



IN THE FIRST TIER TRIBUNAL

Appeal No: EA/2015/0220

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FER0569406 dated 8 September 2015

Before

Andrew Bartlett QC (Judge)

Michael Jones

Marion Saunders

Determined on the papers

Date of decision 6 April 2016

APPELLANT: TONY WAITE

FIRST RESPONDENT: INFORMATION COMMISSIONER

SECOND RESPONDENT: CAMBRIDGE CITY COUNCIL

Subject matter: Environmental Information Regulations 2004 – Exceptions – Internal communications, Regulation 12(4)(e) – Adverse effect on course of justice, Regulation 12(5)(b)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the conclusion of the Commissioner's Decision Notice dated 8 September 2015 but for reasons different from those given by the Commissioner. The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The appellant, Mr Waite, requested copies of four internal emails held by Cambridge City Council, relating to a planning matter. The request fell within the Environmental Information Regulations 2004 ('EIR').
2. The Council released one of the four, but withheld the other three, relying on Regulation 12(4)(e) (exception for internal communications) and Regulation 12(5)(b) (exception where disclosure would adversely affect the course of justice).
3. The Information Commissioner upheld the Council's refusal on the basis of Regulation 12(5)(b).
4. Mr Waite appeals to the Tribunal.
5. The Tribunal convened to consider its decision on 22 February 2016. On the next day we issued the following direction:

The Tribunal met on 22 February 2016 to consider its decision in Case No EA/2015/0220, Tony Waite v Information Commissioner, on appeal from the Commissioner's Decision Notice FER0569406 dated 8 September 2015, concerning information held by Cambridge City Council. The Tribunal concluded that it is not able to reach a decision without first seeing un-redacted versions of certain emails.

The Tribunal therefore orders that Cambridge City Council be joined to the appeal and provide to the Tribunal and the Information Commissioner, within 21 days, fully complete and un-redacted copies of the following internal emails:

3.9.2012 at 13:24 (item A of closed material)

4.9.2012 at 09:24 (item B of closed material)

4.9.2012 at 16:37 (item C of closed material, stated in Patsy Dell's email of 2.7.15 at 19:21 in open bundle to have been disclosed to Mr Waite with the Council's response ref 3588 in October 2014)

4.9.2012 at 09:33 (attached below item C of closed material)

5.9.2012 at 16:18 (item D of closed material)

29.8.2012 at 16:09 (in Open Bundle)

Pending further order, the complete and un-redacted copies shall be provided to the Tribunal in confidence and shall not be disclosed to Mr Waite or to the public.

If, upon sight of the un-redacted emails, the Tribunal considers that it might allow the appeal, the Tribunal will provide the City Council and the Commissioner with an opportunity to make further representations and, if appropriate, will thereafter provide Mr Waite with a further opportunity to make representations.

6. The directions order was complied with by the Council on 11 March 2016. As a result, we have been able to proceed with our consideration of the appeal.

The factual circumstances

7. The question of the application of the exceptions requires an explanation of the background facts.
8. Mr Waite owned residential land in Cambridge. A building was erected on the land, at the rear of existing houses, in 2012-2013. On 5 December 2013 the Council served an enforcement notice in relation to the alleged breach of planning control. This required that the new building be demolished. Mr Waite appealed against the notice. On 12 September 2014 a planning inspector dismissed the appeal, except that he varied the time limit for demolition, extending it for 12 months from the date of his decision.
9. On 30 September 2014 Mr Waite made his information request for the four emails. This request was made as part of a course of correspondence between Mr Waite and the Council; it arose out of the proceedings before the inspector and the responses to two earlier requests.
10. The evidence considered by the planning inspector included things said by or attributed to Mr Kelly, who was Mr Waite's site manager, on 29 August 2012 and in March, April, July and September 2013. Mr Waite confirms that Mr Kelly had authority to speak on Mr Waite's behalf. The conversation on 29 August 2012 is said to have been by telephone, with Mr Steed, who was a Council building inspector, and who provided evidence of the conversation. Mr Waite says that there was no such conversation on that date with Mr Kelly; he believes Mr Steed's conversation of 29 August 2012 was instead with a builder, Mr Edmonds, who did not have authority to speak on Mr Waite's behalf. He wants to see the emails because he believes they will shed light on this, and show whether the Council's personnel acted with probity.
11. An internal email in the open bundle, dated 29 August 2012, written by Mr Steed to the senior planning enforcement officer, refers to Mr Steed undertaking both a site visit and a subsequent telephone conversation on that date, and names the person Mr Steed understood he had spoken to. In the copy in the open bundle the name is redacted, but Mr Waite appears to have deduced that Mr Steed believed at the time that it was Mr Kelly that he spoke to.

12. Under court rules, the period for appealing on a point of law against a planning inspector's decision, pursuant to Town and Country Planning Act 1990, s289, is 28 days. Time therefore expired on 10 October 2014. The six week period under CPR 54.5(5) for commencing a judicial review of the planning inspector's decision expired on 24 October 2014. On the latter date the Council sent to Mr Waite its EIR refusal notice, declining to produce the three emails.

13. On 2 December 2014 Mr Waite informed the Council of his dissatisfaction with its response. He commented:

I know Jotham Steed to have been an honourable officer, who was visibly distressed when he realised that he had confused Mr Kelly with Mr Edmonds, and I therefore suspect that at least one such email addressed this issue to the SEO. I can only imagine that his testimony was signed under duress

14. On 21 January 2015 Mr Waite complained to the Information Commissioner. On 26 February 2015 the Council, after internal review, responded to Mr Waite's email of 2 December 2014, maintaining its refusal.

15. The period for complying with the enforcement notice expired on 11 September 2015. It is not fully clear when demolition of the building was carried out, but it seems to have been completed in August 2015. The Council visited the site on 14 August 2015 and appear to have confirmed on 18 August 2015 that the building had been demolished.

The Commissioner's Decision

16. On 8 September 2015 the Information Commissioner decided that regulation 12(5)(b) was engaged, on the basis that the Council had yet to pursue compliance with the enforcement notice, and that disclosure of the emails would have 'a potentially adverse effect on any future proceedings'. In explanation of this conclusion the Commissioner stated:

[29] The Commissioner considers that disclosure of the emails could adversely affect the council's ability to present and secure the best case for compliance with its planning enforcement notice, should it be necessary to pursue this open matter further.

[30] The Commissioner considers that the Council should be able to defend its position against any claim made against it without having to reveal its position in advance.

17. The Commissioner also concluded that the public interest balance favoured maintenance of the exception.

18. Having taken this view, the Commissioner did not consider Regulation 12(4)(e).

Engagement of Regulation 12(5)(b)

19. Our duty is to consider whether the request was dealt with correctly. It was made by Mr Waite on 30 September 2014 and was dealt with by an initial refusal by the Council on 24 October 2014, which the Council confirmed upon internal review on 26 February 2015. We must therefore consider the exception contained in Regulation 12(5)(b) in relation to the facts at that time.
20. Regulation 12(5)(b) applies where and to the extent that disclosure 'would adversely affect ... 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'.
21. At the time of the initial refusal, the time for an appeal against the planning inspector's decision had expired, but the time for judicial review of it was still running, albeit due to expire later the same day. By the time of the internal review both periods had long expired. However, the question of actual enforcement remained open.
22. If an enforcement notice is not complied with, the local planning authority may prosecute the offender for an offence under s179 of the 1990 Act, and may upon conviction apply for a confiscation order under the Proceeds of Crime Act 2002 to recover financial benefit obtained through the unauthorised development. An authority may also enter the land under default powers to carry out the demolition works itself and recover the cost (s178 of the 1990 Act, Reg 14 of the Town and Country Planning General Regulations 1992).
23. Accordingly, at the material time there was a possibility, if Mr Waite did not comply with the enforcement notice as upheld by the planning inspector, that the Council would need to take action in the courts to ensure that it was obeyed.
24. The Commissioner upheld the application of Regulation 12(5)(b) on the basis that disclosure of the emails would have a potentially adverse effect on possible future proceedings in the enforcement matter. This was derived from assertions to this effect which were made by the Council during the Commissioner's investigation. There is no explanation from either the Council or the Commissioner of why or how the supposed adverse effect might come about. Having seen the emails, we are unable to discern any basis for saying that disclosing them would have – or even could have – adversely affected any further proceedings regarding the enforcement. To illustrate the point: hypothetically, if the emails had been shown to the planning inspector, there is no possibility that they would have had any impact on his decision. Similarly, in our view they would not have had any impact on any further proceedings which might have eventuated if Mr Waite had not demolished the building. We therefore disagree with the Commissioner's reasoning.
25. The Council's explanation of the application of this exemption in its refusal notice of 24 October 2014 referred to the advantage of a 'safe space' for internal consideration of how to proceed in a planning enforcement matter and continued:

In addition, in general:

Investigations often rely on information provided by members of the public. People could be deterred from making statements or reports by the fear that they may be publicised.

Attempts to resolve possible breaches of planning control may involve the assistance of third parties in seeking a resolution. People could be deterred from becoming involved if they thought their involvement could be publicised.

26. The internal review letter of 26 February 2015 added nothing of substance to this explanation.
27. In the refusal notice the Council was not contending that in this particular case disclosure of the emails would have any adverse impact on any possible proceedings for enforcement; its concern was rather with the general principle that, if internal communications on this kind of topic were routinely disclosed, this might discourage people in other cases from coming forward with information, and this would adversely affect the Council's ability to enforce planning control by legal proceedings. In our judgment this was a correct application of the exception.

Regulation 12(4)(e)

28. The exception in Regulation 12(4)(e) applies to internal communications. The disputed emails are internal communications within Cambridge City Council. The exception therefore undoubtedly applies.

Public interest

29. Both exceptions are subject to the public interest test set out in Regulation 12(1)(b). Disclosure may only be refused if an exception applies and 'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information'. There is a presumption in favour of disclosure (Regulation 12(2)). In this case it is appropriate to consider the two exceptions together.
30. The Commissioner's Decision Notice discussed the public interest balance on the basis of his view that disclosure could jeopardize further proceedings in the particular matter. We have found no basis for this view, and are therefore unable to endorse the reasoning in the Decision Notice.
31. The factors in favour of maintaining the exceptions are concerned with the general considerations mentioned in paragraph 27 above. In our judgment there is a strong public interest in maintaining the confidentiality of internal communications on this basis, and this applies to the three emails.
32. The factors in favour of disclosure are concerned with the general principle of accountability and transparency, and the increase of public understanding of how public authorities operate in environmental matters. In our judgment the contribution that disclosure of the three emails would make to these public interests is negligible. It is not as if disclosure of the

emails would reveal wrongdoing, or would reveal something of interest concerning how the Council operated. We understand that Mr Waite is curious to know what the emails said, but we cannot see that disclosure of the emails would make a material contribution to accountability, transparency or public understanding.

33. The considerations mentioned in paragraph 27 could be outweighed in a particular case where disclosure of the internal communications would make an important or worthwhile contribution to accountability, transparency or public understanding, but such circumstances are not found here.
34. Accordingly, notwithstanding the presumption in favour of disclosure, we conclude under Regulation 12(1)(b) that the public interest in maintaining the exceptions outweighs the public interest in disclosure.

Conclusions and remedy

35. We disagree with the Commissioner's reasoning in his Decision Notice, but we conclude that he reached the correct result.
36. The appeal is therefore dismissed.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge