



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

Appeal Numbers: EA/2013/0107 & 0108

B E T W E E N:-

Appellant: DEPARTMENT FOR EDUCATION

Respondent: INFORMATION COMMISSIONER

Determined on the papers on 10th October 2013.

Decision: 17 October 2013.

Before

**Judge Brian Kennedy QC
Steve Shaw
Alison Lowton**

Subject matter: Freedom of Information Act 2000, and the engagement specifically of Regulation 2 of the Environmental Information Regulations 2004.

DECISION OF THE FIRST-TIER TRIBUNAL:

The tribunal dismisses these appeals.

REASONS

Introduction:

1. This decision relates to appeals against two Decision Notices (“the DN’s”) issued by the Information Commissioner (“the Commissioner”) on the 23rd April 2013 (numbered FS50479368 and FS50480392). The DN’s, effectively identical, concern two requests from the same Provider for closely related information wherein the Respondent reached the same

decision in conclusion giving the same reasons. The parties agree that the matters are identical and can be dealt with together. The appeals have been brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), specifically in relation to the application of Regulation 2 of the Environmental Information Regulations 2004 (EIRs).

2. The Tribunal panel sat on the 10th October 2013 and decided the case on the papers.

Request by complainant:

3. The complainant wrote to the Department for Education (“the DfE”) on 23rd August 2012, requesting the following information:

“I request a copy of the Independent School Playing Fields Advisory Panel minutes of discussions relating to Wandsworth Council’s application for consent under Section 77 of the School Standards and Framework Act 1998 (as amended) to dispose of school playing fields at Elliott School in Putney.”

And

“I request all correspondence between the Chair of the Independent School Playing Fields Advisory Panel and Secretary of State for Education relating to the application by Wandsworth Council under Section 77 of the School Standards and Framework Act 1998 (as amended) for consent to dispose of school playing fields at Elliott School, Putney. I request in particular the official letter from the Chair of the Independent School Playing Fields Advisory Panel outlining to the Secretary of State for Education the panel’s grounds for advising against consent being granted by the Secretary of State to Wandsworth for disposal of Elliott School playing fields.”

4. The DfE held two documents containing information within the scope of the request, both dating from July 2012 and refused the information requests,

relying on the exemptions under section 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA. The DfE upheld those refusals on internal review.

5. The Requester complained to the Commissioner who in the course of his investigation asked the DfE to explain why it considered that FOIA rather than the EIR's applied in these cases. The Commissioner was not satisfied with the reasons given and issued the DN's, the subject matter of these appeals. The 36 exemptions are therefore not the subject matter of these appeals but the Commissioner maintains that if FOIA is the applicable regime then the DfE's refusals of the requests were correct in any event.

The Commissioner's Decisions:

6. The Commissioner had been supplied with a copy of the withheld information. It relates to the disposal of school playing fields at Elliott School in Putney. The DfE explained to the Commissioner that the School Playing Fields Advisory Panel ("the Panel") considers such disposal applications against criteria set out in published guidance (see paragraph 12 below) and there is no reference to future use of the land in those criteria. The DfE also explained to the Commissioner that the Panel's recommendation is one of the factors the Secretary of State ("the SoS") takes into account and he can come to a different conclusion when reaching a decision on whether to give consent to the disposal of the land. The DfE confirmed its view that both the Panel and SoS are only concerned with the educational impact of disposal of the playing field land rather than any subsequent use of the land, concluding that the withheld information is of an educational nature rather than environmental.
7. In the Commissioner's decisions he considers that, irrespective of the fact that the intended future use of the land did not form part of the decision making process as to whether or not to sanction its disposal, the fact that it is being disposed of is a measure under Regulation 2(1)(c) EIR, likely to affect the elements of the environment because of the potential change to

the use of the land. In the DNs he sets out Regulation 2 (1) (a) to (f) in its entirety.

8. Regulation 2(1)(c) of the EIR defines environmental information as being any: *“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) above as well as measures to protect those elements;”*.
9. Regulation 5 of the EIR places a public authority that holds environmental information under a duty to make that information available under request, unless an exception applies. The Commissioner therefore in his DNs found that the DfE did not deal with the request for information in accordance with the EIR as it did not apply the correct legislation when handling the request.

Grounds of appeal:

10. The appellant appeals the Commissioner’s decisions on the following grounds:
 - a) The Commissioner focused on the wrong measure
 - b) The Commissioner applied the wrong standard of likelihood and
 - c) The requested information is too remote from the state of the landscape or from measures likely to affect the landscape.
11. The DfE argues that the only measure in any way capable of having an effect on the landscape in this case was the SOS’s decision, not the Panel’s recommendation, arguing that the requests were not for information “on” the SOS’s decision. The Commissioner would accept that, on the facts of this particular case, “the measure” for the purposes of Regulation 2(1)(c) which would affect or would be likely to affect the factors in (a) and (b), is the SoS’s decision on the consent for the disposal of the playing fields. However the Commissioner maintains that the withheld information is “on”

the SoS's decision and therefore falls within the definition in regulation 2(1)(c) EIR. The Commissioner maintains that in order to be consistent with the purpose stated in the first recital of Council Directive 2003/4/EC ("the Directive") from which the EIR are derived, "any information ---on" in Regulation 2 EIR should be interpreted widely. Citing Recital 2 of the Directive states: *"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and eventually, to a better environment"*. The Commissioner argues, inter-alia, that "any information --- on" will usually include information concerning, about or relating to the measure, activity, factor etc. in question. In other words information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

12. The Tribunal agree with the Commissioners' interpretation and we accept that it is in deed open to wide interpretation. We find that the Panel's recommendation on the playing fields was an integral part of the information which had to be before the SoS and which he was obliged to consider in making his decision. We refer to the Protection of School Playing Fields and Land for Academies July 2007 guidance ("the Guidance") on Management & Finance at Tab 6 of our Bundle and in particular Part IV thereof at paragraphs 39 to 100. Under Criterion 3: Finance: therein from paragraph 79 on, is set out process and considerations, including the sale of the land, which could affect school playing fields which the SoS must consider. On the particular facts of this case we are satisfied that Wandsworth Council's application included information indicating an intention for the playing fields of the school to be redeveloped for housing. We accept the contention that if consent was given, it is more likely than not that the Council would pursue its plans to redevelop and the measure would be likely to affect the land or landscape. The panel would have had access to this information in their deliberations.

Accordingly we find on the facts of this case, even though the withheld information may not have a direct effect on the elements of the environment or to record or discuss such an effect, it is “on” a measure within S2(1)(c).

13. The Tribunal has considered the Guidance carefully and find that in following the Guidance, and on the facts of this case, the Panel must consider, even indirectly, factors concerning the Landscape itself when considering the Councils application for disposal, including factors such as (but not exclusively) disposal of funds from sale, the quality of the playing fields and alternative playing field uses.
14. We accept the Commissioners’ argument that the requested information does inform the public about the matter under consideration and therefore facilitates effective participation by the public in environmental decision making and are therefore likely to be environmental information on a measure affecting or likely to affect the elements and factors referred to in Regulation 2(1)of the EIR.
15. In light of the above reasoning we also find that the Panel’s deliberations and recommendations to the SoS are not too remote and dismiss the appeals for the above reasons.
16. The DfE seek guidance through this appeal and we take cognisance of this by discussing the matter further. The tribunal notes that on the facts of this particular case, and in accordance with the Guidance, the Panel’s recommendation was that the Council’s application to dispose of the playing fields be refused. In this instance, the SoS did not follow the Panel’s recommendation and further the SoS’s decision was not based on the proposed use of the land. It seems that the Commissioner’s DN’s are based on the SoS’s decision to dispose of the playing fields. In other words, whether or not the information is covered by EIR’s depends on the outcome of the decision making. The Tribunal is mindful that the relevant word in the regulations is “affect” and not “change”. It is arguable that any

decision about land or landscape may “affect” the land or landscape regardless of the actual decision. If this is correct, the Tribunal is of the view that even had the SoS’s decision been in support of the Panel’s recommendation or he for any other reason had refused the sale of the land, the potential for disposal of the Land means the withheld information should be dealt with under the EIR’s. This is of course obiter but is our considered view in light of what we see as the wide interpretation that should be given to Regulation 2 of the EIR’s.

Conclusion:

17. In light of the foregoing, the Tribunal unanimously refuses these appeals.
18. The respondent 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: 17th October 2013.