First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0123

Heard at Birmingham Employment Tribunal
On 15 November 2018

Before
JUDGE HOLMES
ANNE CHAFER
JOHN RANDALL CBE

Between

ROBERT VAUDRY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

STRATFORD – ON – AVON DISTRICT COUNCIL

Second Respondent

DECISION AND REASONS

The Tribunal dismisses the appeal, the decision notice, no. FER0720778, dated 7 December 2017 is confirmed and no further steps are required to be taken by the public authority.

REASONS

1. In this appeal the Appellant, Robert Vaudry appeals against a Decision Notice issued by the Information Commissioner on 24 May 2018, in which she determined that (save for a small number of documents) the public authority, Stratford – on – Avon MBC ("Stratford" or "the Council"), had not failed to comply with regulation 12(4)(e) of the EIR and had applied that exception correctly.

2. The Appellant appealed the Decision Notice by a Notice of Appeal dated 20 June 2018. In the Notice the Appellant indicated that he required a Decision after a hearing.

3. The Commissioner filed her response to the appeal, after an extension, on 2 August 2018.

4. The Appellant filed a response to the Commissioner's response dated 21 February 2018 in the appeal, and dated 24 April 2018.

5. The Registrar issued case management directions on 15 August 2018. She directed that Stratford be joined as Second Respondent, and notified the parties of this hearing date.

6. On 24 October 2018 the Registrar issued further case management directions for the handling of the disputed information in a closed bundle. She also raised with the Commissioner why the matter had been dealt with by her under EIR and not FOIA.

7. The Commissioner replied by a Response to the Tribunal of 8 November 2018. She explained her reasons for this approach, and pointed out how the parties had agreed that this was the correct legal regime, and how a previous Tribunal Decision under Appeal Reference No. EA/2018/0082 had proceeded on the basis that the EIR was the correct regime.

8. The Appellant attended the appeal in person. The Commissioner did not attend the hearing, but submitted written submissions in the appeal. The Second Respondent was represented by Mr Cisneros of Counsel. The Second Respondent's Skeleton Argument by Mr Cisneros dated 8 November 2018 was produced to the Tribunal and the Appellant. There were two Hearing bundles, one open, and one closed.

9. The Tribunal reserved its Decision, which is now given, with apologies to the parties for the delay in its promulgation, occasioned by a mixture of pressure of judicial business and family medical circumstances being experienced by the Judge.

The Decision Notice.

10. The Decision Notice that is the subject of this appeal is dated 24 May 2018 (No. FER0720778), and this relates to the Appellant's FOIA (for that is how he termed it) request of 29 August 2017, given the reference no. 11778 by Stratford.

The Background.

11. The background to the request made by the Appellant which gives rise to this appeal is that the Appellant is the owner of a property, the Moat House, in Dorsington, for which Stratford – on – Avon MBC is the local authority, with responsibility for planning matters and enforcement. This is a private

residence, which is in the Parish of Dorsington, which has a council. He is also a Councillor on the Second Respondent Council.

12. The Appellant has been in dispute with Stratford concerning the permitted use of his property. An Enforcement Notice and a Stop Notice under the relevant planning legislation have previously been issued by Stratford to the Appellant to prevent his property being used for wedding events and similar functions. There has been a dispute between the Appellant and Stratford about the merits and legitimacy of the stance it has taken in relation to the use to which he can put his property, and the enforcement action taken against him.

13. The Appellant has made previous requests. His first was on 13 July 2017, in which he asked:

    "..to see all correspondence and notes of telephone calls and meetings between SDC's Enforcement and Planning Officers and any Dorsington resident or Dorsington Parish Council in respect of functions at the Moat House (past and future)"

14. This was given reference number 1163 by Stratford, who responded to it on 2 August 2017.

15. The Appellant later amended the initial request on 8 August 2017, to change the last few words to read *"for the period of 1 January to 31 July 2017"*. This was then given reference number 11695 by Stratford.

16. The Council responded to that request by letter of 25 August 2017, refusing the request. That response was to refuse the request, citing Regulation 12(4)(b), and Regulation 12(5)(b).

17. On 29 August 2017 the Appellant wrote further [page 38 of the bundle] to the Council. That document performed several functions. By it the Appellant sought an internal review of the response to request 11695, and also made a further FOI (as he termed it) his request in these terms:

    "I wish to make another FOI request – for all internal correspondence relating to the handling of this FOI request and the initial request."

18. This was given reference number 11778 by Stratford, and is the request at issue in this appeal. This request is a request about a response to a previous response. By the term "this FOI request" the Appellant was referring to that of 8 August 2017 (ref.no. 11695), and by the initial he was referring to that of 13 July 2017 (ref.no. 11631).

19. Finally, in this document the Appellant sought to raise two complaints against five of the Council's officers, for engaging in a concerted attempt at a cover up, and against one of them for failing to investigate a complaint made against him by Roger Thatcher.

20. Stratford responded to this request on 6 October 2017 [pages 39 to 40 of the bundle, though barely legible], confirming that the Council held the information, but contending that it was caught by Regulation 12(4) of the EIR, to the extent that the request involved the disclosure of internal communications. Given that this is a qualified exception, the Council went on to set out why the Council considered that the public interest was in favour of not disclosing the requested information.

21. The Appellant was offered an internal review of this response, which he sought (although how and precisely when is unclear from the open bundle), and which was carried out. The review outcome dated 6 December 2017 was sent to the Appellant [page 41 of the bundle – it is assumed this is complete, although it is only one page, and has no signature page]. In it, the author (Oliver Hughes, it seems) upheld the refusal of the request for the same reasons given in the refusal on 6 October 2017, in relation to internal communications.

22. The review went on, however, also to contend that the information requested was also exempt because disclosure would adversely affect the course of justice, and the ability of the Council to conduct an inquiry of a criminal nature. This was, without it being expressly stated, reference to the exception provided by Regulation 12 (5)(b) of the EIR.

23. The Appellant complained to the ICO on 9 December 2017 [page 56 of the bundle – though this may not be the first communication to the ICO], and his complaint was assigned reference no. FER0720778 in a response from the ICO dated 16 January 2018 [pages 57 – 58 of the bundle].

<u>The ICO's investigation.</u>

24. The ICO investigated the matter by writing to Stratford on 18 January 2018 [pages 59 to 62 of the bundle], seeking its explanation of the reasons it had applied the exceptions both under Regulation 12(4)(b) and 12(5)(b). The ICO also sought and was provided with copies of the disputed material.

25. Stratford's response was dated 9 February 2018, and in redacted form, is at pages 65 to 67 of the bundle. The unredacted version appears in the closed material. There is very little in the way of redaction, and the Council's arguments can be discerned and understood perfectly well without the need for sight of the redacted details.

26. The Appellant meanwhile by email of 20 January 2018 invited the ICO to examine a further issue, namely whether certain Council officers had conspired to block the release of information to him. The ICO did not do so.

<u>The IC's Decision Notice.</u>

27. The Decision Notice was sent to the Appellant and the Council on 24 May 2018. She concluded that save for some limited information, contained in a small number of documents, the Council had correctly applied Regulation 12(4) (e). She directed disclosure of the small number of documents that she identified as not satisfying the public interest test against disclosure, and listed them in an Annex to the Decision Notice (oddly omitted from the bundle). They have since been disclosed.

28. The IC also identified documents which fell outside the scope of the Appellant's request, as not being internal communications, as either being with third parties, or with the Appellant. These too are listed in the Annex.

29. In applying the public interest test to the information which she found did fall within Regulation 12(4)(b) she weighed the competing arguments for and against disclosure, coming down against disclosure for the reasons set out in the Decision Notice [pages 4 to 7 of the bundle].

The Appellant's grounds of appeal, and submissions.

30. The Appellant's Grounds of Appeal, though handwritten, have been helpfully typed up and put in the bundle [pages 14 to 15].

31. The Appellant goes through the public interest test as applied by the IC, and advances his arguments as to why the IC's decision was wrong, and why the public interest favours, consistently with the presumption of disclosure in Regulation 12(2), disclosure on the facts of this appeal.

32. In his written and oral submissions, the Appellant advanced the grounds for his appeal.

33. The first of these, however, that disclosure would alleviate his concerns that there had been a cover up of a misdemeanour by a Council official, was abandoned by the Appellant. There had been a Police investigation in or about summer 2018, and the results had been communicated to the Appellant. He accordingly did abandon this ground of appeal.

34. In support of his remaining grounds, he rightly referred to the presumption in favour of disclosure in Reg. 12(2). He argued the need for transparency in the handling of EIR/FOIA requests, and how disclosure would promote confidence on the part of the public, and himself, that there was no cover – up of what could potentially be a criminal offence. He challenges the IC's reliance upon the need for Council officers to operate in a "safe – space", and the potential "chilling effect" that disclosure may have upon free and frank discussion within the Council of such requests. He contends that the former, on the IC's own published guidance, should not be a "catch – all", and how it

is most pertinent to challenges to policy decisions, not, as he puts it in this case "substantive content" and the nature of the internal communications.

35. In relation to the latter, he argues that the IC's position is untenable, as if anything the risk of disclosure should be a positive factor, encouraging officials to give matters adequate consideration.

36. The Appellant developed these themes in his oral submissions. The IC had failed to take account of her para. 23 of her own Guidance, to the effect that there is a public interest in transparency and good decision making. This should not be controversial. He was seeking to understand the process by which the Council worked through such requests. As a Councillor of the Second Respondent he was aware that there had been a review of its processes and a Report had concluded that there was a lot of work that needed to be done.

37. This was not a request for legal advice, nor for the naming of individuals. The public interest he identified was "does the Second Respondent go about dealing with EIR/FOIA requests in a manner in which a public authority should do, in accordance with guidance and good governance?"

38. He referred to the Decision of the Tribunal EA/2018/0082 ("the Oliver Tribunal") on 17 September 2018, an appeal involving the same parties (save that the Council was not made a party), arising out of the Appellant's request of 8 August 2017, its refusal by the Council, the IC's Decision Notice FER0720759 dated 27 March 2018, and the subsequent appeal to the Tribunal. That request was refused on Regulation 12(5)(b) grounds, and was upheld in the appeal. He referred to para. 36 of that Decision, the closed material viewed by that Tribunal, and its conclusion that there was no "live investigation". That was in the narrow sense of the term, but his point was that there was no investigation, a resident had written to the Council alleging that there was going to be a wedding at his property, but he heard no more about it, it was never followed up.

39. He referred to the letter from the Council to the ICO at pages 65 to 67 of the bundle. He took the Tribunal to the sentence ([page 65]:

"The withheld information is not considered to contain sensitive confidential information other than in so far as it concerns the alleged commission by Mr Vaudry of offences that are the subject of live planning enforcement investigation."

40. He was not seeking anything that would prejudice any investigation, and was not seeking to learn the identity of third parties, whose details could be redacted. To the extent that the Council was relying upon the "safe space" argument, he was not seeking legal advice.

41. The description of his property as "Dorsington Manor" in this letter was inaccurate, and showed a culture of carelessness.

42. The Appellant then took the Tribunal through the Decision Notice. In particular he submitted that the IC had taken his request as broader than it actually was, and had over – emphasised the "safe – space" issue.

43. He went on to discuss the Second Respondent's position, and the Skeleton Argument filed on its behalf. He pointed out that the header has the case reference number EA/2018/0082, as indeed it does, which is the reference for the previous appeal referred to above. He pointed out that the Second Respondent was relying upon there being a "live investigation". There could be no "chilling effect" if there was no live investigation.

44. He concluded by emphasising that this was a request about process, and not anything else. He wanted to see if the Council had put in place what it said it would do some four years ago. Had the Council deviated from its rules because he was the requester? It would be in the public interest to find out.

45. The Tribunal asked the Appellant questions to clarify his submissions. In particular, he was asked if he had ever clarified his request, to make it clear what he was not seeking, such as legal advice? He had not.

<u>The IC's response to the appeal.</u>

46. The IC did not appear, but her written submissions, dated 2 August 2018, are at pages 22 to 30 of the bundle.

47. She identified three issues in the Appellant's grounds of appeal:

    a) Disclosure would (sc. "lead to") further transparency about the Council's handling of the previous request, and alleviate the Appellant's concerns that the Council had covered up a misdemeanour by an official;

    b) She had placed too much emphasis or weight on the "safe space" argument;

    c) She had placed too much emphasis or weight on the "chilling effect" argument.

48. In relation to the first, she queried how the Appellant could have such concerns, without having seen the information. In any event, such concerns should be reported to the Police. Further, given the strained relationship between the Appellant and the Council, she questioned whether the information would alleviate the Appellant's concerns in any event. This ground, of course, has been abandoned.

49. In relation to the "safe space" argument, she noted the published Guidance, but as the Council was undertaking a live investigation, the need for a safe space is at its strongest, and she cites the decision in ***DBERR v IC and Friends of the Earth (EA/2007/0072)*** as support for this view.

50. In relation to the "chilling effect" argument, she disagreed with the Appellant and took the view that the issue of the chilling effect is the strongest when the issues in question are still live, as they were in this case.

The Second Respondent's response and submissions.

51. Mr Cisneros produced a Skeleton Argument (not within the bundle) setting out the Council's case, supporting the IC's decision. He amplified this in his oral submissions.

52. Having thanked the Appellant for the withdrawal of his first ground of appeal, Mr Cisneros in his submissions, following his Skeleton, addressed the "safe space" argument. He referred to the Guidance, and the existence of a live investigation. In relation to that issue, he took the Tribunal to the Decision of the Oliver Tribunal, and its conclusions at paras. 27 to 29. These were to the effect -that there was, in the circumstances an "investigation" in the wider sense, as the Appellant's property was already the subject of an enforcement and a stop notice, and hence any further communications would relate to whether these notices had been complied with. There was, in any event, no need for there to be a "live investigation" for the purposes of Regulation 12(5)(b).

53. All this bolsters the need for a "safe space", he submitted. The Council officials need such a space not only in relation to a live investigation, but also as to whether there is to be one.

54. He pointed out too that the Appellant's request was in wide terms, it had not been clarified or limited. If all he was seeking were documents relating to the as the process, there were publicly available documents which would do that.

55. If there was to be any challenge to the Council's approach, this would have to be by way of Judicial Review.

56. Whilst he was grateful to the Appellant for abandoning his first ground of appeal, the terms of his request were such that, if granted, he would receive far more than just the "process".

57. At the heart of this request are internal communications, and this a prime example of where the "safe space" argument is most appropriate.

58. The Appellant replied, pointing out that Judicial Review was very expensive, and could not be undertaken lightly. He would be nowhere near establishing a case without some foundation for it. The process he was seeking to learn about was not on the Council's website. What process was followed was what he wanted to find out.

The closed material.

59. The Tribunal then viewed the closed material. It cannot, of course, reveal its contents, but suffice it to say that its contents do indeed fall within the types of information that the Council has suggested they would, and are largely of the nature indicated, even in redacted form, in the response to the ICO's queries of 9 February 2018 referred to at para. 25 above.

60. The material included an unredacted version of the Council's letter to the ICO of 9 February 2018, e-mail communication between Council officers relating to the Appellant's request, and how to respond to it, and discussion of the Council's planning enforcement procedures and policy, together with the names of complainants, and dates of complaints.

61. In the closed session argument was advanced as to whether disclosure of the substance of these discussions would assist public understanding of enforcement policy, and the where the balance of public interest would lie.

Further Submissions.

62. The parties then made their final submissions. Mr Cisneros in summary went back over the Appellant's two remaining grounds of appeal, the Commissioner's over – emphasis of the "safe space" and "chilling effect" considerations. He pointed out the Oliver Tribunal's finding that although there was no legal investigation with a view to proceedings, there was nonetheless a form of investigation, as the complaint made was being followed up.

63. He referred in particular to the Decision in ***DBERR v IC and Friends of the Earth (EA/2007/0072,*** at para.114, where the following appears:

"*BERR argues that there is a need for a private "thinking" space for the formulation and development of policy. The Tribunal has recognised that government needs such a safe or private space for ministers and civil servant's deliberations as it formulates and develops policy (for example see HM Treasury v the Information Commissioner, EA/2007/0001 at paragraph 58(7)) This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.*"

64. The Appellant in closing stated that all he sought was non – controversial information on how Stratford dealt with his request, and whether it did so

fairly, reasonably and appropriately. The disclosed emails did not help him do that, he could not check this had been done in the manner that the Audit Committee had wanted. Information did not become legal advice just because the person seeking it was in the legal department. Much weight had been given to whether there was a live investigation, which the Council had at one time said there was, but was now going back on this. If there was any ambiguity in his request he urged the Tribunal to redefine it, and to order disclosure of the redacted material.

The Law.

65. The relevant provisions of EIR are as follows.

5(1) …a public authority that holds environmental information shall make it available on request. ……

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.

12(2) A public authority shall apply a presumption in favour of disclosure. …..

12(4) For the purposes of paragraph (1)(a) , a public authority may refuse to disclose information to the extent that –

(e) the request involves the disclosure of internal communications.

12(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect– ……

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature; ……..

Findings.

66. This appeal comes down to a fairly narrow issue, that of the public interest balance. Where regulation 12(4)(e) is engaged, the information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

67. The public interest in favour of disclosure covers a number of elements:

a) There is a general public interest in openness and transparency as to how public authorities carry out their functions, and this includes planning

control and enforcement action by the Council, and how it processes FOIA/EIR requests.

b) There is a more specific public interest in understanding how a particular matter has been dealt with and why a particular approach has been taken to a planning matter, both in relation to that specific matter and how that may inform planning decisions generally, and in ensuring that the Council is dealing fairly, and in accordance with its own policies, with FOIA/EIR requests.

68. The public interest in maintaining the exception is the ability of the Council to investigate alleged breaches of planning law, and to formulate its response to the Appellant's EIR request without such discussions becoming public. There is indeed a need for a safe space for such discussions.

69. Further, taking guidance from ***DBERR v IC*** cited above, we do consider this is most pertinent where there is a live issue. We consider that the issue is not whether there was a live investigation, but whether there was a live issue. Once the Appellant's property was the subject of an enforcement and stop notice, any potential breach thereof would be a "live" issue. The Appellant's original request, relating as it did to that issue, and how the Council was dealing with it, was thus relating to a live issue, and this request (which is, of course, made only three months after his previous request on 8 August 2017) was, in the Tribunal's view sufficiently proximate and connected to the previous, substantive request, to make it too a request relating to a live issue.

70. The Tribunal would add this observation. This request, like many others that the Tribunal is seeing these days, is, of course, a "secondary" or "parasitic" request, in that it is not directed to the original subject matter, such as, in this case a Council's decision making process on a planning enforcement matter, but is a request for information as to how a previous request has been dealt with. It is a request about a response to a previous request. It thus becomes a stage divorced from the original subject matter. This requester, as do all others in these circumstances, knows how his previous request was dealt with, as he has the Council's response to it. What he seeks by this request is further information about the process by which the response to his previous response was arrived at.

71. We have to question in these circumstances how much legitimate public interest there can be in the process of how the Council responded to a particular previous request. The Appellant relied heavily upon this in his submissions, suggesting that the public had an interest in Council planning enforcement policy. As the Council's submissions argue, however, how much that public interest would be advanced by the release of this particular information as to how the Council dealt with this Appellant's request about how his previous request was dealt with, is very questionable. Similarly in

relation to the Appellant's argument that there was public interest in how the Council dealt with FOIA/EIR requests, and whether it had improved its practices, this particular example would be unlikely to cast much illumination upon such wider policy issues. There is obviously great private interest on the part of the Appellant, as the requester, but that is not the same thing. Further, given the availability of further scrutiny of the merits of the response to a request provided by the right to seek an internal review, the right of complaint to the ICO, and then appeal to this Tribunal, one questions how much utility there can be, from a public interest point of view, in the release of this information.

72. Whilst appreciating that there may be circumstances in which it could be in the public interest for such information to be released, and this cannot be ruled out, on the other hand the Tribunal can see a risk of serial requests about responses to requests stretching "to th' crack of doom" to quote Shakespeare, with no real public interest being served by them.

73. In the alternative, if we were wrong on Regulation 12(4)(e), we would then have to consider, as the IC did not, given her findings, Regulation 12(5)(b). That, of course relates to a different ground of potential exception, that of the adverse effect on the course of justice. For the exception under regulation 12(5)(b) to be engaged, the public authority must show that disclosure "would" adversely affect the relevant matters.

74. We consider that this aspect has effectively already been determined by the Oliver Tribunal in EA/2018/0082 on 17 September 2018, an appeal involving the same parties (save that the Council was not made a party), arising out of the Appellant's request of 8 August 2017, its refusal by the Council, the IC's Decision Notice FER0720759 dated 27 March 2018, and the subsequent appeal to the Tribunal. That request was refused on Regulation 12(5)(b) grounds, which the Tribunal determined in its Decision, were engaged, and in respect of which the public interest test was satisfied against disclosure. As much of the same material, touching upon the same issues, relating to the Council's investigation referred to in its response letter of 8 February 2018, wherein the same arguments against disclosure were made as were made in the other appeal, we adopt that Tribunal's reasoning in the alternative in this appeal, and if called upon to decide this appeal under that Regulation would reach the same decision as the Oliver Tribunal

75. Finally, we would add this. Once is has been determined that the subject matter of the Appellant's previous request of 8 August 2017 was not to be disclosed by reason of Reg.12(5)(b), it is difficult to see how allowing disclosure pursuant to the request at issue in this Appeal would not, by the back door, lead to disclosure of the same excepted information. The Appellant's request effectively seeks disclosure of the process which led to his previous request being declined. It is hard to see how disclosure of such

information would not involve much of the very same material whose disclosure was (as the Oliver Tribunal held) rightly excepted previously.

76. Having balanced these interests, we find that the public interest in maintaining the exception does outweigh the public interest in disclosing the information. In making this finding we have taken account of the content of the withheld information. This is only a limited amount of information, which would not substantially advance the public interest in understanding the operation of planning enforcement generally or how this request had been dealt with specifically.

77. We appreciate that nothing has been said specifically addressing the "chilling effect" argument, and this has very much been a secondary consideration in the IC's decision, and the Second Respondent's submissions. For what it is worth we think it is really another facet of the "safe space" issue – the absence of a safe space is likely to have a chilling effect upon the officials who need to consider the issues, and may inhibit their ability to exchange views and information internally. To that extent we do not think it adds much, but is a further factor to be weighed in the balance.

78. For all these reasons, this appeal fails, and no steps are required to be taken by the IC, whose Decision Notice is confirmed.

Signed:

Judge of the First-tier Tribunal
Date: 10 May 2019
Promulgation date: 13 May 2019