First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0267

Decided without a hearing
On 11 June 2018

Before

CHRIS HUGHES

ANDREW WHETNALL & DAVID WILKINSON

Between

PAUL FERGUSON

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. On 29 December 2016 the Department for Communities and Local Government (DCLG) wrote to Canterbury City Council (the Council) confirming that it would leave the consideration of a planning application which had been made to the Council for a large development on the south of the city in the hands of the Council; that is, it would not "call in" the application. The letter referred to the policy on calling in applications laid down in a Written Ministerial Statement on 26 October 2012 and stated:-

"The Government is committed to give more power to councils and communities to make their own decisions on planning issues, and believes planning decisions should be made at the local level wherever possible.

In deciding whether to call in the application, the Secretary of State has considered his policy on calling in planning applications…. The Secretary of State has decided, having had regard to this policy, not to call in the application. He is content that the application should be determined by the local planning authority. "

2. The letter went on to confirm that it was a matter for the Council to determine whether the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 applied to the proposed development and if so ensuring that the Regulations were complied with.

3. The same day DCLG wrote to the Appellant (who had asked DCLG to call in the application) sending him a copy of the letter to the council and confirming that:-

"The Government remains committed to giving more power to councils and communities to make their own decisions on planning issues, and believe that planning decisions should be made at the local level wherever possible. The call-in policy makes it clear that the power to call in will only be used very selectively.

The Secretary of State has decided, having regard to this policy, not to call in this application. He is satisfied that the application should be determined at a local level."

4. The Appellant immediately replied seeking further information:-

"Please provide the recommendation to the Minister that sits behind the attached decision letter and the reasons for the decision not to call in this planning application"

5. DCLG in responding refused to provide the information requested relying on one of the exemptions contained in Regulation 12 of the Environmental Information Regulations 2004. This provides (as far as is relevant) -

*"**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.
..
(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."

6. On internal review DCLG clarified that it relied on this exemption with respect to the recommendation to the Minister and set out its reasoning. With respect to the request for the "reasons" DCLG stated:-

   "the answer to this question appears to have been given already, and is contained within the letter dated 29th December 2016.."

7. The Appellant complained to the Respondent Information Commissioner who investigated and in her decision notice concluded that the exemption was engaged. In weighing the public interest she noted the interest in transparency, in demonstrating that the decision was taken on accurate advice, the Appellant's arguments that there was an obligation to provide reasons and his claim that the application was controversial. On the other side of the balance she noted the argument in favour of a safe space, that the relevant planning decision had yet to be made by the Council and the concern that placing information in the public domain could impact on that decision. She noted that DCLG disagreed as to the existence of an obligation to provide reasons to decline calling in a planning application and further noted that:-

   "There are avenues of appeal for those opposed to planning decisions and this adds weight to maintaining the exception for the withheld information as the appeal process is a legitimate route for disputing decisions made. In addition, the Commissioner is mindful that there are legal remedies available for challenging the Ministerial decision, namely, via the judicial review process."

8. The IC came to no conclusion as to whether there was an obligation on DCLG to disclose reasons. She found (decision notice paragraph 34) that the planning process itself provided the means for challenging the substantive planning application and that withholding the information did not inhibit that challenge:-

   "Withholding the information does not inhibit the complainant or the wider public's ability to engage with the planning application process and challenge any resulting development via this remedy."

9. She noted that it was open to the Appellant to challenge the decision not to call in the decision through the courts and concluded that as the planning application was still live the arguments as to safe space for decision-making and avoiding disruption to the planning process favoured maintaining the exemption and accordingly she upheld DCLG's reliance on the exemption.

10. In his notice of appeal the Appellant referred to the Aarhus Convention and advanced his arguments in favour of disclosure of the information. He stated that the IC was wrong on ten grounds:-

    - he had confirmed to the IC that he did not require the ministerial recommendation

- reasons could be separated out from the recommendation
- the IC had erred because his request was specifically not for advice but for reasons
- he clarified his view of whether there was a legal obligation to provide reasons for not calling in an application
- he claimed an inconsistency of reasoning between statements as to whether the withheld information related directly to the merits of the planning application and the possible impact of disclosure on the planning application
- he argued that the conclusion in paragraph 34 that non-disclosure would not impede his ability to engage with the planning issues was irrelevant.
- he argued that the "safe space" argument was not relevant to what he claimed was policy implementation where there was a commitment to disclose.
- he asserted that a previous decision of the IC (referred to but not analysed in the decision notice) was not relevant.
- the IC had failed to take into account government policy on the provision of reasons
- the IC was wrong to conclude that regulation 12(4)(e) was correctly applied.

11. In subsequent submissions he abandoned the first two grounds of appeal. He also acknowledged that there had been a change in government policy with respect to the publication of the material relating to the calling in of planning applications. In final submissions of 19 February 2018 he summarised his key points; he continued to dispute the validity of the claims for a safe space for deliberation and the possibility of disruption to the planning process while affirming the importance of disclosure in terms of a statutory presumption in favour of disclosure, a 2001 government policy in favour of disclosure and the provisions of the recitals to the Directive on which the regulations are based.

12. In resisting the appeal the IC noted that the Appellant did not consider the reasons given in the letter of 29 December 2016 were adequate. The disputed information was the recommendation prepared by civil servants. The reasons were contained in the letter of 29 December and the disputed information would not provide any further "reasons" beyond those set out in that letter. A challenge to the adequacy of the reasons could be made by judicial review. The IC submitted that reasons and recommendations were inter-twined and could not be separated in the disputed information. She had not erred in considering that the decision on call in was not unrelated to the planning merits and therefore had the potential to disrupt the planning process. In the light of Ministerial responsibility the DCLG argument on "safe space" was strong.

Consideration

13. The starting point in considering this appeal is the request for information (set out at paragraph 4 above) for the recommendation behind the letter the Appellant had received and the reasons for the decision. The disputed information is a form completed by civil servants considering a request for a planning application to be called in. The completion of the form enables them to consider whether the established policy of leaving local planning authorities to make planning decisions is applicable to the specific case. That form is the *"recommendation to the Minister"* and is what was requested by the Appellant. The completed form is passed between civil servants who make the decision under a scheme of delegated decision-making approved by the Secretary of State. The decision-making process therefore is set out in the form and in the letters to the Council and the Appellant. Those letters reaffirm a policy stance that *"planning decisions should be made at the local level wherever possible"*. The reason for the decision is explicit in the correspondence and the DCLG in the letter sent out following the internal review of the request (paragraph 6 above) correctly identify that reason.

14. The Appellant in his notice of appeal refers to the Aarhus Convention. However he misses a fundamental point of the purpose of the Convention which is through information and access to decision-making to support the right of citizens to participate in decisions affecting the environment. In the case under consideration the decision affecting the environment is that to be made by the Council as the local planning authority; the IC is entirely correct that the decision with respect to this form does not in any way impede the public's right to participate in that process. The DCLG has affirmed that the decision should be made by the local authority, the DCLG has not made the decision; indeed in its letter to the Council it emphasised the need to ensure that environmental issues were properly analysed.

15. The core question is where the balance of interest lies between disclosing the form and providing certain environmental information, and not disclosing it to protect the "safe space" and to avoid prejudicing the proper consideration of the substantive planning application by the Council.

16. The decision with respect to calling in a planning application arises in this case because those opposed to the planning proposal wish to remove it from local decision-making. It is clear that as such the environmental information included within the form would have been put forward by those people and will be related to the information which they are submitting to the local planning process. Disclosure of the form will therefore not put new environmental information before the public and accordingly there is no significant public interest in disclosing the environmental information in the form.

17. However associated with that planning information is an assessment of its relevance to the decision-making on calling in. In essence that amounts to a form of consideration of some of the material against criteria somewhat separate from the criteria upon which it will be evaluated in the planning process. The tribunal is satisfied that disclosure of the material will not assist the effective scrutiny of the planning issues in the proper forum and will rather lead to some confusion and prejudice to the proper processes of the Council.

18. There is accordingly more weight to be given to the "safe space" argument than is sometimes accorded. There is some weight to be accorded to enabling civil servants to robustly analyse the issues before making the formal decision is reached. There is further weight to recognising the principle that, since the Secretary of State is leaving the decision with the local planning authority, DCLG must be scrupulous in not interfering with that decision-making by releasing material which could influence it beyond the normal consideration of general planning guidance.

19. With respect to the other arguments put forward by the Appellant, the recitals to the Directive and the statutory presumption of disclosure, there is no question but that the Regulations properly implement the Directive and the statutory presumption is rebutted by the weight of arguments being preponderantly in favour of non-disclosure. The reference to the 2001 policy is entirely without merit since it has been overtaken by the subsequent Ministerial statement; indeed in a submission of 8 January 2018 the Appellant referred to a decision of Mrs Justice Lang in 2017 *Save British Heritage* which explicitly found that the 2001 policy was no longer applicable and there was no duty to disclose underlying reasons behind a decision not to call in a planning application.

20. Accordingly the tribunal is satisfied that the decision of the IC is correct in law and dismisses the appeal.

Signed Hughes

Judge of the First-tier Tribunal
Date: 23 July 2018
Promulgated: July 26, 2018