First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0266

Heard at Coventry Magistrates Court
On 13 April 2018

Before
CHRIS RYAN
JUDGE
ANNE CHAFER
PAUL TAYLOR
TRIBUNAL MEMBERS

Between

PAUL THORNTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Attendances:

The Appellant represented himself
The Respondent did not attend and was not represented.

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2017/0266**

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and Solihull Metropolitan Borough Council is directed, within 35 days of the date of this decision, to disclose to the Appellant the information which he sought in an information request dated 1 April 2016.

REASONS FOR DECISION

Our conclusion

1. We have concluded that the Information Commissioner was wrong in concluding (in her Decision Notice FER0636600, dated 5 October 2017), that Solihull Metropolitan Borough Council ("the Council") had been entitled to refuse the Appellant's request for information because:
    i. it was still in the course of completion and/or consisted of unfinished documents (and so covered by the exception provided under regulation 12(4)(d) of the Environmental Information Regulations 2004 ("EIR")); and
    ii. the public interest in maintaining the exception outweighed the public interest in disclosure.

The Request

2. The Appellant has a number of concerns about plans to route the HS2 railway line through the area where he lives and to use the resulting HS2 corridor for new roads. He previously sought information from four local authorities thought to be affected and discovered material suggesting that planning officers from each of the affected authorities had been meeting to discuss a particular road scheme planned to run to the South of Coventry and that design work had been undertaken at a relatively detailed level, although not to the stage where formal planning procedures had started.

3. In the light of that information the Appellant maintained a careful watch on any relevant developments. On 1 April 2016 he wrote to the Council in the following terms:

> *"I refer to the agenda papers for the meeting of Warwick District Council on the 24th February 2016…*
> *Agenda item 14 has an Appendix 1…*
> *Buried on page 29 of that Appendix, under the heading 'Policy DS NEW 1 Directions for Growth South of Coventry' it states that 'proposals should take account of the potential for a new road linking the A46 Stoneleigh junction with Kirby Corner and subsequently to the A452 or A45, which has been identified as an important means of mitigating increased traffic flows on the local and strategic road network; increasing existing strategic highway capacity; and providing an improved future strategic highway link to UK Central'"*

The letter went on to mention a report in local media and then continued:

> *"This article cites council officers stating 'the development will also be influenced by a revised masterplan for the University of Warwick and long-term plans for a new road link between the A46 Stoneleigh junction through to the 'UK Central' development in Solihull and onto Birmingham Airport, according to council officers"*
> *This would appear to relate to the same road proposal and the comments indicate that the proposals are not as ethereal as the local plan consultation implies.*
> *Under the provisions of the Environmental Information Regulations, please provide all information that you hold relating to such a potential new road development. This would include any reports, plans, cost-benefit analysis and possible route option information. This will include the documentation within which the claimed merits of such a road have been 'identified', and any evidence claimed to substantiate such merits. The information may be held independently by* [the Council] *or will be included in communications to or from other public agencies."*

We will refer to this letter as "the Request"

4. The Council refused to disclose the requested information, claiming that it was covered by exceptions to the obligation to disclose (under EIR regulation 5) because it fell within the scope of regulation 12(4)(d) (exception for incomplete or unfinished material, documents or data). The refusal was confirmed, following an internal review and the Appellant asked the Information Commissioner to investigate that refusal.

The relevant law

5. The obligation on public authorities to disclose information on request is set out in EIR regulation 5 in the following terms:

> *"(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."*

6. EIR regulation 4 provides:

> ***"Dissemination of environmental information***
>
> *(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds –*

(a)progressively make the information available to the public by electronic means which are easily accessible; and

(b)take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

(2) ….

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12."

7. The relevant parts of EIR regulation 12 read as follows:

"Exceptions to the duty to disclose environmental information

***12.** – (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

(a)an exception to disclosure applies under paragraphs (4) or (5); and

(b)in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) …

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a)…

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;"

<u>The Information Commissioner's Decision Notice</u>

8. The Decision Notice issued at the end of the Information Commissioner's investigation recorded the fact, not disputed by the Appellant, that the withheld documents comprised plans related to the proposed road scheme and that they had been created by Coventry City Council ("Coventry") as part of the project to build the proposed new road. They had then been provided to the Council. The Information Commissioner decided that, in those circumstances, the information could correctly be characterised as "*unfinished documents*" and "*materials in the course of completion*". She recorded that part of her decision in these terms:

> *"32. The Commissioner does not consider that a document must be finished or completed if it is shared with another public authority. Public authorities must be allowed space to communicate ideas and proposals to other public authorities to gain opinions and consensus before finalising documents. This is particularly important in large scale projects involving multiple public authorities."*

The Information Commissioner went on to note that the documents had been shared with only one public authority, were not released to external parties and were still subject, at the time, to revisions and amendments as the project progressed. They therefore comprised "*unfinished documents*". She then concluded as follows:

> *"36. The Commissioner accepts that the withheld documents were created as part of a project that, at the time of the request, had not yet reached the decision making stage and, therefore, also falls under the 'materials in the course of completion' limb of the exception under regulation 12(4)(d)."*

9. Having decided that the exception was engaged, the Information Commissioner proceeded to apply the public interest test stipulated by EIR regulation 12(1)(b). She acknowledged the public interest in supporting the general principle of accountability and transparency in respect of public authority business. She also accepted that the impact of a new road project on local communities required a degree of openness as plans developed. Against that, she considered that disclosure of the withheld information could lead to a chilling effect on the free and frank exchange of views and opinions during large scale projects and that it might lead to future stifling of discussions with other public authorities. She also acknowledged that, at the time of the Request, the new road project was in its early stages and options were still being considered. The preferred option for presentation to the public had not yet been decided upon and she was not persuaded of the benefits of enforcing publication before disclosure during the normal course of a planning application. At that stage the public would be fully consulted. The Information Commissioner concluded:

> *"The Commissioner's view is that the council correctly determined that the public interest favoured maintaining the exception under regulation 12(4)(d)."*

10. Finally, the Information Commissioner considered the Appellant's submission that the Council should have published the withheld information, without waiting for it to be requested, under its obligation to disseminate environmental information under EIR regulation 4. She decided that she did not have the jurisdiction to issue a decision notice in respect of that complaint.

<u>The Appeal to this Tribunal.</u>

11. On 4 November 2017 the Appellant lodged an appeal against the Decision Notice. He set out detailed Grounds of Appeal. They were responded to by the Information Commissioner in a written Response filed on 23 January 2018. We will deal later with each of the arguments set out in those documents and in other submissions made by the parties.

12. Appeals to this Tribunal are governed by FOIA section 58, as applied to EIR cases. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider

whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised her discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

13. A case management direction was made by the Tribunal Registrar ordering that the appeal should be heard on the same day as another, related, appeal (EA/2016/0270) but that the two appeals should not be joined. Thereafter the Information Commissioner co-operated in the preparation of hearing bundles for the Tribunal's use on both cases but chose not to be represented at the hearing of the appeals.

14. The withheld information was made available to us in a closed bundle, which was not shared with the Appellant because to do so would have pre-judged the appeal

<u>The issues to be determined and our conclusion on each.</u>

15. The Information Commissioner's written Response set out her understanding of the points raised in the Grounds of Appeal. She did so in these terms:

> *"(1) the Commissioner erred in failing to consider that the documents in question were finished for the purpose that they were produced at the time they were provided to the public authority, i.e. although the information contained might be liable to change in the course of the planning procedure, the documents themselves were not. The Commissioner's conclusion that the documents were nonetheless in the 'course of completion' was incompatible with both the Directive and the Aarhus Implementation Guide;*
> *(2) even if reg 12(4)(d) were engaged (which the Appellant denies), the Commissioner erred in accepting the Council's generic public interest arguments against disclosure, since they did not provide any specific or substantive arguments to justify overriding the presumption in favour of disclosure;*
> *(3) in light of a parallel request made to another public authority concerning the same proposal, the Commissioner erred in attaching weight to the fact that the material was going to be subject to public consultation in due course;*
> *(4) the Commissioner improperly failed to take account of the Solihull Council's failure to comply with the statutory timescales provided by the planning legislation;*
> *(5) the Commissioner wrongly failed to investigate the Appellant's complaint concerning Solihul Council's compliance with the dissemination obligations under regulation 4 EIR."*

16. In her written Reply the Appellant accepted that summary. We deal with each in turn in the following paragraphs.

1. Engagement of EIR regulation 12(4)(d)

17. The Appellant argued in his Grounds of Appeal that the disputed information could not be characterised as *"material in the course of completion"* because it was information contained in documents that were finished for the purpose for which they had been created, namely release by Coventry to the Council. The documents were not drafts, or

early versions of an identifiable document, even though the project with which they were concerned may still have been in the course of development.

18. The Information Commissioner set out in her Response a short statement to the effect that the documents in question had been created by Coventry at an early stage of the project and that the project had not yet concluded at the time of the Request. The documents were likely to be updated and changed as the planning process progressed and the Information Commissioner's decision that they were both *"unfinished documents"* and *"materials in the course of completion"* was consistent with the EIR, the EU Directive which it was intended to implement and the available guidance on interpretation. The Appellant challenged that claim. He argued, in both written and oral submissions, that the history of the development of the law now embodied in EIR regulation 12(4)(d) demonstrated that the exception was designed to protect documents that were still being considered internally by an authority. That history included the Aarhus Convention [1] which included the following recitals and operative provisions:

> Seventh to ninth recitals
>
> *"Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,*
> *Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,*
> *Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns…"*
>
> Article 4
>
> *"1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation …"*
>
> …
>
> *"3. A request for environmental information may be refused if:*
> *(a) …*
> *(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."*

The final words of Article 4 then read:

[1] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 25 June 1998 and implemented in the EU by Directive 2003/4/EC

"The aforementioned grounds of refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure…."

That approach to interpretation is reflected also in recital 16 and Article 4.2 (penultimate sentence) in the Directive.

19. The Appellant acknowledged that Aarhus refers only to *"material in the course of completion"* and did not make any express reference to unfinished documents. However, the Aarhus Implementation Guide,[2] which we are entitled to rely upon as guidance, includes the following passages in its commentary on Article 4 (at page 85):

> *"The Convention does not clearly define "materials in the course of completion". However it is clear that the expression "in the course of completion" relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.*
>
> *…*
>
> *Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests that the document will have more work done on it within some reasonable time frame …"*
>
> *A similar conclusion was reached by the Conseil d'Etat of France, in case N° 266668 (7 August 2007) with respect to the use of the term "unfinished documents" in Directive 90/313/EEC. The Conseil d'Etat held that a provision excluding preliminary documents produced in the course of drawing up an administrative decision from the right of access to environmental information is not compatible with article 3, paragraph 3, of Directive 90/313/EEC which limits the possibility for a request for environmental information to be refused to when the request concerns 'unfinished documents'."*

20. On the basis of these materials the Appellant argued that the fact that the project in question was unfinished, was still in the course of completion and might well be altered did not mean that every document created during the course of its planning or implementation fell within the exception. The Information Commissioner's own guidance, on which she appeared to have relied, was not compatible with the provisions of the Aarhus Convention and the latter should be treated as determinative on the point, or as having greater persuasive influence. The Appellant conceded that a draft document did not cease to be a draft, simply because it had been shared with another authority. He argued, however, that its release to another authority was strong evidence that the purpose behind its creation had been fulfilled.

21. We start by reminding ourselves that EIR regulation 12(5)(e) provides another exception, namely that an information request may be refused if disclosure of the

[2] United Nations Economic Commission for Europe – the Aarhus Convention – An Implementation Guide, Second edition, 2014

requested information "*would adversely affect…the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law…".* Regulation 12(4)(d) does not require the establishment of an adverse effect before it is engaged. Particular care must be taken in determining the boundaries of such an exception based on the class of the information covered. This is reinforced by the requirement that we apply a restrictive approach to the interpretation of any exceptions.

22. In our view the Information Commissioner fell into error by placing too great an emphasis on the unfinished nature of the proposed road project. It had clearly reached a stage of development, in Coventry's view, where details were ready to be released to a neighbouring council for further discussion. The documents prepared to communicate those details were completed at the time when they were passed to that authority. We have had the benefit of inspecting them (in the Closed Bundle provided to us). Without disclosing their detailed content, they appear to set out a clear set of proposals, with summarised justification for, and potential disruptions to, their implementation. They were not described as a draft and the proposals they contained were not expressed in terms of being unfinished or subject to unilateral change by Coventry. The purpose for which they were created (passing Coventry's views to the Council) was therefore achieved at the date of release. They could not thereafter be treated as either unfinished or in the course of completion.

23. Our conclusion is consistent with our understanding of the purpose of the EIR, derived from the recitals to the Aarhus Convention, which is to facilitate effective public contribution to decision-making in the environmental field. That became a highly persuasive factor at the time when plans had reached the stage where Coventry chose to share them with the Council. Had disclosure at that stage risked harm to subsequent discussions between Coventry and the Council (or any other authority) it would have been open to the Council to rely on EIR regulation 12(5)(e).

2. Application of the public interest test

24. The Appellant's Grounds of Appeal emphasised the presumption in favour of disclosure and argued that, against that background, the public interest factors in favour of maintaining the exception were generic and the arguments in support of them were not specific or substantive. The reference in the Decision Notice to a risk of discussion being stifled was at variance with the purpose of the EIR in facilitating participation in public decision-making. The public should not have been kept in ignorance until the two authorities had completed their discussions and published a final plan as part of the formal planning process.

25. The Council's written Response said no more on the point than:

> *"The Commissioner…explicitly acknowledged the presumption in favour of disclosure under regulation 2(2) … before considering the relevant factors for and against disclosure. Contrary to the Appellant's claim, the factors put forward by the Council were not simply 'generic' but specific to its development of the proposal to construct the new road. Nor did the Commissioner's acceptance of those arguments involvement (sic) any error of law or assessment."*

26. In our view the arguments in favour of maintaining the exception, as set out in the decision notice, would be more appropriate to the possible application of a regulation

12(5)(e) objection than the class based 12(4)(d) exception. We do not accept, in any event, that they carry sufficient weight, in light of the facts of the case and the nature of the withheld information, to overcome the presumption in favour of disclosure. They are not capable of establishing that the public interest in maintaining the exception outweighed the public interest in disclosure. We accept that protection needs to be extended to necessarily private discussions taking place while a document is being drafted and policy considerations recorded in it are being developed. However, that stage had come to an end by the time the Request was submitted and the public interest in being made aware of, and able to engage in public debate on, the information being shared by Coventry and the Council had increased to the stage where it at least matched the public interest in maintaining the exception.

3. Relevance of future public consultation

27. The Appellant suggested that the Information Commissioner had placed too much weight on the Council's claim that the road proposal was to be subjected to a public consultation process. This therefore really formed part of his challenge to the application of the public interest test. The basis of his challenge was that he was sceptical as to whether there was to be a real consultation, fearing that the public would be presented with a *fait accompli*. The exposure of the plans to one or more other authorities could lead to them all co-operating in the presentation of a single plan, which they all supported, thus possibly giving some members of the public the impression that there was little chance of securing any changes. However, that is not the inevitable result and no evidence was presented to us showing that the consultation would be a sham. We therefore placed no weight on this factor when coming to our decision on the public interest balance in paragraph 26 above.

4. Relevance of planning law timescales

28. This, again, formed part of the public interest challenge. It was raised in the Grounds of Appeal in quite tentative language. The Appellant conceded that he was not familiar with the Council's obligations to publish information under planning legislation but considered that the plan had been completed by the date of the Request and that those obligations must have been breached. The Information Commissioner argued that planning requirements were outside her jurisdiction and that there was, in any event, no evidence to support the criticism.

29. We agree with the Information Commissioner. A tentative suspicion of breach of a statutory regime in another area of law is no basis for challenging a decision notice. Again, therefore, we have placed no weight on this factor when coming to our decision on the public interest balance in paragraph 26 above

5. Obligation to publish proactively

30. The Appellant acknowledged that an earlier Tribunal decision with which he was involved (EA/2016/0310) had addressed the same question. In that case the issue to be determined was not whether the information in question should have been published voluntarily before the relevant information request had been submitted. The timing and sequence of events precluded that. The issue was, at what moment in time, after the date of the information request, ought certain information, gathered during a consultation process, to have been published. In this case the facts are quite different,

and the issue becomes a hypothetical one. We do not think that it would be appropriate to address it therefore. However, for the record, the relevant part of the earlier Tribunal decision was in these terms:

> *"43. FOIA section 50 (as applied to the EIR by regulation 18) provides that a complaint may be made to the Information Commissioner if an information request is thought to have been dealt with in a manner that is inconsistent with the requester's right to have information disclosed on request. Clearly a complaint that voluntary publication has not been effected cannot, by definition, arise from an information request. It is of course open to the Information Commissioner to consider, under FOIA section 52, whether a public authority has complied with any of the requirements of Parts 2 and 3 of the EIR (which will include obligations to publish environmental information under regulation 4). And if that leads to the conclusion that the public authority is in default, an enforcement notice may be issued. Although a public authority on which an information notice has been served may appeal to this Tribunal under section 57(2), there appears to be no provision enabling an appeal to be made by a third party, even the person who may have been responsible for alerting the Information Commissioner to the breach in the first place.*
>
> *44.We are therefore faced with a decision notice, which includes matters that appear only to be appropriate for intervention by the Information Commissioner through the enforcement notice procedure and an appeal instigated by an individual who would not, in any event, have had standing to challenge such an enforcement notice. However, the issue was not raised by either of the parties to the appeal and it is, accordingly, not appropriate for us to make a ruling on it. And, in case our concerns about lack of jurisdiction prove to be unfounded, we will address the question of whether the NIC complied with its obligations under EIR regulation 4."]*

Conclusion

31. In light of our findings above, we have concluded that the Information Commissioner fell into error in deciding that regulation 12(4)(d) was engaged. Even if that exception had been engaged we are satisfied that the public interest in maintaining it did not outweigh the public interest in disclosure. The Information Commissioner was therefore in error on that issue also. In those circumstances we allow the appeal and issue a substituted decision notice recording those findings and directing that the Council disclose the withheld information within 35 days of the date of this decision.

32. Our decision is unanimous

……..

Judge
2018

Signed

Judge of the First-tier Tribunal
Date: 8 August 2018
Promulgation Date: 9 August 2018