Neutral citation number: [2025] UKFTT 9 (GRC)

Case Reference: EA/2022/0346

First-tier Tribunal

(General Regulatory Chamber)

Information Rights

Heard by Cloud Video Platform

Heard on: 23 October and 26 November 2024

Decision given on: 29 January 2025

Before

JUDGE MELANIE CARTER

MEMBER EMMA YATES

MEMBER DAVE SIVERS

Between

JASON BLAKE

Appellant

and

(1) INFORMATION COMMISSIONER

(2) LEICESTERSHIRE COUNTY COUNCIL

Respondents

Decision: The appeal is Dismissed

REASONS

1. This appeal concerns information as to the state of repair of a particular road in the Leicestershire County Council's (the Second Respondent) area. The Appellant requested the following information from the Second Respondent, the Council on 26 August 2021, as follows:

> *"Please could you send me the all road inspection reports for Bosworth Road Walton, for 2014, 2015, 2016, 2017, 2018, 2019, 2020."*

2. On 29 September 2022 and 14 October 2022, the Council confirmed that it was relying on reg. 12(5)(b) of the Environmental Information Regulations 1997 (EIR) to withhold the redacted information, and agreed to partial disclosure of reports prior to September 2016, with reference to the Limitation Act 1980.
3. In a Decision Notice dated 24 October 2022, the First Respondent, the Commissioner concluded that the Council had correctly applied regulation 12(5)(b) of the EIR to the withheld information. The essential basis for the Council's and in turn, the Commissioner's view that the requested information could lawfully be withheld was that, in the wrong hands (this being public disclosure), it could be used to pursue fraudulent claims for damage and/or injury. Release of the information would both encourage speculative fraudulent claims and in turn have the effect of removing important procedural defences for the Council thereby increasing the costs to the public purse.
4. The Appellant appealed to this Tribunal on 26 October 2021 arguing in effect that the course of justice would not be adversely affected if disclosure were made and that, in any event, the public interest balancing test favoured the disclosure of the information.
5. The Commissioner played no part in the proceedings beyond its written response, which supported his findings in the Decision Notice. The Decision Notice set out findings specific to this Council but also relied upon a more detailed Decision Notice IC-45186-B4K7 on essentially the same requested information and same exception of the EIR, albeit in relation to a different public authority. The Tribunal took the view however that little evidence had been put forward that was specific to the Second Respondent. On account of this, it joined the Council as Second Respondent and issued Directions requesting that:

a. The Second Respondent "*provide its evidence for concluding at the relevant date, per the second paragraph of page C73 of the Open Bundle:*

- *"Disclosure is likely to result in fraudulent claims being successful where they would otherwise not be;"*

b. The Second Respondent was further to *"provide submissions how the evidence provided affects its conclusion on the degree of likelihood and how it meets the test of whether disclosure "would adversely effect" the "course of justice" under the Environmental Information Regulation and to substantiate that the perceived risk is more than a possibility"*

6. The first day of the hearing took place on 23 October 2024. The proceedings were then adjourned to a second date to allow the Council to provide further witness evidence at the request of the Tribunal. The second hearing date took place on 26 November 2024.

THE LAW

7. Regulation 12 of the EIR provides a number of exceptions to the general duty to disclose environmental information, including sub-paragraph (5)(b), which provides that:

> *"(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;"*

8. In Rudd v ICO & the Verderers of the New Forest [EA/2008/0020], the "*course of justice*" was given a wide meaning as "*a more generic concept somewhat akin to 'the smooth running of the wheels of justice'*".

9. The Council put forward legal submissions, unchallenged by the Appellant, and with which the Tribunal agreed. It was accepted by the Tribunal that it was necessary to view the "*course of justice*" concept not just from the perspective of a claimant attempting to bring a claim in civil proceedings, but also from the perspective of a

defendant requiring safeguards to reduce to an acceptable level the risk (and associated burden) of opportunistic and/or fraudulent claims. Thus, the Council submitted that the concept is "*broad enough to capture the effects of disclosure upon the ability of parties to litigate fairly and at arm's length without the risk of wider disclosure prompting a disproportionate increase in the volume and associated costs of claims*".

10. The Council urged the Tribunal to recognise the careful balance that the Civil Procedure Rules ("CPR") and Pre-action Protocols, relevant to the civil proceedings, strike with regards to issues such as disclosure and evidence to ensure the course of justice runs smoothly, efficiently and fairly. Thus, the Council explained that where a genuine claim for damage and/or injury arising out of a defect on a highway is made with regards to an incident on or around a particular date, then the Council will, at the appropriate time in the proceedings and critically after a claim has been issued, respond providing specific details of inspection and maintenance reports. By then the Council would be able to determine whether it could seek to rely on a so-called s.58 defence or not. This is a legal route for a highway authorities to avoid liability for damages caused by potholes or other non-repaired highways. To use this defence, the authority must show that they took reasonable steps to ensure the highway was safe, including having a system for regular inspection and maintenance. Thus, there is a defence where the authority can show it had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic
11. The Council put forward in legal submissions, which the Tribunal accepted, "*that the threshold for establishing adverse effect is high. However, it does not require certainty. In Archer v ICO & Salisbury DC [EA/2006/0037], a differently constituted Tribunal identified some key elements of the "would adversely affect" test:*
    a. *It is not enough that disclosure should simply affect the interests referred to in the exception; the effect must be "adverse";*
    b. *Refusal to disclose is only permitted to the extent of that adverse effect;*
    c. *It is necessary to show that disclosure "would" have an adverse effect - not just that it could or might have such effect;*
    d. *Even if there would be an adverse effect, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".*

EVIDENCE

12. The Council's evidence in respect of the Directions, set out above, was provided by the Witness Statement of Jayne Newbert Claims Manager for the Insurance Department of the Council. She explained that in her view the disclosure sought would enable opportunistic and/or fraudulent claimants to identify defects that the Council had knowledge of but had not yet repaired. In her witness statement and oral evidence she set out (as summarised by the Council):
    a. The nature of insurance and personal injury claims, including with regards to procedural safeguards that are in place such as limitation and disclosure;
    b. The volume of such claims that are received by the Council, as well as a summary of the steps that the Council has put in place in an attempt to identify potentially fraudulent claims;
    c. The costs associated with defending claims, particularly from the perspective of the additional risk and burden that the Qualified One-Way Costs Shifting rules place upon defendants, including the Council;
    d. The nature of highways claims, including the relevant legal test, available defence and evidence that can be relied upon both to bring and also defend such claims;
    e. The safeguards provided in respect of such claims that are provided by the Civil Procedure Rules and Pre-action Protocol, noting that disclosure is limited to a pre-accident period of 12 months only;
    f. The approach of other authorities, which were said to be entirely consistent with that adopted by the Council to the Appellant's request.
13. The evidence of Jayne Newbert was in effect that fraudulent claims could, if the information sought was routinely released, be 'reverse engineered'. It was noted that it was, by its very nature, difficult to provide evidence of the actual number of fraudulent claims given the safeguards in place and also that those pursuing fraudulent claims were likely to simply withdraw or not pursue their claims where they subsequently feared that they were likely to be found out. The evidence that was

given in support was not in relation to highways damage or personal injury claims but rather by reference to insurance claims.

14. She gave evidence that, as noted above, non-disclosure would not affect genuine claimants at all given their right to see relevant information during the course of the proceedings. By that point however, the claimant would have had to specify facts and details of any accident, such that the Council could effectively defend itself on the basis of discrepancies.
15. An important aspect of this was the particular difficulty for the Council around legal costs. Given the 'Qualified Shifting Rule', the Council is forced to defend claims, entirely at its own risk. Claimants on the other hand face very limited risks. A claimant can submit a claim speculatively in the knowledge they face very little costs exposure.
16. Two examples were provided by Ms Newbert: First, an example was given of highway works being carried out in public, then the Council seeing a marked increase in claims made alleging damage/injury from the location before the repair was carried out. Ms Newbert also gave evidence as to the risk of opportunistic claims: by way of a hypothetical example, a claim involving an invoice for a replacement tyre, with the assertion that the damage took place before the due date for a road repair – this being reverse engineered in the sense that the fraudster would have become aware of the repair, having seen or heard about it and then claiming the damage occurred on that road and before any repair was carried out. It was explained that nearly all claims settle, with many of low value and in order to disprove a fraudulent claim, the Council would have to embark on what was said to be "a long and risky process".
17. Ms Newbert gave evidence also, by way of a further analogy, to the many reported cases of fraudulent claims being made for holiday sickness, as set out in Law Society guidance. Both examples were said to be materially similar to the situation that would arise if wider disclosure is required to be made.
18. The second witness who provided a statement and gave oral evidence was Chris Green, Head of Service – Highways Operations for the Environment and Transport Department. His evidence was with regard to information the Council makes public as to its general performance on highways repair – as opposed to the street level detail as to dates of inspection and repair (as requested by the Appellant and not routinely made public). The Tribunal had requested this evidence in part because of provision in the Council's Highways Maintenance Policy and Strategy (2012) (the 'Policy'),

attached to Jayne Newbert's statement, which set out the Councils intended reporting criteria (page 43 of the Section 18 Monitoring Review and Reporting):

Monitoring

- *As stated earlier there are a number of performance indicators applicable to the provision of highway maintenance these being the responsibility of individual Group Managers. Progress on all the performance indicators is reported to Strategic Performance Improvement Group, which meets bi- monthly to ensure that progress towards the agreed targets is maintained.*
- *Progress on the County Council Annual Plan indicators is reported to the Corporate Management Team and the Council's Cabinet*
- *Annual benchmarking is done through the National Highways and Transport Network*

19. The Tribunal wanted to understand, further to this Policy, what was in fact made public (see reference to reporting to Cabinet, which would be in public), potentially having an impact on the public interest balancing test. Mr Green explained that the material which addresses the points raised in the above section of the Policy is not at a street by street level and is not presented in one single, publicly available, report. Instead, monitoring is carried out internally by the Council and is then presented in various forms in respect of section 18 of the Policy in part to meet the statutory reporting requirements to the Department for Transport (DfT), which requires all Councils in the UK to report certain information and data. The data published via the various routes is in a sense 'outcome' data – i.e.: how well is the Council doing in terms of measuring the state of the highways, rather than drilling down into where a repair is needed on a specific road and when the repair was carried out.
20. In relation to that latter data, it was clear that, whilst the performance indicators (PI) data obtained, specifically in relation to so-called Category 1 & 2 repairs and due dates for inspection was, as stated, monitored internally, it was not published. The Council does not publish the data captured by its software system, Pentana as the data is vast and the data changes regularly; for example, many factors such as time of year and weather affect performance against PIs. As such, presenting regular 'snap shots' of individual statistics on number of potholes/repair times etc would not give an accurate assessment of the Council's performance against its PIs as the position is more fluid.

21. Mr Green stated that:

> *"The information obtained however at 'working' team level is gathered into data for general reporting of headline PIs within the Council's Scrutiny Committee and information requested by the DfT, and as such PI information is published relating to the percentage of the highway network where structural maintenance should be considered, split by network classification (Principal A Roads, Classified non-Principal B & C roads, and unclassified roads).*
>
> *This PI information is included in the Highways & Transport Performance Report and is provided to the LCC Highways and Transport Overview and Scrutiny Committee[2] in compliance with 18.1.2 of the Policy. Minutes of the meetings are published on the Council's website, with an available search function.*

22. Separately, the Tribunal's attention was drawn to the Annual Local Authority Road Maintenance ('ALARM') Survey, which is an independent survey of local authority highway departments in England and Wales commissioned by the Asphalt Industry Alliance (AIA). The ALARM survey report provides detailed insight into the funding and conditions of the local road network, based on information provided directly by those responsible for its maintenance.
23. With paragraph 18.1.3 of the Policy in mind, the Council also publishes benchmarking and customer satisfaction PI information, taken from the National Highways and Transport public satisfaction survey (the 'NHT Survey'). The NHT Survey collects public perspectives on, and satisfaction with, Highway and Transport Services in Local Authority areas.
24. Finally, Mr Green also produced examples of the information the Council has published further to the FOIR/EIR regimes. The Tribunal did not take this into account, as the publication of this data, which was wholly dependent on someone seeking particular information and not being part of any systematic disclosure, was considered too ad hoc and partial to necessarily be of any reliable use to the public.

ANALYSIS

25. The Appellant made the following points, as to the likelihood of adverse impact and the public interest balancing test:

    a) First, he emphasised that there was no hard data specific to highway related

claims, as to the number, scale or risk of fraudulent claims if the information requested were to be routinely disclosed. The Tribunal however gave this point only limited weight, as it accepted the Council's submission that by its very nature data as to fraudulent claims was very difficult to come by. Furthermore, given that this information has not been published, it was obvious that there could not possibly be any data on claims prompted by its publication.

b) He then noted that there were, in the Council's own evidence, a host of robust measures to safeguard against fraud, arguing that in light of this, the risk must be substantially reduced and not likely to increase if this information were to be disclosed. Again, whilst agreeing with him to some limited extent the Tribunal considered the exact weight to be given to this point difficult to calibrate in light of a). It concluded that the safeguards put forward would in any event, only be of limited impact given how disclosure would undermine the so-called section 58 defence.

c) The Appellant argued that since most claims are of a low value, and that a PI of 91% performance for repairs by the due date, is already very high, the window of opportunity in which fraud could take place and the low financial impact this might have, would reduce any adverse impact. The Council had explained however that there could be single high value claims in the hundreds of thousands and in any event, the average cost of a single claim being £35,000, the figures involved were not likely to be as de minimis as suggested.

26. He also argued that the impact of disclosure in this case on other Councils was of very limited import, given the difference in measures taken by different authorities. The Tribunal agreed with this analysis and only gave limited weight to this particular factor.

27. The Council argued in turn that it had a responsibility to tackle/prevent fraud and protect the public purse from any fraudulent claim. The Council considers, as explained above, that there is an alternative access regime pursuant to the disclosure rules of the Civil Procedure Rules to obtain any specific data relating to the dates of inspections.

28. The Tribunal agreed that if a claim is fraudulent, then the Council is able to defend such a claim by disproving the claimant's evidence and/or providing that it had the benefit of s.58 defence. Conversely, where claims are genuine there will be appropriate

disclosure of information equivalent to that sought by the Appellant, during the course of the proceedings but not before – thereby reducing the risk of fraudulent claims but without any adverse effect on genuine claimants.

29. The Tribunal accepted the Council's submission that it is more likely than not that the adverse effects claimed by the Council would occur should disclosure occur and the Council be routinely required to disclosure such information. As noted above, the Tribunal accepted as self-evident that fraudulent claims are difficult to identify and prove. By removing one of the important procedural safeguards – withholding this information and thereby the defence at section 58, the Tribunal was of the view, they will become even more difficult to identify and prove.

30. Thus the Tribunal accepted the Council's submission that wider disclosure would enable claims to be 'reverse engineered' and thus to be successful in circumstances where they otherwise would not be. This was said to be not only about the identification of such claims, but also to ensure the balance of evidence and equality of arms.

31. The Tribunal concluded finally that the public interest in withholding the information greatly outweighed the public interest in disclosure (and as such the presumption in favour of disclosure in EIR cases did not arise). The Council clearly did publish a good deal of information as to the state of repair of its highways as set out above further to the evidence of Mr Green. Overall, the Tribunal considered that the various reports and data published gives a wide range of information to the public as to the state of repair of its highways generally (outcome data) which in turn would support the public's ability to call the authority to account. Whilst street by street information as to repairs needed and carried out within the last 6 years was not published and would be of some public use, specifically in terms of enhancing accountability and transparency as to the detailed causes of failings noted in the published outcome data, it was clear that the risk of fraud and cost pressures on the Council, outstripped the public interest in the usefulness of that data.

CONCLUSION

32. For the reasons given above, the Tribunal agreed with the Commissioner and the Council, in deciding that the exception is engaged. The evidence provided demonstrates that disclosure would adversely affect the course of justice. The Tribunal then concluded that the public interest in withholding the information greatly

outweighs the public interest in disclosing the information. As such, the Decision Notice is upheld and the appeal dismissed.

Signed

Judge Carter

Date:

6 January 2025