of the Environmental Information regulations 2004 (**“the EIR”**). The appeal is against the decision of the Information Commissioner (**“the**

Commissioner”) contained in a Decision Notice (**“the Decision Notice”**) dated 12th March 2012 (reference FER0406438).

2. The Tribunal Judge and lay members sat on Monday the 8th October 2012 and decided the appeal on the papers.

Factual Background to this Appeal:

3. Full details of the background to this appeal, the Appellant’s request for information, and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns a request made by the Appellant to the Second Respondent, Northern Ireland Water (**“NI Water”**). The Appellant’s request consisted of ten specific queries relating to Northern Ireland Water’s sewer upgrade within the Stranmillis Road/Richmond Park area of Belfast. Those specific requests were as follows:
 - i. “The exact locations of the ground vibration monitors – placed on a scale drawing of the entire area being excavated – at the point of impact -5.0 M away from point of impact;
 - ii. The method of measurement for the vibration readings as taken by your accredited ground vibration experts – F R Mark;
 - iii. The geology reports of the area made by NI Water’s accredited experts;
 - iv. The number of vibrometers used;
 - v. The types of vibrometer;
 - vi. When was each vibrometer last calibrated and copy certificate?;
 - vii. Copy of vibration trace from each vibrometer – signature monitor;

- viii. Method of securing vibrometer heads;
 - ix. Were the vibrometers used for a single 'pile drive' or the continuous 'pile drive' for all sheeting – of how many sheets?;
 - x. Were the vibrometers capable of continuous measurements?"
4. NI Water responded to this request stating that it was withholding the requested information under the exception set out in regulation 12(5)(b) of the EIR (disclosure would adversely affect the course of justice).

The Commissioner's Decision:

5. The Respondent ("the Commissioner") served a Decision Notice dated 12th March 2012. The Commissioner found that NI Water had correctly applied the exception under regulation 12(5)(b) of the EIR (adverse effects on the course of justice) and required no steps to be taken.
6. In relation to regulation 12(5)(b) of the EIR, the Decision Notice sets out that:
- “under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect ‘the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature’ “
7. The Decision Notice discusses in detail the following matters:
- i. Does the requested information attract legal professional privilege.
 - ii. Public interest arguments in favour of disclosing the requested information;
 - iii. Public interest arguments in favour of maintaining the exception;

- iv. Balance of the public interest arguments.

All of these above matters are dealt with and set out in detail in the decision notice and are not repeated herein.

The Notice of Appeal:

8. The Appellant appealed against the Decision Notice by way of a notice of appeal dated 6th April 2012. The appeal is brought under section 57 of the Freedom of Information Act 2000, as incorporated by regulation 18 of the EIR 2004.

Issues to be considered by the Tribunal:

The timing issue

9. In the first instance, both the Commissioner and NI Water raise timing issues – namely that the Appellant lodged his appeal two days out of time. The Appellant applied for the Tribunal to use its case management powers under rule 5 of the 2009 rules to extend time for lodging the appeal. The Tribunal decided to allow the appeal as there was an important issue of general importance.

The merits of the Appeal

The Disputed Information as requested by the Appellant is set out at paragraph 3 above.

(a) Exception under Regulation 12(5)(b) of the EIR

10. The disputed information in this case comprises expert technical information relation to vibrations associated with the relevant sewer works. The Commissioner found that this did not attract legal professional privilege. This Tribunal agree with this finding. However, both the first and

second named respondents refer to regulation 12(5)(b) of the EIR, in that it is not confined to privileged information. In that regard, both respondents refer to paragraph's 15 and 16 of the Decision Notice, which state as follows:

“15. The Commissioner, having viewed the requested information, accepts that it constitutes expert evidence which would be used in litigation proceedings, in this case an insurance claim. Disclosure of the information would reveal to the opposing party evidence intended for use in court to defend such a claim. This would obviously be extremely prejudicial to NI Water's legal position as it would affect its ability to defend itself fairly, as the opposing party would be on notice as to the evidence and NI Water would not enjoy the same privilege in relation to evidence being used by the opposing party in support of the claim. This would place NI Water at an unfair disadvantage in the proceedings.

16. The Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice as premature disclosure would prejudice litigation proceedings. This prejudice would be particularly strong in this case as NI Water informs the Commissioner that the information constitutes expert evidence which would go to the heart of any litigation proceedings.”

(b) The Public Interest

11. The Commissioner found that there was strong public interest in favour of disclosure. Particularly in relation to: public authority decision-making; matters affecting the environment and people's property; and in demonstrating best value in the use of public funds. This Tribunal agree with the reasoning and findings of the Commissioner in this regard.

12. However, the Commissioner accepted NI Water's submissions, that:

- i. NI Water provided a person on site at the time of the works taking place, who could answer queries;
- ii. The particular disputed information was not necessarily of wider public interest beyond those directly affected in that residential area;
- iii. It was strongly in the public interest to avoid substantial prejudice to public authorities' position in ongoing legal claims and litigation.

This Tribunal are not convinced that this particular information is not of wider public interest as suggested at ii above and we find no evidence to support the contention that there would be “substantial prejudice” to the public authority (NI Water) by the disclosure of the requested information in this case.

(c) The Appellant’s Grounds of Appeal

13. Firstly, the Appellant claims that at no time during his discussions and correspondence with NI Water did he contemplate, institute, imply, threaten, initiate or intimate legal advice, legal proceedings or litigation.
14. However the Commissioner was persuaded that NI Water had received a ‘public liability’ claim form the Appellant, which was currently being handled by its claims department and/or NI Water’s contract on the sewer works. The Commissioner states that the Appellant did not appear to deny this. NI Water refers to this claim as shown through e-mails. The relevant text is as follows:

“Mr McCullough’s email of 06 June 2011 10:18 at paragraph 2 states ‘a full structural survey is going to have to be carried out – from foundations to roof – internally and externally, a cost you will have to uplift in conjunction with remedial works of the damages’.

Mr McCullough’s email of 06 June 2011 14:46 at paragraph 2 states ‘In the meantime, please treat the fractured double-glazed

window panel, as reported this morning, as an official claim and register accordingly, as such”.

15. The Commissioner also refers to an indication by the Appellant of his intention to seek an injunction and also that he had engaged professional experts to assist in his claim/complaint. However, as noted by the Commissioner, these are points of dispute between the Appellant and NI Water.
16. Further, the Commissioner noted that the disputed information would prejudice *not only* NI Water's position in relation to any claim by the Appellant, but also outstanding claims which NI Water and/or its contractor was facing, from at least one other individual unrelated to the Appellant's complaint.
17. Secondly, the Appellant suggests *inter alia* that NI Water engaged engineers with insufficient qualifications, expertise or competency. However, the Commissioner notes that there has been no evidence to support such contentions. Also, both Respondent's submit that in any event, the fact that the Appellant might disagree with the technical information in dispute does not suffice, to outweigh the harm to the public interest that would arise from the prejudice to NI Water's litigation position.

Decision of the Tribunal:

18. The Tribunal are of the view that NI Water, the Public Authority in this case, failed in their duty to assist the Appellant in the course of his making his request. The purpose of the legislation is to allow transparency and accountability on the part of Public Authorities. The reason for a request is immaterial. Furthermore under Section 16 of the FOIA the Public Authority has a duty to provide advice and assistance to the appellant during the course of the request. Having looked carefully at the correspondence and other documents provided, it is the view of the Tribunal that NI Water failed

to provide such advice or assistance in the course of dealing with this request.

19. The Tribunal does not accept the arguments of NI Water or the Commissioner in their reasons for refusing this request. In particular the tribunal do not accept that the disputed information: “---- *would obviously be extremely prejudicial to NI Waters’ legal position as it would affect its’ ability to defend itself fairly –*“ Firstly the Tribunal are of the view that under regulation 12(5)(b) EIR it must be established that disclosure of the disputed information would “adversely affect” the course of Justice. This requires the Public Authority to demonstrate any adverse affect which must be proven at least on the balance of probabilities. There is no evidence in this case that this would be so. Further the Tribunal are not persuaded that purely factual information such as this could ever adversely affect the course of Justice. We therefore conclude that regulation 12(5)(b) is not engaged. Secondly, even if we are wrong in the above, for the reasons given below the Tribunal is of the view that it is in the public interest that the disputed information, where available, in this case is disclosed.

20. The Tribunal considered the requested information in detail and summarise our views as follows:
 - i. *“The exact locations of the ground vibration monitors – placed on a scale drawing of the entire area being excavated – at the point of impact -5.0 M away form point of impact;*

The Tribunal are of the view that if this information is recorded it is in the public interest that it is disclosed. Such information would be information that would provide transparency and accountability and assist in assessing many aspects of the undertaking by the public authority, including potential litigation. The disputed information, if in existence, would have been recorded in the course of the works involved and would in any event be discoverable in litigation. Experts on both sides of litigation would have access to such technical details, in the requested information, in the course of litigation and both sides

should have access to independent expert interpretation of such information. Access to such information can only assist the parties in identifying any issues between them and provide an early opportunity for expeditious resolution of such issues. This would save time and costs in any such potential litigation and would therefore be in the public interest. Further this Tribunal do not accept that early disclosure of this technical information would prejudice NI Water in any way that they would not be prejudiced in the normal course of discovery in litigation by such information. For example if the information led an independent expert to form a view on liability in a civil action then it would be to the Public Authorities advantage to address that view at the earliest possible stage. This too, for the reasons we have stated above, would be in the public interest.

Further on the papers before us, this Tribunal is firmly of the view that the release of this requested information, if it is available, could expedite the conclusion of potential legal proceedings without prejudice to the parties and it is in the public interest to do so.

- ii. The method of measurement for the vibration readings as taken by your accredited ground vibration experts – F R Mark;*

The Tribunal repeat the reasoning at Paragraph 20 i above.

- iii. The geology reports of the area made by NI Water's accredited experts;*

The Tribunal repeat the reasoning at Paragraph 20 i above.

- iv. The number of vibrometers used;*

The Tribunal repeat the reasoning at Paragraph 20 i above.

v. *The types of vibrometer;*

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vi. *When was each vibrometer last calibrated and copy certificate.*

The Tribunal repeat the reasoning at Paragraph 20 i above.

vii. *Copy of vibration trace from each vibrometer – signature monitor;*

The Tribunal repeat the reasoning at Paragraph 20 i above.

viii. *Method of securing vibrometer heads?;*

The Tribunal repeat the reasoning at Paragraph 20 i above.

ix. *Were the vibrometers used for a single ‘pile drive’ or the continuous ‘pile rive’ for all sheeting – of how many sheets?*

The Tribunal repeat the reasoning at Paragraph 20 i above.

x. *Were the vibrometers capable of continuous measurements?”*

The Tribunal repeat the reasoning at Paragraph 20 i above.

21. The Tribunal is of the view that if NI Water, do not have the specific information that has been requested, then they should say so. Again we refer to the duty on a public authority to provide and give assistance to those making a request for information.

22. For the reasons given above the Tribunal expresses concern about the position stated at Paragraph 26 of the Decision Notice which in effect appears to suggest that it would be in the public interest to withhold any information that might prejudice the Public Authorities position in potential legal proceedings. The implications of implementing such a policy could, in some circumstances amount to a cover up, and in our view would be contrary to the spirit and intent of the FOIA and EIR legislation and further, contrary to the Public Interest. We are of the view that it is in the Public Interest that Justice is done and that the correct result emerges from litigation, not that a Public Authority should necessarily be successful, just because it is a public authority.

Conclusion:

23. In light of the foregoing, the Tribunal allows this appeal. The requested information should be disclosed.
24. The Appellant has the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Brian Kennedy QC

Tribunal Chairman

DATE: 6th November 2012.