Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2016/0042**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0588330
Dated: 26 January 2016

Appellant: **David Precious**

Respondent: **The Information Commissioner**

On the papers

Before

HH Judge Shanks

and

Henry Fitzhugh and Suzanne Cosgrave

Date of decision: **21st June 2016**

Subject matter:

Environmental Information Regulations 2014 (EIR)

Regulation 12(4)(d) (unfinished documents)

Regulation 12(4)(e) (internal communications)

Regulation 12(5)(b) (course of justice)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. On 28 December 2006 Hampshire County Council and Helical (Liphook) Ltd as developer entered into an agreement under section 106 of the Town and Country Planning Act 1990 relating to the development of a site in Liphook as a retirement village. Under clauses 3(l) to (p) of the section 106 agreement the developer undertook to provide a taxi (and subsequently a mini-bus) service from the retirement village to the centre of Liphook and its railway station and back " … (free of charge) … for the benefit of residents visitors … and staff …" of the retirement village.

2. The agreement also contained an obligation on the part of the developer to submit for approval to the Council a "Community Travel Plan" and to implement and operate that plan while the retirement village was operating. The agreement defined Community Travel Plan as a travel plan " … *based on* (our emphasis) the Framework Community Travel Plan attached to the [agreement] at Schedule 3". The travel plan attached at Schedule 3 referred at para 3.2.3 to a dedicated mini-bus service for the sole use of employees and residents of the retirement village and stated that the service would be funded through the annual management charge paid for by the residents; it also stated in a number of places that it was an evolving document that would change over time. It seems that in due course the Community Travel Plan was produced. It is dated November 2007 and is similar to but not the same as the Schedule 3 document; it refers to a "free taxi/minibus service" in a number of places (see eg paras 4.4.3 and 6.1.13) but as far as we can see does not have a provision like that at para 3.2.3 in the Schedule 3 document.

3. The Appellant, Mr Precious, is Chairman of the Residents' Association of the retirement village which was in due course built on the site and is known as Bramshott Place Village. In June 2013 the Residents' Association contacted the Council to complain that the developer was not complying with its obligations to provide a free taxi/minibus service because, although such a service is provided free of charge at the point of use, the residents pay for it as part of their annual service charge. There has followed an extensive correspondence in the course of which the Council have said there is nothing that they can do to help the Association by way of enforcement of the section 106 agreement and the Association has expressed dissatisfaction with that position.

Requests for information and the Council's responses

4. As part of the on-going debate about the meaning and effect of the section 106 agreement Mr Precious wrote to the Council on 30 June 2014 seeking information about " … how the section 106 was derived …" and, at para 6, asking to be supplied with:

> **… any discussions verbal or in writing, relating to the S106 Agreement that have taken place with [the developers and various successor companies] since June 2013**

Following a request for clarification the request was answered by a letter from the Council dated 10 September 2014 which supplied certain information and documents.

5. On 17 September 2014 Mr Precious wrote to the Council's Head of Legal Services attaching detailed comments on the Council's letter of 10 September 2014 and complaining that the request had not been properly dealt with. His 17 September letter stated:

> **… we are asking for full disclosure of ALL information within the meaning of the [EIR] appertaining to how and why [clauses 3(n) to (p)] were inserted with the said S106.**

Kate Hume Smith, a solicitor in the Council's Corporate Services department, responded to the comments (and some further comments Mr Precious sent) on behalf of the Council in a five page letter on 12 November 2014. She dealt in detail with the comments and supplied further documents. In relation to para 6 of the request of 30 June 2014 she said this:

> **You state [in your comments] that *"not all correspondence has been included such as emails and discussions that must have taken place within [the Council] from the information we had provided during this period [ie since 2013]* …**
>
> **I have considered the information supplied to you and your comments …**
>
> **You are stating that you have not received internal emails within [the Council] since 2013. Having looked at your request I do not think this is a request you have made previously. I have considered whether I can deal with it as part of this review, however, I believe that it should be dealt with as a fresh request. I am therefore requesting the Information Compliance team to deal with it as such.**

6. On 19 November 2014 Mr Precious wrote to Ms Hume Smith thanking her for the further documents and stating that the fact she had supplied them confirmed the view that information had been withheld originally. He went on:

> **We understand that no further meaningful documentation in relation to this subject is available and that you have supplied all documentation as required under [EIR]. Therefore we accept that there has not been and neither will there be found in the future any documents or correspondence in any form that comment upon the "free of charge to residents" S106 clause 3(n) to 3(p) … prior to signing of the S106.**
>
> **On this basis, we see no benefit in involving the [Information] Commissioner …**

The letter finished by thanking her again for her help and saying they awaited the further documents from the Information Compliance team referred to in her letter of 12 November 2014.

7. On 22 December 2014 the Council sent Mr Precious certain documents in response to the request for internal correspondence since 2013. Some of the contents were redacted on the basis they were legally privileged under EIR regulation 12(5)(b).

8. Mr Precious responded to this letter by writing to the Chief Executive of the Council on 10 January 2015 seeking a review of the redactions but also stating that the Council was " … leaving [them] no choice but to consider contacting the [Information] Commissioner". Ms Hume Smith wrote to Mr Precious in response on 6 March 2015 . She stated that she had reviewed the matter and concluded that the majority of the redactions were properly made under regulation 12(5)(b) and that the remainder were not properly made under that regulation but were properly made under regulation 12(4)(e) relating to internal communications. She also enclosed two publicly available documents that had not been provided previously.

9. On 30 March 2015 Mr Precious wrote to the Principal Solicitor of the Council stating that the Community Travel Plan dated November 2007 (to which we refer above at para 2) had recently come to light but had not previously been provided to the Residents' Association. It was clear that Mr Precious considered the November 2007 document to have been potentially helpful in relation to the Association's dispute with the developer and the Council and he expressed some indignation that it had not been disclosed by the Council. The letter ended by seeking an early reply to the question whether the Council would now be taking steps to enforce the section 106 agreement in relation to the free taxi/minibus service against the developer or its successors in title.

Complaint to Information Commissioner

10. On 29 June 2015 the Residents' Association (in a letter signed by Mr Precious and a Mr Knight) complained to the Information Commissioner about the way the Council had dealt with their requests for information. Three points were raised: (1) the redactions should not have been made; (2) the Community Travel Plan dated November 2007 ought to have been supplied in response the requests we describe above; and (3) that 'documentation that relates specifically as to how the "free of charge" clauses actually came to inserted into the S106 cannot be found by the Council'.

11. In his Decision Notice dated 26 January 2016 (which named Mr Precious as the complainant) the Commissioner found that the Council had been entitled to make the redactions they had on the basis of regulations 12(5)(b) and 12(4)(e) and that they were entitled to rely on regulation 12(4)(d) (unfinished documents) in relation to a draft variation put forward to the developer which had not been agreed. He also found that on the basis of the searches the Council had made he was satisfied that no further information "specifically discussing the inclusion of the 'free of charge' term within the section 106" was held by the Council.

The appeal

12. Mr Precious has appealed to this Tribunal on behalf of the Residents' Association. The appeal has been treated as one by him personally and since it makes no difference to the substance of the matter we will proceed on that basis. He has put in a detailed letter setting out grounds of appeal. It seems to us that the letter raises two main issues for our consideration: (1) whether on the balance of probabilities the Council have supplied him with all information they hold relating to how and why clauses 3(n) to (p) were inserted in the section 106 agreement and (2) whether the Council were entitled under regulations 12(5)(b), 12(4)(e) and 12(4)(d) to redact parts of the internal email correspondence relating to the section 106 agreement since 2013 when supplying that material to him.

13. Before turning to these issues we should make it clear that our statutory task is to consider whether the requests for information in this case were dealt with in accordance with the requirements of the EIR and what steps, if any, the Council now need to take to comply with their obligations under EIR. We do not have any jurisdiction to rule on the merits of any underlying dispute about the meaning and effect of the section 106 agreement and what steps the Council ought to take to enforce it. Nor do we have power to take disciplinary action against the Council to make them disclose what has happened to documents or to disclose their reasoning for the insertion of certain provisions in the section 106 agreement or to make people sign affidavits. Thus, apart from the issue of whether the Council were entitled to rely on

regulation 12(5)(b), none of the matters set out by Mr Precious in the box headed "Outcome of appeal" in the pro forma notice of appeal can come within our purview.

Issue (1): has all information held by the Council relating to the insertion of clauses 3(n) to (p) in the section 106 agreement been supplied?

14. Given the terms of the letter dated 19 November 2014 it is on the face of it somewhat surprising that this issue has been raised at all. But it seems that subsequent events, including the Council's continuing stance that they are unable to help the residents in relation to the free travel service issue, have led Mr Precious to the view that information is being wrongly withheld. The test to be applied is whether we are satisfied on the balance of probabilities that there is information held by the Council within the terms of the request which has not yet been supplied.

15. It seems from the letter of 19 February 2016 that Mr Precious really relies on three matters in this context. First, he relies on the fact that the November 2007 Community Travel Plan document was not provided to the Association in response to the requests for information we are concerned with. Although it is understandable that Mr Precious should feel indignant that the Residents' Association only learnt of the November 2007 Community Travel Plan document recently, it is clear that it was not the subject of any of the requests for information we are concerned with, although it would have been obvious to any informed reader of the section 106 agreement that such a document should have come into existence after the agreement and that it could have been requested from the Council. We cannot therefore draw any inference from the Council's failure to supply this document at an earlier stage.

16. The second matter he relies on is the fact that the internal emails from 2013 and 2014 were not supplied until December 2014 and then in redacted form. Looking at the correspondence it is clear that no request for internal correspondence was made until the matter was raised by Mr Precious in September 2014 and that Ms Hume Smith was quite right to treat this as a new and separate request for information. We deal with the question of redactions below. Again, we cannot draw any inferences against the Council from this point.

17. The third point Mr Precious appears to be making is that in so far as the Council say that documents have been lost they must have committed an offence under regulation 19 (that is the offence of destroying records after a request for information has been made under EIR). There is simply no basis for this suggestion in our view. Given that the information relates to events in 2006 it would be unsurprising if some of it had been lost and it seems to us from looking at the correspondence (and in particular Ms Hume Smith's letter of 12 November 2014) that, far from destroying records in order to subvert the EIR regime, the Council have dealt with Mr Precious's requests in a conscientious and thorough way.

18. We have reviewed the position again taking account of all the material we have been supplied with. Bearing in mind in particular (a) that the relevant events were in 2006 (b) the comprehensive letter from Ms Hume Smith dated 12 November 2014 (c) the Association's own immediate response of 19 November 2014 and (d) the assurances given by the Council to the Information Commissioner recorded at paragraph 69 of the Decision Notice, we are quite satisfied on the balance of probabilities that the Council has disclosed all the information they hold coming within the terms of the request we are concerned with.

Issue (2): were the Council entitled to rely on regulations 12(5)(b), 12(4)(e) and 12(4)(d) to redact parts of the internal email correspondence?

19. Regulation 12 of EIR allows a public authority to refuse to disclose information if various exceptions apply to it and, in all the circumstances of the case, the public interest in maintaining the relevant exception outweighs the public interest in disclosure. The exceptions relied on by the Council are these:

> **(4) … a public authority may refuse to disclose information to the extent that**
>
> **…**
>
> **(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or**
>
> **(e) the request involves the disclosure of internal communications.**

> **(5) … a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-**
>
> **…**
>
> **(b) the course of justice, [or] the ability of a person to receive a fair trial …**

Although not an invariable rule it is well established that, in general, material covered by legal professional privilege under English law will come within regulation 12(5)(b). But, even if it does, it is still necessary to apply the public interest balance before the public authority can rely on that regulation to refuse to disclose it.

20. We have been provided with a full unredacted version of the Council's internal email correspondence relating to the section 106 agreement since 2013 and have reviewed the redactions made by the Council. It is clear that most of the redacted material consist of requests for, or the provision of, legal advice by the Council's internal legal team and that it is covered by legal professional privilege and comes within regulation 12(5)(b). Any material not covered by legal professional privilege consists of internal discussions about communications to be sent to the developer (or their successors) or to Mr Precious and/or consists of related draft documents and thus comes within regulations 12(4)(d) and/or (e). Given the context of discussion and dispute which we have outlined and the possibility of litigation (which is clearly there) we are quite satisfied that all the redacted material is covered by one or more of the exceptions relied on and that the public interest in maintaining the relevant exception outweighs that in disclosure.

21. Mr Precious has raised various issues in relation to regulation 12(5)(b). He objects that it is the Council which decides whether the regulation applies so that it is "judge and jury in its own case". But it is intrinsic to the system set up by the EIR (and the Freedom of Information Act 2000) that it is the public authority itself which makes the first decision as to whether an exemption applies; that decision is of course open to review by the Information Commissioner and the First-tier Tribunal (and any other tribunals or courts to which appeals are brought). He also says that the Council are "hiding behind" legal privilege in not allowing the Association to know what legal advice they have been given. That is to misunderstand the nature and purpose of legal

professional privilege: its very purpose is to enable citizens and organisations to have a free and frank exchange with their lawyers safe in the knowledge that what they tell the lawyers and the advice received remains confidential and is not disclosed to others, in particular those who they are or may in future be in dispute with. Mr Precious also talks about wanting justice for the residents of Bramshott Place Village. That is not part of the remit of this Tribunal, as we have explained; all we can suggest is that they take proper legal advice as to their position in relation to the section 106 agreement and pursue any legal action that they think appropriate.

22. On regulation 12(4)(d) (unfinished documents) Mr Precious appears to be under a misconception. The unfinished documents relied on by the Council are not, as he appears to believe, versions of the Community Travel Plan; they are in fact draft deeds of variation of the section 106 agreement coming into existence many years later.

Conclusion

23. We therefore reject Mr Precious's case on both the issues we have identified and consider that the Commissioner was correct to reject his complaints about the way the Council dealt with the EIR requests and we therefore dismiss his appeal.

24. This is a unanimous decision.

HH Judge Shanks

21st June 2016