First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0270

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/2017/0270**

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

<u>Our conclusion</u>

1. We have concluded that the Information Commissioner was correct in concluding (in her Decision Notice FER0638124, dated 5 October 2017), that Coventry City Council ("the Council") had been entitled to refuse the Appellant's request for information because:
    i. it was manifestly unreasonable by reason of the estimated cost of complying with it (and so covered by the exception provided under regulation 12(4)(b) of the Environmental Information Regulations 2004 ("EIR")); and
    ii. the public interest in maintaining the exception outweighed the public interest in disclosure.

<u>The Request</u>

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 5 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 Coventry 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) 12(4)(e) (exception for internal communications), and 12(5)(e) (exception for confidentiality of commercial or industrial information). The refusal was confirmed, following an internal review and the Appellant asked the Information Commissioner to investigate that refusal.

5. During the course of the resulting investigation it emerged that the Council had interpreted the Request as applying only to "*reports, plans, cost-benefit analysis and possible route option information*" and had not appreciated that those specific materials formed a part only of the Request, by reason of the reference, in opening, to *"all information"* on the subject of the proposed development. The Council then argued that, in those circumstances it was entitled to rely also on EIR regulation 12(4)(b) because a large amount of correspondence would then fall within the scope of the Request.

6. 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)…

(b)the request for information is manifestly unreasonable;"

The Information Commissioner's Decision Notice

7. The Information Commissioner decided that it was open to her to find that a request was "*manifestly unreasonable*" if the cost of complying with it would impose an unreasonable burden on the Council or an unreasonable diversion of its resources. In assessing the burden, it was permissible to consider whether the cost of complying would exceed the limit imposed on information searches under section 12 of the Freedom of Information Act ("FOIA"), read with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Under those provisions a public authority may refuse an information request if the cost of complying exceeded £600 for Central Government departments or £450 for other public authorities. Those totals are to be based on a notional hourly rate of £25 being applied to the individual(s) carrying out the search. The limit would be met, therefore, if the task of compliance absorbed more than 18 hours.

8. The Information Commissioner accepted evidence from the Council that:

   a. 1006 emails relating to the A46 project had been located in the records maintained in respect of just one senior staff member in the Council's Transportation Team.
   b. Time would have to be spent reviewing each email for relevance (estimated at 2 minutes per email by the Council, but considered to be much less by the Information Commissioner).
   c. A further 2-5 minutes per email would be required to review each email and consider whether any information within it needed to be redacted and/or whether it fell within any other of the EIR exceptions.
   d. The result was that between 33 and 84 hours would be likely to be required to complete the exercise.
   e. Five other team members and one councillor would have been involved in email communications on the same subject matter, requiring the equivalent exercise to be carried out on their email traffic. The email archive of three former staff members would also have to be considered.

9. On the basis of that evidence the Information Commissioner concluded that the FOIA cost limit would have been exceeded by a considerable margin. That was not determinative, in the context of an EIR request, but it was appropriate to take it into account as guidance. That led her to conclude that the regulation 12(4)(b) exception applied. In reaching that conclusion the Information Commissioner rejected the Appellant's argument that public authorities should not be able to apply regulation 12(4)(b) on the basis of staff time as EIR regulation 7(1) relaxes the time limit for complying with a request if the public authority *"reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so."* She did not accept that extending time to respond provided the only available remedy and concluded that the regulation 12(4)(b) exception was both available and, for the reasons given, engaged.

10. The Information Commissioner then considered the public interest test under EIR regulation 12(1)(b) and, while acknowledging the public interest in transparency and accountability in the circumstances of this case, concluded that this was outweighed by the public interest in protecting public authorities from exposure to a disproportionate cost burden.

11. The conclusion of the Information Commissioner's investigation, as recorded in her decision notice, was that the requested information was excepted from the obligation to disclose and that the Council had been entitled to refuse it on that basis.

12. Having reached that conclusion, the Information Commissioner did not consider the possible application of the other exceptions relied on by the Council but did go on to find:

    a. that the Council had failed to provide the Appellant with any advice or assistance, which was in breach of its obligation to do so under EIR regulation 9, and was to be remedied by the Council providing such assistance within 35 days of the date of the decision notice;
    b. that the Council had not breached EIR regulations 11(4) or 14(2) (obligation to respond promptly to an information request); and
    c. she did not have the jurisdiction to issue a decision notice in respect of the Council's failure, as alleged by the Appellant, to publish environmental information proactively under EIR regulation 4.

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

13. On 10 November 2017 the Appellant lodged an appeal against the Decision Notice. The Council did not appeal the decision that it had been in breach of EIR regulation 9 by failing to proffer advice and assistance and the Appellant did not pursue an appeal against the finding set out in sub-paragraph b. in the immediately preceding paragraph.

14. 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.

15. The Appellant's Grounds of Appeal were as follows:

    a. The Information Commissioner should not have relied on the cost of compliance as the basis for her conclusion that the Request was manifestly unreasonable;
    b. It was wrong to avoid making a decision on the other exceptions, once regulation 12(4)(b) had been found to apply;
    c. The conduct of the Information Commissioner's investigation, as well as the absence of any advice or assistance by the Council, had prevented the Appellant from making an informed decision on whether to limit the scope of the Request (for example to the more limited materials which the Council originally took into consideration);
    d. The Information Commissioner had been in a position to direct the disclosure of some parts of the information covered by the Request, but failed to do so.
    e. The public interest test had not been correctly applied;
    f. The Information Commissioner's investigation had not been conducted with sufficient speed; and
    g. A decision should have been made on the Council's obligation to publish environmental information under EIR regulation 4.

16. The Information Commissioner filed a written response to the Appeal on 23 January 2018 responding to each of the Grounds of Appeal.

17. 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/2016/0266) 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 appeal.

18. We deal, in the following section, with each of the Grounds of Appeal raised by the Appellant, in the order set out above.

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

Cost of compliance not relevant under EIR regulation 12(4)(b).

19. Binding authority emanating from the Upper Tribunal and approved by the Court of Appeal precludes us from accepting the Appellant's argument that regulation 12(4)(b) may not be engaged solely by reason of the volume and complexity of the information requested. In *Craven v Information Commissioner* [2012] UKUT 442 (AAC) the Upper Tribunal established the principle that *"a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as 'manifestly unreasonable', purely on the basis that the cost of compliance would be too great…"*. The Appellant attempted to distinguish the case because the facts were quite different. However, that does not permit us to ignore the very clear point of general principle which the Upper Tribunal has stated, and which binds us on this Appeal. That authority also prevails over the terms of the Aarhus Implementation Guide, to which the Appellant drew our attention, as well as an earlier decision by a differently constituted panel of this Tribunal (EA/2016/0310), which mentioned, but did not in fact rule on the point.

20. Although the Appellant did not present argument or evidence to challenge the detailed application of this exception in his written Grounds of Appeal, he did argue during the hearing that the estimated figures were excessive. In particular, he said, it had not been appropriate to include time attributed to redacting materials as this was not a permitted element of cost allowed under FOIA section 12. We have some sympathy for that argument. However, the Appellant was unable to persuade us that the estimate was unreasonable, given that a sample exercise carried out on a relatively modest portion of the whole body of information potentially within scope generated a cost figure that was far in excess of the section 12 guideline figure. We have considered afresh the Information Commissioner's calculations of time and could see no serious flaw in them and certainly none that made it likely that they might be revised in a way that would bring the total cost below that figure.

Other exceptions should have been considered

21. The Information Commissioner argued, and we agree, that she was not obliged, having concluded that the Appellant's request fell within regulation 12(4)(b) and that the balance of the public interest favoured non-disclosure, to consider the possible engagement of other exceptions. Had we found in favour of the Appellant on regulation 12(4)(b), it would have been necessary to receive submissions on those other grounds of objection and determine them at a later hearing.

Appellant prevented from narrowing the scope of the Request

22. Although the Information Commissioner's Written Response suggested that the failure to give advice and assistance had no bearing on her conclusion that the Request was manifestly unreasonable, we believe that the Appellant's complaint was in fact recognised in her decision notice. It is reflected in the direction made requiring appropriate assistance to be given within 35 days of the decision notice having been published.

Failure to direct partial disclosure

23. We agree with the Information Commissioner's submission that the EIR does not impose on her any obligation to pick out part of the information requested and require it to be disclosed pending resolution of other issues arising from an information requester's complaint. Although the Information Commissioner may explore the possibility of compromise, and did so in this case, her statutory obligation, if that fails, is to determine the legal issue or issues arising from the complaint referred to her. In this case the issue was clear and affected all the withheld information, not part of it.

Application of the public interest test

24. This Ground of Appeal was explained in these terms:

> *"…even in consideration of any legitimate engagement of section 12(4)(b) for some or all of the information, public interest arguments should have been properly applied to at least some of the information. The notion that public interest arguments cannot apply in respect of some of the information withheld under 12(4)(b) is unsustainable."*

25. The regulation 12(4)(b) exception, when based on the likely cost of compliance, inevitably affects the whole of the requested information. It is the cost of compliance with the Request that counted, not the cost of complying with any part of it. If it had been refined (as it may have been had appropriate advice and assistance been provided by the Council) then the test of manifest unreasonableness would have to be applied to that subset of the originally requested information. But that situation has not arisen, and the public interest test must therefore be applied, at this stage, against the whole body of information covered by the Request. The Information Commissioner was entitled to conclude, in those circumstances, that the public interest in preventing unreasonable cost burdens from being imposed on public authorities outweighed the public interest in disclosure.

26. During the hearing the Appellant addressed us on a different aspect of the public interest. He argued that the requirement set out in the Aarhus Convention, and reflected in the EIR, to make environmental information available to enable the public to participate in debate on future plans meant that maintaining secrecy until disclosure is made under planning permission procedures was no longer appropriate. The road plans which he was investigating had clearly reached a stage of quite detailed preparation and in those circumstances the public interest in disclosure carried great weight. The argument is certainly an attractive one and in other circumstances may have carried the day. But in this case the estimated costs of complying with the Request, given its very wide terms, have the effect of outweighing the public interest in favour of disclosure because of the unreasonable burden that would be imposed on the Council. It may prove possible to reduce that burden once the Council has complied with the Information Commissioner's direction to provide advice and assistance. The public interest in disclosure may then be such that the balance swings in favour of disclosure, although that is not something on which it would be appropriate to comment further at this stage.

Time taken over the investigation

27. The Appellant argued that the delays of which he complained had the effect of "*enabling the authority to prevaricate in the provision of information with impunity, thereby sabotaging the implementation of the regulations.*" We would say, first, that the Council's initial willingness to interpret the Request as having a narrower scope than was ultimately found to be the case by the Information Commissioner points away from any strategy of prevarication. Although it was certainly unfortunate that the true scope of the Request was not established until the Information Commissioner commenced her investigation, no evidence was presented to us suggesting that this resulted from intentional delaying by the Council or that it undermined the Appellant's rights.

Obligation to publish proactively

28. The Appellant acknowledged that the earlier Tribunal decision with which he was involved (EA/20160310) 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 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

29. In light of our findings on each of the issues discussed above, we have concluded that the Appellant has not satisfied us that the Information Commissioner fell into error in deciding that regulation 12(4)(b) applied and that the cost estimate made under it was reasonable. In those circumstances we uphold the decision notice and reject the Appeal.

30. Our decision is unanimous

………..

Judge
2018

Signed

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