



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0248

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER0444036
Dated: 22 NOVEMBER 2012**

Appellant: GILLIAN M ROBINSON
Respondent: INFORMATION COMMISSIONER
Heard at: FIELD HOUSE
Date of hearing: 5 JUNE 2013
Date of decision: 8 JULY 2013

Before

ROBIN CALLENDER SMITH
Judge

and

MICHAEL HAKE and GARETH JONES
Tribunal Members

Attendances:

For the Appellant: Mrs Gillian Robinson assisted by Mr PJ Robinson
For the Respondent: Mr Michael Lee, Counsel instructed by the Information
Commissioner and Ms Clare Nicholson, Solicitor for the Information
Commissioner

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2012/0248

Subject matter:

Environmental Information Regulations 2004

Request for information, Reg 5

Exceptions, Regs 12 (4) and (5)

- Legal privilege (5) (b)

Personal data, Reg 13

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Case No. EA/2012/0248

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22 November 2012 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Appellant asked for copies of all internal correspondence regarding Longcroft Farm held by East Staffordshire Borough Council (ESBC).
2. ESBC provided some information in September 2010 and February 2011 but withheld other information on the basis of the Environmental Information Regulations 2004 (EIR) and – in particular - Regulation 12(4)(e) and regulation 13(1).
3. During the course of the Information Commissioner's (IC's) investigation, ESBC provided additional information within the scope of the request but withheld some information on the basis of regulation 12(5)(b).
4. The history of the request merits a brief summary. The Appellant's original request for information in September 2010 was made orally and a dispute arose about its scope.

5. There was an appeal to the Tribunal concerning an Information Notice issued by the IC – and dealt with by the Tribunal Judge who is also the Judge in this appeal - requiring ESBC to provide certain information.¹
6. The Tribunal dismissed ESBC's appeal and upheld the Information Notice requiring ESBC to provide the Commissioner with information within the scope of the request, namely: *"all internal correspondence and information held by ESBC in respect of Longcroft Farm, Yoxall, Burton on Trent, up to and including early September 2010"*.
7. This environmental information related to concerns raised by residents about planning matters concerning Longcroft Farm and the importation of material forming bunds on the farm.
8. After ESBC provided information to the Appellant following the 5 March 2012 Decision Notice she made a further complaint to the IC which is the subject of this appeal. The IC concluded that
 - (i) ESBC had now provided all relevant information falling within the scope of the request and had therefore complied with regulation 5 of the EIRs;
 - (ii) ESBC had correctly applied regulation 12(5)(b) of the EIRs in withholding certain legally privileged documents; and
 - (iii) ESBC had correctly applied regulation 13(1) of the EIRs in not disclosing certain individuals' personal data.

The appeal to the Tribunal

9. The Appellant believes the IC reached the wrong conclusions in relation to regulations 12 (5) (b) and 13 (1) EIR and that ESBC holds more information than it has provided to her.

¹ *ESBC v Information Commissioner* EA/2011/0243.

10. It was clear to the Tribunal that the Appellant has deeply-held beliefs and long-standing concerns about how ESBC has dealt with issues that concern her.

11. In her own words

What of the impact that this has had on the 98% of people in North YoxallThe LGO [Local Government Ombudsman] on 2 long investigated cases, the Audit Commission, Defra, [and the] Environment Agency? And we have not done anything wrong. 7 years, of questioning by the residents, that is distress and damage. The residents gained nothing....[by what] appears to be the lack of action in this case by ESBC.

Evidence

12. The Tribunal has had the opportunity of seeing closed and confidential information provided as part of the appeal. It has considered carefully the public interest issues that arise out of the exceptions being relied on by ESBC and confirmed by the IC.
13. The Tribunal does not feel that there is any need for a closed, confidential annex to this decision.

Conclusion and remedy

14. In terms of deciding whether ESBC has provided the Appellant with all the information it held – and although not binding on this Tribunal – the decision of *Charman v Information Commissioner and Olympic Delivery Authority*² is helpful. That case decided the Tribunal had no jurisdiction under section 57 of FOIA³ to hear an appeal against a decision notice issued by the IC which, properly construed, amounted to a determination as to whether or not the public authority had complied with an earlier decision notice. A decision notice in such

² EA/2011/0210.

³ The comparator in the EIRs is regulation 18.

terms was not a decision notice with the meaning of section 50 of FOIA and meant that the Tribunal had no jurisdiction under section 57.

15. The correct route, where it was alleged that a public authority had failed to comply with a decision notice, was section 54 of FOIA over which the Tribunal had no jurisdiction.
16. Here ESBC had to either provide all information falling within the scope of the request or issue a valid refusal notice in compliance with regulation 14 of the EIRs. Its response was to provide the Appellant with the information, subject to some redactions made pursuant to regulation 13 of the EIRs. It withheld some legally privileged material.
17. Following *Charman*, while it was open to the IC to investigate under section 50 of FOIA whether the exemptions cited had been applied properly by ESBC, it was not open to him to do so in relation to whether or not ESBC had provided all the information which it held within the scope of the request.
18. The IC issued a decision notice under section 50 of FOIA determining whether or not a public body had complied with the earlier March decision notice. This Tribunal has no jurisdiction under section 57 of FOIA to determine whether or not the Decision Notice was correct in law insofar as it considered ESBC's compliance with the March 2012 Decision Notice.
19. It follows that this Tribunal must strike out this portion of the appeal in respect of whether all information held has been disclosed.
20. In terms of Regulation 12(5)(b) of the EIRs, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice.

21. The Tribunal finds that the withheld information does attract legal professional privilege (LPP). We have taken into account the general effect which disclosing privileged material would be likely to have in weakening the confidence of public authorities that communications with their legal advisers would not be subject to disclosure. We have also taken into account the general effect on the course of justice in terms of undermining LPP in relation to environmental information generally.
22. Having read the closed material we have no trouble concluding that it is clearly information that is subject to LPP. The Advice itself was relatively current and remained in issue at the date of the request.
23. Information which is subject to LPP is not absolutely exempt from disclosure. However, the strong public interest in maintaining LPP means that strong countervailing considerations need to be in play to override that in-built public interest. Considerable weight needs to be given to the risk that ordering disclosure will erode confidence in LPP generally. There is a compelling public interest in a public authority being able to obtain informed legal advice in confidence, else the completeness or candour of the advice will be compromised, or a party might be deterred from obtaining advice altogether.
24. The Tribunal and the IC note the generic public interest in accountability for the quality of public authorities' decision making and the fact that this may be facilitated by transparency in the decision-making process and access to the information on which decisions were made. There is also the generic public interest factor that public authorities should be accountable and transparent in relation to the expenditure of public money.
25. The Appellant argues that there is a strong public interest in favour of disclosure of the information as she has concerns regarding the legality

of ESBC's decisions in relation to planning matters at Longcroft Farm. She would therefore like to ascertain whether the relevant Council's decisions regarding these matters are based on legally defensible advice.

26. Having seen the material the Tribunal is satisfied her worries are groundless and that none of the above factors displace LPP being correctly identified, claimed and maintained in this appeal.
27. The Tribunal notes that the Appellant's concerns have been raised with the Local Government Ombudsman and the European Commission without disclosure of ESBC's legal advice.
28. On the final point – disclosure of personal data - that information can only be disclosed in accordance with regulation 13 of the EIRs. Personal data of someone other than the requester cannot be disclosed by a public authority under the EIRs if disclosure would contravene any of the data protection principles. The exemption is absolute. If disclosure would breach one of the principles it must be refused.
29. Section 1(1) of the Data Protection Act 1998 provides that "personal data" means data which relate to a living individual who can be identified from those data, or from those data and other information in the possession of, or likely to come into the possession of, the data controller.
30. The IC considered ESBC's initial redactions and considered they were too extensive. Further – less redacted material - was provided to the Appellant.
31. Outstanding are the names of individuals who corresponded with ESBC and the individual involved in the issues at Longcroft farm.

32. The Tribunal finds that the individuals in both of these categories have a legitimate expectation of privacy in respect of their names being disclosed to the whole world even though the name of the individual at Longcroft Farm may be known locally.

33. Our decision is unanimous.

34. There is no order as to costs.

Robin Callender Smith

Judge

8 July 2013