



**Appeal number: EA/2021/0149P**

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

**PETER WILSON**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Before:  
JUDGE ALISON MCKENNA  
SUZANNE COSGRAVE  
KATE GRIMLEY EVANS**

**Determined on the papers, the Tribunal sitting in Chambers on 14 March 2022**

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## MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules<sup>1</sup>.
2. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 300. It also considered a closed bundle comprising pages 1 to 73. We received no closed submissions and there is no closed annexe to this Decision. A "gist" of the closed material is provided at paragraph 29 below.

## DECISION

3. The appeal is dismissed.

## REASONS

### *Background to Appeal*

4. The Appellant made a multi-part request to Shropshire Council ('the Council') on 10 January 2020 for disclosure of information relating to planning matters.
5. The Council responded on 13 February 2020 and, following an internal review, on 21 May 2020 confirmed its position that it did not hold some of the requested information, had already supplied other information, and was refusing to disclose the remaining information within scope of the request in reliance upon regulation 12 (4) (d) of the Environmental Information Regulations 2004 ('EIRs')<sup>2</sup> ('material in the course of completion'). During the course of the Information Commissioner's investigation, the Council disclosed further information to the Appellant.
6. The Appellant complained to the Information Commissioner, stating that the Council was not entitled to rely on regulation 12 (4) (d) EIRs and further that he believed further information was held.
7. The Information Commissioner issued Decision Notice IC-41834-X4D6 on 19 May 2021, upholding the Council's reliance on regulation 12 (4) (d) EIRs and finding on the balance of probabilities that no further information was held. The Appellant appealed to the Tribunal.

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<sup>1</sup><https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

<sup>2</sup> [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

*The Law*

8. It is well-established that information relating to planning is ‘environmental information’ so that the relevant legal framework in this case is the EIRs. The parties are in agreement on this point.

9. The EIRs set out exceptions to the duty to disclose environmental information as follows:

*“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.”*

10. Regulation 12 (4) (d) EIRs provides that:

*“For the purposes of paragraph 1 (a) a public authority may refuse to disclose information to the extent that –*

*(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;”*

11. The powers of the Tribunal in determining this appeal are set out in s.58 of the Freedom of Information Act, as applied by regulation 18 EIRs, as follows:

*“(1) If on an appeal under section 57 the Tribunal consider -*

- (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.”*

12. The Upper Tribunal has confirmed that an appeal against a Decision Notice made under FOIA or EIRs is to be regarded as an appeal by way of re-hearing. Support for that approach may be found in the Decision of a three-Judge panel of

the Upper Tribunal (AAC) in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)<sup>3</sup>.

13. This Tribunal’s approach to an appeal by way of re-hearing is consistent with the Court of Appeal’s judgment in *R (Hope and Glory Public House Limited) v City of Westminster Magistrates’ Court* [2011] EWCA Civ 31<sup>4</sup>, which was in turn approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at [45]<sup>5</sup>. Such an approach requires the Tribunal to consider what weight to attach to the Respondent’s reasons for making the decision under appeal and, if the appeal is to be allowed, substituting a fresh decision. This avoids the Tribunal conducting a review of the procedure adopted in making the Respondent’s own decision, as the ability for an independent judicial body such as this Tribunal to take a fresh decision is generally understood to be curative of any procedural shortcomings by the administrative decision-maker. This Tribunal’s approach to an appeal by way of re-hearing was recently upheld by a three-Judge panel of the Upper Tribunal in *Leave. EU and Eldon Insurance Services Ltd v The Information Commissioner* [2021] UKUT 26 (AAC).<sup>6</sup>
14. In assessing the “public interest” test under EIR regulation 12 (1) (b), the Tribunal must consider the public interest as it stood at the date the public authority formally answered the request (following its internal review) and so relied on the exemption(s) claimed at that date – see the Upper Tribunal’s Decision at paragraphs [61] to [73] in *Maurizi v IC and CPS* [2019] UKUT 252 (AAC).<sup>7</sup>
15. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant in each appeal.

#### *The Decision Notice*

16. The Decision Notice records in part the terms of the original request at paragraph 5, as follows:

*“1. Please supply copies of all records of communications, discussions and meetings between Shropshire Council officers and the members of the Stanmore*

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<sup>3</sup> [https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA\\_0447\\_2017-02.pdf](https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf)

<sup>4</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>

<sup>5</sup> <https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf>.

<sup>6</sup> [Leave.EU and Eldon v Information Commissioner: \[2021\] UKUT 26 \(AAC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/cases/leave-eu-and-eldon-v-information-commissioner-2021)

<sup>7</sup> [Maurizi v The Information Commissioner and The Crown Prosecution Service \(Interested Party: Foreign and Commonwealth Office\): \[2019\] UKUT 262 \(AAC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/cases/maurizi-v-the-information-commissioner-and-the-crown-prosecution-service-2019)

*Consortium...in connection with the release of land from the Green Belt at Stanmore and Swancote owned/managed by them and development options and proposals.*

*2. A meeting was held at Shire Hall on the 1<sup>st</sup> September 2017...at which previous correspondence indicates development proposals were discussed. The Council has stated that no notes or minutes of that meeting are held...Please clarify whether 'no notes or minutes held' means that none were taken or that notes or minutes were taken but there is no longer any record of them? Even if no notes or minutes are held, it is reasonable to suppose that written or email correspondence...will exist. Therefore please supply copies of emails or other correspondence or notes of telephone conversations relating to the meeting being set up and also copies of emails or other correspondence or notes of telephone conversations after the meeting took place. Please redact private information if necessary to meet data protection restrictions.<sup>8</sup>*

17. The Decision Notice records at paragraph 7 that the Council stated it had already provided the Appellant with information held within part 3 of the request. At paragraph 6 it records that the Council had confirmed that no formal minutes of the meeting on 1 September 2017 were held. It initially relied on regulations 12 (4) (d) and 12 (5) (e) EIRs in respect of the remaining information held and within the scope of the request at parts 1 and 2. Following internal review, only regulation 12 (4) (d) was relied upon - see paragraph 8 of the Decision Notice.

18. The Decision Notice acknowledges the EIR's presumption of disclosure at regulation 12 (2) EIRs – see paragraph 48.

19. The Decision Notice concludes at paragraph 33 that the information requested was held by the Council in connection with its Local Plan, which was in the course of development through public consultation at the time of the request. It is noted at paragraph 52 that the Council intended to publish the Local Plan once the process had concluded.

20. At paragraph 53, the Decision Notice states that, having reviewed the withheld information, the Information Commissioner is satisfied that disclosure would frustrate the process of preparing the Local Plan and inhibit the Council's ability to carry out that work. The Decision Notice gives weight to the need for interested parties to engage and consult in a 'safe space' and without the 'chilling effect' which is likely to flow from the disclosure of information still in the course of completion. The Decision Notice concludes that the public interest in maintaining the exception outweighs the public interest in disclosure.

21. Paragraph 69 of the Decision Notice records the Information Commissioner's conclusion on the balance of probabilities that the Council did not hold further information within the scope of part (2) of the request.

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<sup>8</sup> Only parts 1 and 2 of the original 9-part request are relevant to this appeal.

### *Submissions and Evidence*

22. The Appellant's Notice of Appeal dated 16 June 2021 relied on a number of grounds of appeal, which the Respondent has helpfully summarised into six grounds<sup>9</sup>, as follows:
- (1) That the Decision Notice erroneously concluded that regulation 12 (4)(d) is engaged by the withheld material, particularly in viewing the Local Plan as a single process rather than a series of self-contained steps;
  - (2) The claimed exemption was not available to the Council in connection with negotiations with site promoters for a high-value scheme in which tactics were used to persuade local elected members of its merits;
  - (3) The Decision Notice had failed to consider the facts of this case properly and had relied too heavily on the Information Commissioner's own Guidance and a previous Decision;
  - (4) The Decision Notice failed to give proper consideration to the public interest test;
  - (5) The Decision Notice was in error in concluding on the balance of probabilities that no further information was held by the Council, and had not considered the full scope of the second part of the request, which had included a request for correspondence in addition to the meeting minutes;
  - (6) The correspondence suggests that the Council had misled the Information Commissioner, and the Decision Notice does not address this.
23. The Respondent's Response dated 24 August 2021 maintained the analysis as set out in the Decision Notice in resisting the appeal. It submitted that the grounds which rely on procedural challenges were outside the Tribunal's jurisdiction in this appeal. As to the substantive grounds, its response was as follows:
- (1) Ground 1: regulation 12 (4)(d) is plainly engaged, *prima facie*, given that the Local Plan was at the time of the request a working document which was envisaged to develop and on which the Council would be obliged to consult publicly at a later date. There is no basis for the Appellant's assertion that a Local Plan can be broken down into stages – it is by nature a single document arising from a multi-stage process including the eventual appointment of a Planning Inspector to carry out an

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<sup>9</sup> The Appellant did not object to the Respondent's summary when filing his Reply.

independent review of the Plan. No 'stage' can be considered as complete in itself because all stages feed into the final Local Plan. Thus, the information withheld was 'in the course of completion'.

(2) Ground 2: it is accepted that there is a public interest in transparency, particularly where there is a large amount of public money at stake. There is a correspondingly greater interest in the maintenance of a safe space in which to develop a robust Local Plan which is informed by full and frank stakeholder engagement. The public interest in disclosure is lessened significantly in circumstances where a substantial amount of public consultation is envisaged before the Local Plan's completion.

(3) As to ground 4, the Decision Notice adopts the correct approach to the public interest test, taking into account the presumption of disclosure but also the disincentive for participation in such exercises in future were information of the type withheld here to be disclosed, even at this distance from the time at which it was created. Furthermore, the public interest in disclosure of this information is lessened where a substantial amount of public consultation is envisaged before the Local Plan's completion.

(4) As to ground 5, the evidence is that the Council does not hold the meeting notes requested. An unequivocal statement from a public official is entitled to be accorded some weight, and the Council has explained that minutes are not created for such informal meetings. All information within the scope of the request which was not disclosed has been withheld under regulation 12 (4) (d) EIRs.

24. The Appellant's Reply dated 27 October 2021 submitted that the Respondent's submission as to the Tribunal's jurisdictional limits demonstrated that the Information Commissioner did not wish to be troubled to justify her decisions. He submits that the Tribunal's role is to take a fresh decision on the appeal and to scrutinise the actions taken by the Information Commissioner.
25. The Appellant draws the Tribunal's attention to the Guidance on the Aarhus Convention which states that the expression 'in the course of completion' relates to the process of preparation of the information or document and not to the decision-making process for which the information has been prepared. He notes that the entire Local Plan process will take several years to complete, and that the Information Commissioner's approach means that 'key information on a crucial matter affecting thousands of people and with multiple millions of pounds at stake' could be withheld for four years. The Appellant submits that it is inappropriate for the Information Commissioner to be guided by her own Guidance and Decisions, especially as it uses terms such as 'safe space' and 'chilling effect' which are not to be found in the legislation.

26. As to ground 5, it is submitted that it is inappropriate for the Information Commissioner to have reached a conclusion in reliance upon the word of the Council officer in respect of the absence of minutes.
27. Neither party has provided the Tribunal with witness evidence. Our open bundle contains evidence in the form of correspondence between the Appellant and the Council; the Appellant and the Information Commissioner's Office; the Information Commissioner's Office and the Council and the Appellant's supporting material. We note from this that the Appellant has been in frequent and direct contact with the Council throughout the Local Plan process to date and that there have been public meetings and consultation periods during the evolution of the Local Plan (with more planned). We also note that some of the requested information has already been disclosed to the Appellant.
28. The Appellant supplied to the Information Commissioner a copy of a report published by Transparency International entitled "*Permission Accomplished: Assessing Corruption Risks in Local Planning*". This is included in our bundle. The Appellant's covering email dated 23 February 2021 stated that the report emphasised the need for openness and transparency in planning issues. The Appellant's pleaded case does not rely on any specific allegation of corruption by the Council, so we do not find it relevant to consider this evidence.
29. Our closed bundle contains the withheld information, consisting of 19 emails comprising exchanges between the Council's officers and third parties. We provide here a "gist" of that information by describing it as preliminary and exploratory exchanges about some 'in principle' development opportunities, taking into account decisions by Planning Inspectors in other areas, and caveated by the officers as expressing informal views only in view of the requirement for public consultation before any formal decisions could be taken.

### *Conclusion*

30. As noted above, the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision-making process or to correct the drafting of the Decision Notice. For this reason, we agree with the Information Commissioner that the Appellant's grounds 3 and 6 invite us to take an impermissible approach to the appeal and we have no hesitation in dismissing those grounds.
31. As to ground 1, we conclude that regulation 12 (4) (d) EIRs is engaged by the withheld material in this appeal. We observe that there is no authority supporting the Appellant's view that a Local Plan process may be broken



down into segments for the purposes of ongoing disclosure so as to facilitate greater public participation. It is an attractive argument in some ways and, taking into account the Appellant's submission about the Aarhus Convention guidance, there may be cases in which it would weigh heavily with a Tribunal in considering the public interest in disclosure. However, the public interest in disclosure is always intensely fact-sensitive and in this case the withheld material itself has not clearly been identified as falling within a discrete stage of the Local Plan process which may be regarded as complete (albeit preliminary) rather than in the process of completion. Having read it for ourselves, we find that the withheld information is unlikely to contribute to public participation in decision making because, as we have "gisted" it above, it is informal, explorative, and preliminary. As we find it impossible to attribute its relevance to a single procedural stage of the Local Plan process, we prefer the Decision Notice's approach of viewing it as information held 'in the course of completion' of the overall Local Plan process.

32. Turning to ground 4 and the public interest balancing exercise, we conclude that the Decision Notice articulated well the relevant competing arguments in favour of disclosure ('transparency') and non-disclosure (the 'safe space'), and we do not need to repeat them here. We acknowledge the weight of the public interest in transparency in connection with a Local Plan, which, as the Appellant states, can affect thousands of lives. However, our focus must be on the particular withheld material in this appeal, which we consider of itself to be of little value in facilitating public participation compared with the public interest of permitting the Council a safe space in which to hold preliminary discussions with stakeholders. We note that there has been significant information placed into the public domain already and that there will be a further public process. We do not accept the Appellant's suggestion that this is a process impermissibly taking place behind closed doors.
33. We observe that the Information Commissioner is the person tasked by Parliament with the role of making decisions such as the one in this case. It is entirely consistent with her duties to publish Guidance to assist public authorities and the public and it would be open to challenge were she to fail to consider that published Guidance. We agree with the Decision Notice that it is relevant to weigh the potential chilling effect of disclosure of this particular material against the value of the Council conducting a robust process in which there is an initial safe space for exploration, followed by extensive public consultation. In conclusion, we discern no error of law in the approach or conclusion reached by the Decision Notice. We conclude that the public interest favours maintaining the exception in respect of the particular withheld material in this appeal, and that the EIR's presumption in favour of disclosure does not displace that conclusion.
34. As to ground 5, we accept the Respondent's submission that the information requested has either been disclosed or withheld under regulation 12 (4) (d) EIRs. We are not persuaded that there are categories of information within the scope of the request that have been overlooked by the Information

Commissioner. We do not regard it as erroneous for the Information Commissioner to attach weight to the assurances given by the Council's officer during the course of a formal investigation process. We note that there is no evidence before us to contradict the Council's statement that minutes of the meeting are not held. We acknowledge the Appellant's personal scepticism but this on its own is an insufficient reason for the Tribunal to overturn the Decision Notice on this point and so we dismiss this ground.

35. For all these reasons, we now dismiss this appeal.

**(Signed)**

**JUDGE ALISON MCKENNA**

**DATE: 29 March 2022**

**PROMULGATION DATE: 30 March 2022**