Neutral citation number: [2023] UKFTT 00596 (GRC)

Case Reference: EA/2022/0325.

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on GRC - CVP

Heard on: 30 June and 3 July 2023.

Decision given on: 10 July 2023.

Before:

Tribunal Judge: Brian Kennedy KC
Tribunal Member: Kate Grimley Evans

Between:

EDMUND PLOWDEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Edmund Plowden as a Litigant in Person.
For the Respondent: Sapna Gangani, Solicitor within the Information Commissioners' Office in writing the Response dated 19 December 2022.

Decision: The appeal is allowed, and the Tribunal direct the Bristol City Council to release the withheld Report.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as, against the Commissioner's decision notice 22 September 2022 with reference number IC-159464-B6P4 (the "DN"), which is a matter of public record. At the outset of the oral hearing the Tribunal hereby accedes to a request by the Appellant to correct his name in the appeal to his correct name of Edmund Plowden.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The Appellant requested a copy of a Workplace Parking Levy ("WPL") feasibility report to assess the readiness of Bristol City Council ("the Council") to develop a workplace parking levy scheme. The council applied regulation 12(4)(d) (material in the course of completion) of the EIR on the basis that the WPL feasibility report relates to, and feeds into, a decision pathway report which is not yet complete. The Commissioner's decision was that the council correctly withheld the requested information under regulation 12(4)(d) of the EIR but that it failed to respond in time and breached regulation 5(2) of the EIR.

[3] The Commissioner maintains the position set out in the DN. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

[4] The Appellant is a Green Party Councillor at the Council and on 20 December 2021 wrote to the Council making the following request for information:

"I asked for access to a report that has been funded by public funds and which is held by the Council. I believe it is entirely normal for reports such as this one to be released to Councillors on request. Please can you give me an explanation as to why this is not being released? If necessary, please treat this email as a formal Freedom of Information request with a starting date of 20/12/21.

(*"* The "Report" in question is referred to in more detail at Para. [11] -).

[5] The Council responded on 17 January 2022 stating it was withholding the Report under s22 FOIA (information intended for future publication) as its basis for doing so. On 26 January 2022 the Council provided the Appellant with its findings regarding the public interest test.

[6] The Appellant requested an internal review on 5 February 2022.

[7] On 14 February 2022, the Council completed a review of its handling of the request, and wrote to the Appellant maintaining its original decision regarding s22 FOIA. The Council accepted it had not responded to the information request within the statutory deadline of 20 working days.

[8] The Appellant contacted the Commissioner on 6 March 2022 to complain about the way the request for information had been handled. The Commissioner commenced an investigation.

[9] During the investigation the Council revised their response, stating it now wished to rely upon regulation 12(4)(d) EIR (information in the course of completion) to withhold the information, instead of s22 FOIA.

[10] Legal Framework:

A public authority that holds environmental information is required to make it available on request (reg. 5(1) EIR). "Environmental Information" is defined in Reg 2(1) EIR as any information in written, visual, aural, electronic or any other material form 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c):»

By virtue of reg.12(1), a public authority may only refuse to disclose environmental information in response to a valid request where both:

> *an exception in reg.12(4) or 12(5) applies; and*
>
> *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".*

reg.12(4) EIR provides, among other things, that:

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

(a) it does not hold that information when an applicant's request is received; ...

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

By virtue of reg.12(2) EIR, when considering whether an exemption applies, a public authority shall apply a presumption in favour of disclosure. The Upper Tribunal in the case of Montague v IC and Department for International Trade [2022] UKUT 104 (AAC) made clear that (i) the public interest is to be judged as at the time when the public authority makes its decision on the request, and (ii) that such time does not include any later decision in the context of an internal review.

Commissioner's Decision Notice:

[11] The Commissioner considered the scope of the complaint in relation to the request for information. On foot of this, he decided on 22 of September 2022 that the Council correctly withheld the requested information under regulation 12(4)(d) EIR, but that it failed to respond on time, breaching regulation 5(2) EIR. The Commissioners' reasoning within the DN is as follows; - In deciding regulation 12(4)(d) EIR applied, the Commissioner during his investigation, heard arguments from both the Council and Appellant. The Council explained the withheld information the Appellant was requesting was a document entitled "Workplace Parking Levy Feasibility Report" ("the Report"), commissioned by the Council in 2021 and produced by Nottingham City Council to assess the readiness of the Council to develop a WPL scheme. The Council explained the Report itself is not an *'unfinished document'* but was part of a larger piece of work, a pathway decision report to bring a proposal regarding the development of a WPL scheme (referred to as the Proposal) to the Mayor of Bristol and his Cabinet. The Report was one of 5 appendices to the Proposal. The Council explained that at the time of the request and the date of this response, the Proposal was (and still is) in draft form and had not been (and has still not been)

submitted to the Cabinet for scrutiny. The Commissioner concluded therefore that the Report relates to (because it forms part of) material which is still in the course of completion (i.e. – the Proposal). There was a query raised whether, on the back of Manisty, the Report was complete and separate from the Proposal, which would mean it would not 'relate to' material still during the course of completion. If that was so, Regulation 12(4)(d) would not be applicable. In determining whether the Report was separate the Commissioner considered the Tribunal's guidance in Manisty (Highways England Company Ltd. v Information Commissioner and Henry Manisty [2018] UKUT 423 (AAC) which stated such decisions needed to be based on the circumstances of each individual case. The Commissioner concluded the Report was not complete and separate from the Proposal. This was because the Report was commissioned by the Council and produced by Nottingham City Council to assess the readiness of the Council to develop a WPL scheme. As Nottingham was the only UK local authority to have introduced a WPL scheme the purpose of the Report was to share its skills and experience of developing and implementing such a scheme to assess the preparedness of the Council to start the formal process of delivering its own WPL scheme (aka the Proposal).

Once the Proposal is ready to be put to Cabinet, the piece of work (or Report) will be complete. Before that, the Proposal is still being worked on and the Report, will inform and according to the Council, form part of that ongoing piece of work or proposal. Thus, the Commissioner concluded the exception is engaged.

The Commissioner then considered the public interest test, being mindful that Regulation 12(2) EIR instructs authorities to apply a presumption in favour of disclosure. The Commissioner noted the Appellant argued there was public interest in disclosure as, amongst other arguments, withholding the Report is preventing proper scrutiny in order to have a healthy debate when the matter comes to Cabinet and possibly challenging the Proposal and officers of the Council, who would not be prevented from giving frank advice on the Proposal as the Report should be a factual report on which people could draw their own conclusions.

Nevertheless, the Commissioner concluded that the public interest in maintaining the exception outweighed the public interest in disclosure for the following reasons:

As to the importance of maintaining a safe space around incomplete material, the Commissioner decided there is a strong likelihood that the integrity and effectiveness of the decision-making process would be harmed by the disclosure of information before the Proposal process is complete; The Commissioner was of the view that if the information was disclosed, public confusion would not be mitigated with a corrective or explanatory narrative as the Council itself was unsure when the Proposal would be put to Cabinet;

Once the Proposal has been made (put forward to Cabinet), the Commissioner decided the Report is likely to form a key part of the evidence base and will allow the public to evaluate the Proposal that has been put forward. However, the Commissioner argues that no meaningful evaluation is possible until the final Proposal has been put forward.

The Commissioner considered that the Council has successfully demonstrated that the Report relates to and informs a decision-making process that is incomplete, and that its disclosure would, by misinforming public debate, impede the decision-making process that it supports.

Grounds of Appeal:

[12] The Appellant argues the following in his grounds of appeal:

a. The Council have not confirmed a date in which the Proposal will be put to Cabinet, this cannot go on indefinitely;
b. A timescale should be imposed as to when continuing to withhold the Report becomes unreasonable;
c. The Report should be provided on request by officers in this process;
d. Given that the Council is in a very grim position financially and this Report is specifically about the potential to raise revenue, it is important the opposition parties can formulate alternative proposals (for debate) on the lead up to budget setting for future years;
e. The argument that private time (aka a 'safe space') is needed was already fatally flawed from within the administration before this was given as a reason to the Commissioner.
f. The Report is a standalone document, not part of the Proposal;

g. The Council should not have been allowed to change its reliance from FOIA to EIR / rely on a new exemption.

The Commissioner's Response:

[13] The Commissioner resists the appeal. The Commissioner relies upon his DN and findings therein. The Commissioner responded to each submission made by the Appellant.

a) The Council have not confirmed a date in which the Proposal will be put to Cabinet, this cannot go on indefinitely; - The Commissioner's Response: This does not affect the DN in anyway. This appears to be the Appellant's issue with the Council's delay in presenting the Proposal to Cabinet.

b) A timescale should be imposed as to when continuing to withhold the Report becomes unreasonable; - The Commissioner's Response: Regulation 12(4)(d) EIR does not propose any timescales as to when withholding of an incomplete document 'becomes unreasonable.' Nevertheless, the Council have made clear the Report will be 'complete' once the Proposal is presented. They do not have to provide timescales of the same to the Commissioner.

c) The Report should be provided on request by officers in this process; - The Commissioner's Response: The Commissioner is aware the Appellant is a Green party Councillor and may be able to obtain the Report outside the confines of EIR. The fact he can do so is irrelevant as the Council are entitled to withhold information under EIR for the reasons they have, as disclosure is to the world at large. The Commissioner's jurisdiction is limited to the Council's application of EIR only.

d) Given that the Council is in a very grim position financially and this Report is specifically about the potential to raise revenue, it is important the opposition parties can formulate alternative proposals (for debate) on the lead up to budget setting for future years; - The Commissioner's

Response: the Commissioner notes this argument for the public interest in disclosure of the Report was raised by the Appellant during the investigation. It was considered by the Commissioner but ultimately the Commissioner decided the public interest favoured maintaining the exemption. The Commissioner understands that once the Proposal is presented to Cabinet (i.e. 'complete'), there will be an opportunity for others to make representations.

e) The argument that private time (aka a 'safe space') is needed was already fatally flawed from within the administration before this was given as a reason to the Commissioner; - The Commissioner's Response: the Commissioner has no reason to doubt the validity of the Council's 'safe space' arguments, despite the Appellant's version of events because safe space arguments are usually raised in cases like this and the importance of the safe space has been endorsed by the Commissioner and Tribunal in previous decisions. The Commissioner's guidance makes clear the importance for a 'safe space' is strongest when the process is incomplete.

f) The Report is a standalone document, not part of the Proposal; - The Commissioner's Response: from the Commissioner's reading of the withheld information and Manisty he is confident the Report is not a separate or standalone document independent of the Proposal. Taken objectively, the Report alone would not be able to be solely relied upon before Cabinet, if the Council decided to (or not) impose a WPL scheme. It is clearly part of a bigger piece of work which is still incomplete. The Appellant disagrees with the Council regarding the impetus of the Report, but this does not take away from the fact that the Report is not a standalone document.

g) The Council should not have been allowed to change its reliance from FOIA to EIR / rely on a new exemption. The Commissioner's Response: The Commissioner understands the Appellant's frustration, but the Council were entitled to change its reliance from FOIA to EIR. This is because the information falls squarely within the definition of environmental information. The same information cannot fall within both FOIA and EIR. The

Commissioner does not understand the Appellant to be stating which regime applies. Following confirmation from an earlier Tribunal decision, the Council were also entitled to rely on exemptions later in the investigation, frustrating as this is for Appellants.

[14] The Commissioner invited the Tribunal to dismiss the appeal.

The Oral Hearing on 30 June 2023:

[15] The Tribunal heard from the Appellant at length in the allotted time, reserving their deliberation thereafter to 3 July 2023. The Appellant takes no issue with the application of the EIR but challenges the Commissioners' DN and Response to his grounds of Appeal. He produced helpful additional information (not available to the Commissioner at the time of the investigation or making the DN) which arose from and was included in a document which is a Council record entitled – "Amendment Proposals to Revenue Budget 2020/21 and MTFP 2021/25" which we identify as Closed Annex A.

[16] Throughout the course of the appeal hearing the Appellant made detailed and helpful submissions which can summarised as follows.

(a) Firstly, new evidence which he presented (at *Closed Annex A)* shows that this case can be distinguished on the facts from the Manisty Case. In effect, the Appellant argues that the purpose of the withheld report, was captured by an amended motion (within Closed Annex A) that was passed with Full Council approval - viz: *"This proposal allocates £* [a redacted sum] *to update an already existing scheme plan and* ***begin*** (our emphasis) a *consultation with businesses. Further funding would be required to be identified to fully develop a business case and for implementation."*

(b) This proposed amendment, the Appellant argues, clearly sets out that this is a standalone Report that should be used to go to consultation and that further funding will be required for the more technical details required to go to the next stage of the quite separate decision-making process which he indicates

is separate from the Proposal. Therefore, the Report in this case, he argues is a standalone document. Furthermore, he argues, it is clear that this is to enable a decision as to "*whether, rather than how to proceed".* In this respect he argues it materially differs from the facts in the Manisty case where it was to decide "***whether*** *there is a case for improving east-west connectivity between Oxford, Milton Keynes and Cambridge and to then consider the options for improving the road network which can support growth"* The Appellant argues that report was both "whether and how" which is not the case in the material facts in this appeal). Therefore, the Appellant argues the exception should not apply – (he continues) " -:"*and if it is indeed adjudged to apply then the second level consideration for disclosure further applies".* In other words, he also argues it is still in the Public Interest to disclose it as the Report herein is a simple licensing scheme.

(c) On the Public Interest test, the Appellant distinguishes the facts in this appeal from the Manisty case, inter-alia, due the consequences of the proposals, given that there are three options for a major construction project in the Manisty Case, which would affect people's private property, its value and amenity, demonstrating that there are far more serious consequences should the public be confused. The further work, he argues is indeed required to settle on an option. By contrast in this case, the Appellant argues the withheld Reports' stated objective is specifically to be able to consult with businesses, which is a precondition for the implementation of a WPL, and the consequences of such a decision may cost a few pounds per day per parking space, but do not entail the kind of irreversible and often life-changing consequences of building a major new road via individual landowners' property. The Tribunal accept and adopt this analysis.

In summary therefore the Appellant argued at this appeal hearing that:

(i) The withheld Report in this case can be considered as a standalone document due to the initial brief and scope of the report – whether to proceed, which is materially different from a whether and how to proceed statement.

Even if it is the case that the consequences are far different form a major capital construction project.

(ii) The safe spaces argument does not apply due to both the facts pertaining to this appeal - ;

a. being a standalone document and

b. the cabinet member's own resolution that this report should be made public on completion and that further work may or may not then take place, including a timetable should it be taken forward.

(iii) The Commissioner has not satisfactorily addressed the evidence from the Appellant that counters the safe spaces argument and has too readily accepted the argument that more documents are required before making this public.

Conclusions:

[17] The Tribunal acknowledge that each case must be determined on its merits. Having considered the evidence before us, and the entirety of the Closed information, the Tribunal is persuaded by the Appellants arguments that the withheld information, a bespoke and self-contained Report commissioned from the Nottingham City Council for a specific purpose was complete and a standalone document. We are persuaded it therefore falls outside the exception provided by regulation 12(4)(d) of the EIR. We do not accept that the Council has successfully demonstrated that the Report relates to and informs a decision-making process that is incomplete, and that its disclosure would, by misinforming public debate, impede the decision-making process that it supports. In that respect we fundamentally disagree with the Commissioner.

[18] The following extracts from the Manisty case assist us greatly in coming to our conclusions. By way of background in recognising that the convention, through the EU Directive 2003/4 EC, which in turn implemented by the EIR, recognises

that reg 12(4)(d) raises material issues and how they should be addressed - at Page 1;

1. the Regulations must be interpreted consistently with the Directive and in accordance with normal EU principles including the requirement that exceptions be interpreted restrictively but not so narrowly as to defeat its purpose of allowing public authorities to think in private;

2. the exception cannot cover speculation or preliminary thoughts based on limited research and is concerned with 'information' that is held. It is only engaged if there has been a request and it is the information in the documents that is the subject of the request and the duty. It is not engaged when a piece of work is complete in itself. The terms of the request are important as the exception is wider than just 'material in the course of completion' and includes information that merely relates to that material;

3. adverse consequences must not be made a threshold test for regulation 12(4)(d), it is simply a relevant factor that only arises if the exception is engaged;

4. material must have a physical existence and it is not apt to describe something incorporeal like a project, exercise or a process; it is the material that must be in the course of completion not the project;

5. the exception which contains expressions of everyday use must be applied consistently with its context and contains two elements (a) that it is engaged and (b) the balance of public interests is in favour of maintaining the exception. The exception gives rise to three possibilities, that it is not engaged, that it may be engaged with the balance in favour of maintaining the exception or it may be engaged with the balance in favour of disclosure. A decision that the exception is not engaged means that disclosure is appropriate irrespective of where the balance of public interests lie.

The reasoning in the Manisty case at paragraphs [30] and [31] was also very helpful in guiding us on the analysis which we needed to undertake in the reasoning we have applied– see - :

30. The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

31. It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. In this case, I would loosely apply that description to the Stage 3 Report and work on it. The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably

always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. That is why it would be inappropriate in a decision to provide a detailed critique of everything said in the Implementation Guide. Cases like those referred to in the Guide will have to be dealt with on their own terms when they arise.

[19] The withheld information and specific subject matter of the request is a Report which the Council have persuaded the Commissioner forms a part of their decision-making process which is still in the course of completion. However, the Convention, (and it follows the EIR), does not clearly define *"materials in the course of completion"*. It seems clear to us that *"in the course of completion"* related to the process of preparation of the information in the Report and not to any decision- making process for which the given information has been prepared. The minutes in Closed Annex A state inter-alia: "*This proposal allocates £ [sum redacted] to update a scheme plan and begin consultation with businesses. Further funding would be required to be identified to fully develop a business case and for implementation".* The fact that redacted sum appears to have been set aside for this bespoke report seems to us to isolate it from a bigger process that may or may not have followed. In fact, at the time of the request there is no evidence that such process has commenced or to have been followed. Similarly, the mere status of a report alone does not automatically bring it under the exception. The words *"in the course of completion"* suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in "*course of completion" they may be released, even if they are still unfinished and even* if the decision to which they pertain has not yet been resolved. In the course of completion suggests the document will have more work done on it within some reasonable time frame. For these reasons we find the withheld Report does not engage the exception claimed, under reg. 12(4)(d) of the EIR, by the Council.

[20] However, if we are wrong about that, we accept and endorse the submissions of the Appellant that the greater Public Interest lies in disclosure of the withheld Report for the reasons set out above at [16] (c) above. We agree with the factors in favour of disclosure identified by the Information Commissioner in his decision notice, paragraphs 40 to 45 but find that the arguments in favour of disclosure were stronger than the Information Commissioner had understood. As the

Appellant stated, and as the Council minutes demonstrated, the Workplace Parking Levy had been a subject of significant public discourse for some time prior to the Appellant making his request and the disclosure of the report could only inform that public discourse in a significant and positive way.

[21] Considering the factors in favour of maintaining the exception which the Information Commissioner identified in paragraphs [46} to [48] of the DN, we found that the Commissioner had given excessive weight to the arguments in favour of the report being withheld. The safe space arguments in our view are weak in this case because the report was finished and would not change. It would merely serve to inform the cabinet's thinking in the future. Disclosure of the report would not in our view materially affect the Cabinet's safe space when discussing the proposal.

[22] We do not accept that the public would be misled by the disclosure. It is clear to us that the report was essentially a feasibility study, a pre-requisite to embarking on a potential Program and would inform public discourse.

[23] We reached the conclusion that the public interest favoured disclosure and so did not need to go on to consider the presumption in favour of disclosure under Regulation 12(2).

[24] Accordingly, we allow the appeal and direct disclosure of the withheld Report on or before 28 July 2023.

Brian Kennedy KC 4 July 2023.