



Appeal number: EA/2020/0308P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

SEAN O'FARRELL on behalf of ADVICE NORTH WEST Appellant

- and -

**THE INFORMATION COMMISSIONER First
Respondent**

- and -

**DEPARTMENT FOR INFRASTRUCTURE Second
Respondent**

**TRIBUNAL PANEL: JUDGE ALEXANDRA MARKS CBE
TRIBUNAL MEMBER NAOMI MATTHEWS
TRIBUNAL MEMBER SUSAN WOLF**

- I. Pursuant to Rule 32(1) of the First-tier Tribunal (General Regulatory Chamber) Rules and by consent of the parties, this matter was determined on the papers because the Tribunal is satisfied it can properly determine the issues without a hearing.
- II. The documents which the Panel considered are noted in paragraph 17 of this Decision.
- III. The outcome of the appeal is stated at both the start and the end of this Decision.

Sean O'Farrell was unrepresented

The Commissioner was represented by Sapna Gangani, Solicitor

DECISION

The appeal is allowed.

REASONS

Background to Appeal

1. The Appellant, Mr O'Farrell, made a request on 11 July 2019 to the Department for Infrastructure ('the Department'). The Department administers the Blue Badge Scheme which provides on-street parking concessions for people with severe mobility problems. The Scheme was established by the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978.

2. Mr O'Farrell asked the Department for:

'...a copy of the 'Assessment' criteria used by [the Department] when determining applications for the Blue Badge which are 'Discretionary' in nature and do not fall within 'Automatic' entitlement, for example scoring 8 points or more for PIP mobility under 'Moving Around'.

3. The Council responded to Mr O'Farrell's request on 31 July 2019. The Department refused the request, relying on the exception at Regulation 12(4)(e) of the Environmental Information Regulations (EIR).

4. Mr O'Farrell asked for an internal review on 20 August 2019. On 18 September 2019, the Department informed Mr O'Farrell that the review upheld the decision to withhold the information.

5. On 18 November 2019, Mr O'Farrell contacted the Commissioner to complain about the handling of his request.

6. On 29 September 2020, the Commissioner issued Decision Notice IC-47215-Y1J2, upholding the Council's decision to apply Regulation 12(4)(e) and therefore to withhold the requested information. In making this decision, the Commissioner balanced the competing public interests in disclosing the information on the one hand and withholding it on the other.

7. On 21 October 2020, Mr O'Farrell sent a Notice of Appeal to the Tribunal.

Appeal to the Tribunal

8. Mr O'Farrell's ground of appeal is that the Commissioner wrongly exercised her discretion in finding that the public interest in withholding the information outweighs the public interest in disclosing it.

9. The Commissioner's Response dated 28 January 2021 maintained the analysis set out in the Decision Notice.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

10. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'1 (1) Any person making a request to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if this is the case, to have that information communicated to him.'

Regulation 5 EIR: access to environmental information held by public authorities

11. Regulation 5 EIR sets out a specific duty by public authorities to make environmental information available on request.

Regulation 2 EIR: definition of 'environmental information'

12. 'Environmental information' is defined by Regulation 2(1) EIR as any information on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....'

Dft, DVSA and Porsche Cars GB Ltd. v. The Information Commissioner and John Cieslik [2018] UKUT 127 (AAC)

13. In the *Cieslik* case, the Upper Tribunal considered the meaning of 'environmental information'. That case was about noise emissions and the running of a car engine for the purpose of carrying out safety testing. The Upper Tribunal said:

*'...the principle established by the Court of Appeal in Henney and in Glawischnig [is] that information which has only a minimal connection with the environment is not environmental information. That principle must apply not only in deciding whether information is **on** an environmental matter but whether a measure or activity has the requisite environmental effect...' [paragraph 33].*

Regulation 12 EIR: exceptions to the duty to disclose environmental information

14. There are exceptions to the duty to make environmental information available under Regulation 5. Those pertinent to this appeal are set out in Regulation 12, the relevant parts of which provide:

'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.'

15. A public authority is permitted to withhold the requested information under the exceptions in Regulation 12(4) *only* if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The powers of the Tribunal

16. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of EIR are set out in FOIA, as follows:

's.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.'

The burden of proof

17. The burden of proof rests with Mr O'Farrell in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

18. Before the hearing, the parties had submitted written evidence. This was collated into one Open Bundle of 97 pages (including an Index); and a Closed Bundle of 10 pages (comprising the requested information). The Panel, but neither Mr O'Farrell nor the public, also had access to the Closed Bundle. The Panel noted the contents of both bundles.

Submissions

Submissions by Mr O'Farrell in his Appeal Notice dated 21 October 2020

19. Mr O'Farrell does not suggest that the Commissioner's decision was wrong in law: his complaint is that the Commissioner inappropriately exercised her discretion when she concluded that the public interest in withholding the requested information outweighed the public interest in disclosing it. Mr O'Farrell puts his case as follows:

- (1) the significant risk of fraud suggested as a result of disclosing the information – the purported reason for withholding the information - is not supported by any specific evidence relating to Northern Ireland.
- (2) the primary reason given for concern about fraud is that, in England in 2018-19, there were over 1400 prosecutions for misuse of Blue Badges. This reasoning is flawed because it does not relate to Northern Ireland.
- (3) the Commissioner acknowledges the potential benefit of making more detailed information available but considers that disclosure carries a significant risk of fraud.

- (4) there is no reason to conclude that it would be more difficult for assessors to distinguish between genuine and fraudulent applicants if everyone had access to all the criteria, and the guidance as to how it could be met.
- (5) there is no Northern Ireland specific evidence available to show that if fraudulent applications were more likely to be successful, the Scheme would be overwhelmed, thus defeating the purpose of providing support to people who genuinely need it.
- (6) while there may be fraudulent applications to some extent, it is a function of decision-makers to decide entitlement based on the evidence before them, whether the applicant knew the criteria in advance or not.
- (7) medical evidence is obtained in the vast majority of cases which ultimately is a primary factor in the eventual outcome.
- (8) if the discretionary criteria were disclosed, the risk of fraud would be no greater than that experienced by, say the Department for Communities in respect of benefit entitlement where the criteria are published and can be found on the internet.
- (9) the Decision Notice should be overturned, and the Department for Infrastructure ordered to disclose the discretionary criteria as requested.

Submissions on behalf of the Department for Infrastructure dated 28 January 2021

20. In a response on behalf of the Department, in summary Ms Jones submits that:

- (1) if the Tribunal determines that the EIR does not apply, the information should continue to be withheld under the exemption in section 36(2)(c) FOIA (prejudice to effective conduct of public affairs).
- (2) if EIR is the applicable regime, notwithstanding the presumption in favour of disclosure, when balancing the public interest there is a more compelling public interest in protecting the Scheme's effective operation.
- (3) there is a very high demand on disabled parking spaces, and each blue badge issued increases that demand. The Scheme is designed to ensure that a badge is issued only to individuals for whom it is necessary.
- (4) a 'successful' fraudulent application not only grants a badge to an individual not entitled to it, but also reduces the opportunities for entitled individuals to fully avail of the Scheme.
- (5) disclosure of the discretionary criteria would leave decision-makers making determinations that are tailored to the criteria rather than the condition of the applicant. This would be prejudicial to the overall conduct of the Scheme.

- (6) in response specifically to the grounds of appeal:
- (a) though the prosecutorial information from England is cited, it was not the sole reasoning for the decision. Moreover, no evidence is offered that fraud would not, or does not, also occur in Northern Ireland.
 - (b) the Scheme already provides to the public detailed information as to eligibility criteria for a Blue Badge. The majority of applicants (51%) fall within the categories of ‘automatic entitlement’. The remaining applications are assessed under the discretionary criteria, and the Department issued 21,854 badges under these criteria in 2019/20.
 - (c) in total 1,155 applications for Blue Badges were unsuccessful in 2019/20.
 - (d) there is no new information which changes the material before the Department or the Commissioner.
- (7) The Department adopts the Commissioner’s Decision Notice, and opposes the appeal

Submissions on behalf of the Commissioner dated 3 March 2021

21. In response on behalf of the Commissioner, in summary Ms Gangani submits that:

- (1) having initially considered whether the EIR or FOIA regime applies, the Commissioner has decided that the EIR is applicable.
- (2) in the unlikely event that the Tribunal considers that the FOIA regime applies, the Commissioner does not consider that the exemption in section 36(2)(c) is not applicable because that exemption requires a Qualified Person’s Opinion and no such opinion has been obtained in this case.
- (3) in carrying out the public interest balancing exercise required by EIR 12(1)(b), the Commissioner reviewed the factors in favour of disclosure – namely promotion of openness and transparency and a wider public interest in ensuring people were aware of the Scheme, and that wide dissemination of the information may encourage eligible individuals to apply.
- (4) the Commissioner also reviewed factors in favour of withholding the information, noting that the Department maintained there was a strong public interest in protecting integrity of the Scheme; that it has a duty to ensure that Blue Badges are only granted to eligible individuals; and that disclosure of the information would encourage fraudulent claims, citing over 1400 prosecutions for misuse of the Scheme in England in 2018-19.
- (5) balancing these two competing public interest arguments, the Commissioner concluded there was a more compelling public interest in withholding the information, thus protecting the Scheme’s effective operation which would

otherwise be made vulnerable to fraudulent claims were the information to be disclosed.

- (6) responding specifically to the grounds of appeal:
- (a) it is not necessary for the Department to provide statistical information to engage the EIR exceptions, nor to inform the public interest: Parliament could have made this clear when drafting the legislation but did not do so.
 - (b) however, the fact there were 1400 prosecutions for misuse of the Scheme over a one-year period in England shows that the risk of fraudulent claims is very real, and a weighty public interest argument in withholding the information.
 - (c) the fact that other Departments may routinely publish information is immaterial because each request and each Decision Notice is unique. Similarly, the Commissioner need not compare risks and public interest factors affecting one public authority with another's.
 - (d) while medical evidence can lower the risk of fraudulent claims, this may not necessarily apply to discretionary users of the Scheme.
- (7) The Commissioner opposes the appeal, maintains the reasoning set out in the Decision Notice and adopts the public interest arguments in favour of withholding the information set out in the Department's submissions.

Response from Mr O'Farrell dated 22 March 2021

22. Mr O'Farrell responds to the submissions of the Department and the Commissioner as follows:

- (1) he concedes that the EIR rather than FOIA is the correct regime.
- (2) his additional evidence obtained through FOIA requests of the Department shows that for the three years 2017-18, 2018-19 and 2019-20, there have been *no* prosecutions in Northern Ireland for misuse of Blue Badges.
- (3) at 31 March 2019, there were 2.29 million Blue Badges held in England and a mere 1,432 prosecutions in England for the year ending on that date: 99% of such prosecutions were of non-Badge holders using another person's Blue Badge. This is a tiny fraction of the number of Blue Badges held.
- (4) thus in Northern Ireland, and to a negligible extent in England, the issue of fraudulent claims is not a worthy consideration in deciding the public interest weighs in favour of withholding the information sought.

- (5) in his personal experience of over 30 years, the overwhelming majority of Blue Badges issues under the ‘Discretionary Criteria’ are supported by medical evidence.
- (6) the disclosure of the information could open up the Scheme to people who would not otherwise have known that they may potentially be entitled.
- (7) the eligibility criteria need to be made public in full, otherwise there is a clear lack of transparency and implicit discrimination against the needs of the disabled.
- (8) the criteria for Employment & Support Allowance (ESA) and for Personal Independence Payment (PIP), both administered by the Department for Communities (DfC) also concern themselves with the physical ability to walk and the criteria are made publicly available by DfC.
- (9) the Discretionary Criteria for the Blue Badge Scheme presumably have some overlap since the criteria for ESA and PIP are referenced in the ‘Automatic’ criteria for the Scheme. This adds weight to the argument that there is no compelling reason, or public interest reason, in withholding the information sought.

Discussion

Is the EIR the correct regime?

23. The Panel takes into account the Upper Tribunal’s decision in *Cieslik* and is mindful of the risk of interpreting ‘environmental information’ too broadly.

24. The Panel attributes weight to the Department’s submissions that this appeal touches on a range of environmental issues and does not simply concern noise emissions and the running of a car engine as in the *Cieslik* case.

25. The Department submits, and the Panel agrees, that the Blue Badge Scheme is a ‘measure’ which affects a range of environmental issues including the number, location, and type of parking bays; congestion in city centre locations; impact on the pedestrian areas in urban areas and thus land use; and increased use of private vehicles.

26. The Panel also considers that the number of Blue Badges issued will decrease use of public transport, increase the number and distances of journeys by private cars by Blue Badge holders and hence increase the emissions and pollution emanating from such vehicles.

27. Further, the Panel notes that the number of valid Blue Badges issued in Northern Ireland is in the region of 118,000 so on the balance of probabilities there is a collective environmental effect of the Scheme.

28. The Panel has carefully considered whether the measure in question here is, as the Upper Tribunal found in the *Cieslik* case, too remote for information about it to be truly ‘environmental’. The Panel agrees with the Department and the Commissioner

that, based on the above considerations, the measure in this case is not too tenuous: in the Panel's view, the information requested does fall within the EIR regime. The Panel notes that both the Department and Mr O'Farrell agree with the Decision Notice that the EIR is the applicable regime.

29. Taking all the above into account, in the Panel's view the information sought by Mr O'Farrell about the Blue Badge Scheme satisfies the definition of 'environmental information' as defined in Regulation 2(1) EIR because it is information on a 'measure' (policy and legislation) that affects 'the state of the elements of the environment' (air and land) and 'the factors that affect those elements' (emissions and roads etc).

30. We conclude that the Commissioner made no error of law in deciding that EIR is the correct regime, and we therefore confirm the Commissioner's Decision Notice in that respect.

Is the exception in EIR 12(4)(e) (internal communications) engaged in this case?

31. In considering this issue, the Panel takes into account the Commissioner's guidance on 'internal communications' under Regulation 12(4)(e) which states that:

'...the concept of 'internal communications' is broad and covers a wide range of information. However, in practice the application of the exception will be limited by the public interest test. A 'communication' will include any information intended to be communicated to others or saved in a file where it may be consulted by others...''

32. In this case, the requested information on 'discretionary' criteria for the grant of Blue Badges is clearly intended to be consulted by those responsible for making decisions on Blue Badge applications in Northern Ireland.

33. We therefore agree with the Commissioner that that the exception in Regulation 12(4)(e) is engaged, and we confirm the Decision Notice to that extent.

Balancing of the public interest

34. Having satisfied itself that the Commissioner made no error of law in her Decision Notice, the Panel went on to consider whether the Commissioner applied her discretion inappropriately. The Panel asked itself whether the Commissioner wrongly balanced the public interest in this case when she concluded that the public interest in favour of withholding the information outweighed the public interest in disclosing it.

35. The Panel notes that the Commissioner's guidance on 'internal communications' says that:

"There is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question."

36. The Panel takes account of the explicit presumption in the EIR in favour of disclosure. We note too the objectives of the EIR, and that there is a public interest in disclosing the environmental activities of public authorities, as well as a public interest in understanding how such authorities make their decisions. This not only enhances trust in public authorities but may also improve public understanding of matters which have an impact on the environment.

37. The Panel acknowledges and agrees with the public interest arguments in favour of disclosure cited by the Commissioner. The aim of the Scheme is to help people with severe mobility problems, and there is a public interest in ensuring that people are aware of the Scheme. Wide dissemination of the eligibility criteria would serve the public interest insofar as it might encourage eligible individuals to apply under the Scheme. It would also allow greater transparency and enhance the public's understanding as to the Department's operation of the Scheme.

38. The Panel also notes the arguments raised by the Department and the Commissioner in favour of maintaining the exception and therefore withholding the information. The Panel accepts there is a strong public interest in protecting the integrity of the Blue Badge Scheme and ensuring that Blue Badges are granted only to eligible individuals.

39. The Department is concerned that disclosure of the discretionary criteria would encourage fraudulent claims because, if the criteria were known, it would assist applicants in tailoring information to help their claim. An increase in fraudulent applications would prejudice the Scheme itself which would not be in the public interest.

40. The Commissioner accepted the Department's concerns about a 'significant risk' of increase in fraud while noting that the evidence produced in support of this concern related to prosecutions for misuse of Blue Badges in England rather than Northern Ireland. The Commissioner said that if everyone had access to all the criteria and guidance as to how they could be met, the identification of fraudulent as opposed to genuine applications might become more difficult and the Scheme could be overwhelmed, thus defeating its purpose of supporting people who genuinely need it.

41. The Panel has considered the Department of Transport's publication of *Blue Badge Statistics, England: 2019* from which the evidence of prosecutions for misuse was derived. This publication states the number of prosecutions for 'misuse' in England for the year 1 April 2018 to 31 March 2019 was 1,432. However, the Panel did not find this evidence supportive of the Department's claim of 'significant risk of fraud' because:

- (1) the data relates to England whose blue badge scheme operates under a different statute, regulations and guidance;
- (2) the 2.29 million Blue Badges held in England vastly outnumbers the approximately 118,000 Badges held in Northern Ireland.

- (3) there is no realistic comparison in the number of ‘misuse’ prosecutions in England (where there were over 1400 in 2018-19) and in Northern Ireland (where there were none in 2018-19, and none in either the year 2017-18 or the year 2019-20).
- (4) the available data suggests the level of proven ‘misuse’ of Blue Badges is at most a tiny proportion of the Blue Badges held.
- (5) even more significantly, however, ‘misuse’ offences as set out in the legislation governing Blue Badge Schemes apply to misuse of *existing* Blue Badges, not fraudulent *applications* for Blue Badges.
- (6) information about the number of prosecutions for misuse offences gives no indication of the increased risk of the more serious offence of fraudulent misrepresentation (under the Fraud Act 2006) which applies to fraudulent applications.
- (7) no evidence was before the Panel about the number of prosecutions for (nor even suspected prevalence of) fraud offences in relation to Blue Badge applications in either England or Northern Ireland. Such criminality is clearly more serious than ‘misuse’ because it is invariably pre-meditated and sustained, hence the maximum penalty of 10 years’ imprisonment for such fraud, rather than the maximum fine of £1000 which applies to misuse offences.
- (8) for all the above reasons, the Panel is not persuaded that the ‘misuse’ prosecution data (from England) has any bearing on the issue of risk of increased fraudulent applications for Blue Badges in Northern Ireland.

42. The Panel accepts that there may be *some* increased risk of fraudulent applications were the requested information to be disclosed. However, in the absence of any evidence to indicate the scale of any such increase, and hence possible detriment to the Scheme as a whole, the Panel considers this a weak public interest argument for withholding the requested information.

43. The Panel considers that the argument of increased risk of fraud is further weakened by various low or no cost steps the Department could - and to some extent already does - take to protect the integrity of the Scheme and reduce the risk of fraud, such as verifying applicants’ identities; requiring supporting medical and other evidence; and drawing applicants’ attention to the criminal offence and penalties under the Fraud Act for making a fraudulent application.

44. In the Panel’s view, every welfare benefits system is open to abuse. However, in the absence of evidence of the likelihood of - and/or impossibility of reducing, mitigating or deterring - such abuse, the mere *prospect* of increased fraud does not of itself justify withholding information about a system.

45. In this case, the Panel considers there is weighty public interest in disclosing the requested information because:

- (1) making the discretionary criteria clear would – as Mr O’Farrell argues – open up the Scheme to people who would not otherwise have known that they may be entitled;
- (2) knowledge of the discretionary criteria would enable agencies advising those who might be entitled to Blue Badges to give accurate and realistic advice, as well as manage applicants’ expectations;
- (3) the current lack of transparency is potentially detrimental to the needs of the very people the Scheme is designed to support, namely those with severe mobility issues but who do not fall within the ‘automatic’ category;
- (4) it seems contrary to the interests of natural justice for those who may be deserving of the grant of a Blue Badge to be unaware of the scope of the Scheme, and/or unable to obtain a Badge for lack of clarity about the criteria and decision-making which applies to the discretionary grant of Badges under the Scheme;
- (5) increased transparency might increase public confidence in the process of granting discretionary Badges in Northern Ireland: the opacity or even ‘secrecy’ of the current process could give rise to suspicions of unfairness or even concerns by the public about the opportunities for possible corruption in the grant of highly valued Badges.

46. Taking all these matters into account, the Panel concludes that the Commissioner ought to have exercised her discretion differently when balancing the public interest. The Panel considers that, contrary to the Commissioner’s conclusion in her Decision Notice, the public interest balancing exercise favours disclosing the requested information rather than withholding it.

Conclusion

47. For the above reasons, in accordance with s.58(1)(a), we substitute the Decision Notice with that set out in the Appendix below.

48. The appeal is allowed.

(Signed)

ALEXANDRA MARKS CBE

DATE: 29 July 2021

APPENDIX

SUBSTITUTED DECISION NOTICE

To: Department for Infrastructure
Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

The Tribunal directs the public authority to disclose the requested information within 35 days of the date of promulgation of Decision reference **EA/2020/0308P** of the First Tier Tribunal, General Regulatory Chamber (Information Rights).

Dated: 29 July 2021

Alexandra Marks CBE
(Recorder sitting as a Judge of the First Tier Tribunal)