



Neutral citation number: [2023] UKFTT 964 (GRC)

Case Reference: EA/2022/0393

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by: determination on the papers

Heard on: 1 August 2023

Decision given on: 13 November 2023

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER DAVID COOK
TRIBUNAL MEMBER PAUL TAYLOR**

Between

THOMAS JOHN BROOKS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0393, set out below, is substituted for the Commissioner's Decision Notice reference IC-180247-F7P8 dated 2 November 2022 with regard to the request for information made to Gwynedd Council by Thomas Brooks dated 8 October 2021 (and as subsequently clarified by his email dated 1 January 2022).

Substituted Decision Notice

1. Gwynedd Council is not entitled to rely on regulation 12(5)(b) of the Environmental Information Regulations 2004 to withhold the relevant requested information (namely, that set out in point 3 of the email sent to Gwynedd Council by Thomas Brooks dated 1 January 2022) because that regulation is not engaged.

2. Gwynedd Council must disclose such requested information, subject to any applicable redactions of personal data pursuant to regulation 13 of the Environmental Information Regulations 2004.
3. Gwynedd Council must disclose such information within 35 days of the date on which the Information Commissioner sends them notification of this decision in accordance with the Directions below.
4. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

Directions

5. The Information Commissioner is directed to send a copy of this decision to Gwynedd Council within 35 days of its promulgation, or (if either party applies to appeal this decision) within 14 days after there is an unsuccessful outcome to such application or any resulting appeal.

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appellant	Thomas John Brooks.
Commissioner:	Information Commissioner.
Council:	Gwynedd Council.
Decision Notice:	The Decision Notice of the Information Commissioner dated 2 November 2022, reference IC-180247-F7P8.
Disputed Information:	The information referred to in point 3 of the Appellant's email dated 1 January 2022 (as set out in paragraph 9).
EIRs:	The Environmental Information Regulations 2004.
FOIA:	The Freedom of Information Act 2000.
Public Interest Test:	The test as to whether, in all the circumstances of the case, the public interest in maintaining an exception in the EIRs outweighs the public interest in disclosing the information, pursuant to regulation 12(1)(b) of the EIR (set out in paragraph 38).
Request:	The request for information made by the Appellant dated 8 October 2021 more particularly described in paragraph 7 (and as subsequently clarified by the Appellant by email dated 1 January 2022, as set out in paragraph 9).

Tribunal Rules: The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the time of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Request.

Introduction

3. This was an appeal against the Decision Notice, which (in summary) held that the Council could rely on regulation 12(5)(b) of the EIRs (course of justice) in order to withhold the Disputed Information. The Decision Notice did not require the Council to take any steps.

Mode of Hearing

4. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
5. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Rules and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

6. The background to this appeal is as follows.

The Request

7. On 8 October 2021, the Appellant made a request to the Council for information in the following terms:

"This is a Freedom Information Request under the Freedom of Information Act...

THE REQUEST IS FOR

A copy of all information held by Gwynedd Council that dates between January 1st 2018 and the present time in relation to an application made on 6th March 2018 for "prior notification of agricultural or forestry development - proposed road. Town and Country Planning General Permitted Development Order 1995 Schedule 2, parts 6 & 7", for a property identified as Hafodydd, Borth-y-Gest (Easting: 256577, Northing: 337842).

The application Number is believed to have been C18/0181/44/YA The request also asks for copies of any assessments held by Gwynedd Council in relation to flood risks in the Natural Resources Wales defined flood plain in Borth-y-Gest of which this site is part."

The purpose of this Freedom of Information request is to obtain a copy of all correspondence, assessments and reports etc that relate the application and the development and objections raised subsequently.

PLEASE COULD YOU SUPPLY THE FOLLOWING

1. *Please confirm whether or not a planning application has been submitted for this site and if so provide a copy of any planning application that has been made on this site or its reference*

number.

2. *A copy of all representations made by residents and Cyng Selwyn Griffiths in relation to this site subsequent to 28th March 2018, and the responses from Gwynedd Council.*
3. *A copy of any correspondence between Gwynedd Council and Natural Resources Wales about this site and its flooding risk and impact*
4. *A copy of any flood risk assessments made since 2004, and held in respect of this site or in respect of the flood plain of which it is part.*
5. *A copy of the agreement quoted by the applicant allegedly from a Mr Alun Williams of Gwynedd Council quoted in the 6th March 2018 "prior notification statement".*
6. *A copy of correspondence held by Gwynedd Council relating to flooding events near this site subsequent to 28th March 2018, including the floods to Glanaber Garage, which adjoins the site, since 28th March 2018."*

The Council's reply and subsequent review

8. The Council responded on 23 November 2021, citing FOIA. It provided some information within the scope of the Request, but redacted names and email addresses under section 40(2) of FOIA.
9. The Appellant requested an internal review of the Council's response by way of email to the Council dated 1 January 2022. In that email, the Appellant provided more information regarding the purpose of the Request. The Appellant also clarified the nature of the Request, as follows:

"It may help conclude this 'Request for Information' if you would answer specifically the following:

1. *Can you confirm whether or not any planning or development application or notice has been submitted or made in respect of this site since 28th March 2018?*
 2. *Can you confirm whether or not a [name redacted] of Gwynedd Council made an agreement with the applicant in relation to this site, as the submitter of the 6th March 2018 application alleges? If so please provide details of the agreement.*
 3. *Please provide a copy of all correspondence written by Cyngor Gwynedd and its officials in respect of this site since 28th March 2018. I am advised that such documents written by Cyngor Gwynedd and its officials would not be considered the personal data of any third-party individual, but could include some redactions.*
 4. *Is Cyngor Gwynedd aware of any registration under 'The Environmental Permitting (England and Wales) Regulations 2016' for storage or use of waste on the site for construction improvement works, or maintenance? If so please provide details?"*
10. Following its internal review, the Council wrote to the Appellant on 9 June 2022. It stated that the Request should have been considered under the EIRs. The Council provided information with regard to points 1, 2 and 4 raised in the Appellant's email of 1 January 2022. However, the Council refused to provide information relating to point 3, citing regulation 12(5)(b) of the EIRs (course of justice) as its basis for doing so.

11. The Appellant contacted the Commissioner on 10 July 2022 to complain about the Council's response.

The Decision Notice

12. The Commissioner decided, by way of the Decision Notice, that the Council correctly cited regulation 12(5)(b) of the EIRs to refuse to provide the Disputed Information.
13. In summary, the Decision Notice stated that the Council had explained that:
 - a. its Planning Service was actively considering taking enforcement action under the Town and Country Planning Act 1990 Part VII;
 - b. the Disputed Information included communications with the site owners and occupiers in relation to the activities on site which were the subject of the enforcement investigation;
 - c. it was engaged in correspondence seeking to regularise and resolve an alleged breach of planning control and the aim of such correspondence was to seek resolution without the need for formal action;
 - d. disclosure of such correspondence or the possibility of disclosure of it could hamper the Council's ability to have a candid discussion with the site owners and occupiers and resolve the matter; and
 - e. whilst the matter could proceed in a number of ways, in the Council's view the most important thing was to seek informal resolution which such correspondence was aiming to achieve.
14. Based on those explanations, the Commissioner was satisfied that the Disputed Information engaged regulation 12(5)(b) of the EIRs. The Commissioner then considered the Public Interest Test (whilst recognising the presumption in favour of disclosure under regulation 12(2) of the EIRs).
15. In respect of the Public Interest Test, the Commissioner concluded that the balance of the public interest lay in maintaining the exception in regulation 12(5)(b) of the EIRs. This was on the basis that where an investigation is ongoing, and that investigation could lead to litigation, it could not be in the public interest to disclose information that is relevant to that investigation.

The appeal

16. Regulation 18 of the EIRs provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIRs, subject to certain modifications.
17. As we have noted, at the time of the Council's initial response to the Request, only FOIA was referred to by the Council but, in its subsequent response following an internal review, it decided that the EIRs applied. The Decision Notice was also issued pursuant to the EIRs.
18. The appeal is therefore an appeal against the Decision Notice pursuant to the EIRs, in accordance with section 57 of FOIA as applied by regulation 18 of the EIR.

Grounds of appeal

19. The Appellant's main ground of appeal, as summarised in his Notice of Appeal, appeared to relate to his dissatisfaction with the Commissioner's investigation. The Appellant stated that the Commissioner misled him in terms of the Commissioner's planned procedure in investigating his complaint and in not giving him the opportunity to comment on the Council's response before issuing the Decision Notice (which he stated was delivered 6 months earlier than initially indicated by the Commissioner).
20. However, the Appellant's Notice of Appeal also included further allegations relating to the information which the Council had provided to the Commissioner and the Appellant's views on the Council's alleged enforcement action referred to in connection with its refusal to disclose the Disputed Information. The Appellant included some evidence in support of his position, to which we refer below.

The Commissioner's response

21. The Commissioner generally relied on the Decision Notice as setting out his findings and the reasons for those findings.
22. The Commissioner accepted the Appellant's assertions that the Appellant was not offered an opportunity to contribute to the Commissioner's investigation and that the Decision Notice was delivered 6 months earlier than initially indicated. However, the Commissioner's position was that the conduct of the Commissioner was beyond the scope of the Tribunal.

The Appellant's reply

23. In reply to the Commissioner's response, the Appellant made various further submissions relating to the Commissioner's conduct of the investigation into the Appellant's complaint.
24. The Appellant also provide further information relating to his views on the Council's alleged enforcement action, stating (in summary):
 - a. 5 years had passed since the Council issued a formal determination that prior approval of the local planning authority was required in respect of an application which was made by a third party for the proposed development of the site which was the subject matter of the Request;
 - b. no such prior approval or planning application had ever been submitted to the Council;
 - c. the Council's Planning Enforcement Officer, in March 2019, had acknowledged that development was taking place on the site and warned the site owner that full permission would be needed to construct the flood tide deflecting dyke and roadway;
 - d. the Council knew that the unauthorised construction was well underway in May 2021 and that the Council's new Planning Enforcement Officer was "considering" the matter;

- e. in July 2022¹, that Planning Enforcement Officer wrote to Porthmadog Town Council stating that there had been communication between the Planning Service and those who are undertaking the mechanical work on the land but that the land owner had not been in contact with the Council since receiving a letter from the Council dated 28 October 2021;
 - f. in the letter of July 2022², the Planning Enforcement Officer also stated that “*the Council intends to publish a notice under Section 330 of the Town and Country Planning Act 1990 in the coming days*” but no such notice had been seen by residents or by members of Porthmadog Town Council; and
 - g. whilst the Council had described to the Commissioner how the matter might proceed in a number of ways, there had been no application for permitted rights in the public domain and no enforcement action has been observed.
25. The Appellant submitted that the Council’s failure to provide evidence to the Commissioner of a quantity of relevant Council activity which would be expected of an “ongoing investigation”, undermined the Commissioner’s conclusion that there was an ongoing investigation that could lead to litigation.
26. The Appellant also submitted that the letter to Porthmadog Town Council confirmed that the recipient of the Council’s letter was not engaged in responding to the Council, in contrast to the Council’s view that it was engaged in correspondence with them “seeking to regularise and resolve the alleged breach” (as referred to in the Commissioner’s response to the appeal).
27. In respect of the application of regulation 12(5)(b) of the EIRs, the Appellant submitted (in summary) that:
- a. there was no indication that disclosure of the Disputed Information would engage that regulation;
 - b. the difference between the speculative word “could” and the probable word “would” was important and the Council “*had provided no indication that it expects events will lead to a criminal trial or that any of its employees are likely to face disciplinary action*”;
 - c. the regulation does not contain an exception to disclosure to enable a public authority to “seek informal resolution” and the Council had not secured an “informal resolution” five years after the initial application for permitted rights and more than three years after being aware of unauthorised development being underway on the site; and
 - d. whilst the Decision Notice had stated that “*the possibility of disclosure could hamper the Council’s ability to have a candid discussion with the applicant and resolve the matter*”, having a “candid discussion” was not a ground to enable a public authority to refuse to disclose environmental information under that regulation.
28. The Appellant also submitted that the Council did not apply a presumption in favour of disclosure as required by regulation 12(2) of the EIRs. The Appellant also

¹ Whilst the Appellant stated that this letter was in July 2022, we believe he was referring to the letter dated 30 June 2022.

² As above.

considered, in essence, that the Commissioner incorrectly applied the Public Interest Test by 'heavily under evaluating' the Appellant's "*valid and real concerns about the possibility of flooding several nearby homes*".

29. The Appellant's position was that the public interest in disclosing the Disputed Information was "*far greater than any public interest that Gwynedd Council may claim for suppressing the documents given the Council's apparent failure over more than three years to address the unauthorised development causing residents real harm*".

The Tribunal's powers and role

30. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIRs), as follows:

"(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."

31. In summary, therefore, the Tribunal's remit for the purposes of this appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

The law

General principles

32. The EIRs provide individuals with a general right of access to environmental information held by public authorities, subject to some exceptions. Regulation 5(1) of the EIRs provides:

"...a public authority that holds environmental information shall make it available on request."

33. The term 'environmental information' is defined in regulation 2(1) of the EIRs which, so far as is material, states:

"...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...".

34. The definition of 'environmental information' is to be given a broad meaning in accordance with the purpose of the underlying European Council Directive which the EIRs implement (Directive 2004/4/EC).³

35. Therefore, under regulation 5(1) of the EIRs, a person who has made a request to a public authority for 'environmental information' is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIRs, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) of the EIRs (that is, the wording immediately preceding the extract of that regulation quoted above) provides:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations..."

36. Part 3 of the EIRs contains various exceptions to the duty to disclose environmental information which has been requested. It is therefore important to note that the EIRs do not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in regulation 5(1) of the EIRs is subject to certain other provisions of the EIRs.

37. Requests for 'environmental information' are normally dealt with under the EIRs rather than FOIA, pursuant to section 39(1) of FOIA (which contains an exemption to disclosure of environmental information under FOIA).

Regulation 12

38. As noted, Part 3 of the EIRs contains various exceptions to the duty to disclose environmental information which has been requested. Within Part 3 of the EIRs, regulation 12(5)(b) (the course of justice) is applicable for the purposes of this appeal. So far as is relevant, regulation 12 of the EIR provides:

"(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.

³ See the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] All ER (D) 145 and the case of *Department for Business, Energy and Industrial Strategy v Henney and Information Commissioner* [2017] EWCA Civ 8444.

...

(5) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – ...*

(b) *the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;”* .

39. Putting this into other words, a public authority may refuse to disclose environmental information which is requested under the EIRs:
- a. to the extent that its disclosure would adversely affect:
 - the course of justice;
 - the ability of a person to receive a fair trial; or
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature; and
 - b. if, in the circumstances at the time of the refusal, the Public Interest Test favours withholding the information.

The pleadings and evidence

40. The Tribunal read and took account of an open bundle of evidence and pleadings. We also read and took account of final written submissions from the Appellant.

The Appellant’s Submissions

41. In his final submissions, the Appellant reiterated some of the background which led to the Request. He stated:

“A group of residential properties, and a commercial property, are threatened by an increased risk of flooding. The threat is real as the commercial property has already been flooded once recently. The increased threat does not arise purely from natural causes. A local land owner, or its occupier, has constructed a “dyke” to deflect incoming sea water from one part of a flood plain towards the residential properties and commercial property bordering the other part of the flood plain, where the land is in different ownership.”

42. The Appellant gave further details of the nature of the works referred to, including pictures which he submitted showed the flood plain, the route of the newly constructed ‘dyke’ and the location of the properties affected.
43. The Appellant also made further submissions regarding the Commissioner’s conduct of the investigation, which the Appellant claimed resulted in the Decision Notice being flawed.
44. Whilst acknowledging all of the specific points made in the Appellant’s final submissions, further elements of these reflected points he had already made in his Notice of Appeal and his reply to the Commissioner’s response to the appeal.

Findings, discussion and conclusions

Outline of relevant issues

45. The primary matter before us was to determine whether the Decision Notice was correct to conclude that regulation 12(5)(b) of the EIRs was engaged in respect of the Disputed Information and (if it was) then whether, in all the circumstances, the public interest in maintaining the exception outweighed the public interest in disclosing the Disputed Information.
46. We address those issues below, after some preliminary points.

Remit of the Tribunal

47. As we have noted, some of the Appellant's grounds of appeal (and subsequent submissions) relate to the Commissioner's investigation of the Appellant's complaint, including assertions that the Commissioner misled the Appellant in terms of both the procedure and the timing of the Commissioner's investigation. The Appellant considered, in essence, that he was not afforded the opportunity to contribute to the decision-making process and accordingly was treated unfairly.
48. The Tribunal's jurisdiction does not extend to matters regarding the conduct of the Commissioner's investigation prior to the issue of a decision notice under section 50 of FOIA (as applied pursuant to regulation 18 of the EIRs). Put another way, the Tribunal does not conduct a judicial review of the Commissioner's activities. It is therefore outside of our remit to consider, or make any finding in respect of, the Commissioner's conduct of his investigation leading to the Decision Notice.
49. However, as we have noted, the powers of the Tribunal are set out in section 58 of FOIA (which applies pursuant to regulation 18 of the EIRs), and the Tribunal may review any relevant findings of fact in the Decision Notice and may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a 'full merits review' of the appeal before it. That is what we have done.

Application of the EIRs

50. It is common ground between the parties that the EIRs (rather than FOIA) apply to the Disputed Information. We concur with that view, on the basis that the Disputed Information comprises correspondence relevant to limb 'c' of the definition of 'environmental information' as set out in paragraph 33 (and having regard to the broad interpretation of 'environmental information' which is required, as referred to in paragraph 34).

Was regulation 12(5)(b) of the EIRs engaged?

51. We start by addressing the evidence provided by the Appellant in the form of the emails sent to the Tribunal from the current Gwynedd County Councillor for Porthmadog West and from a former Gwynedd County Councillor for Porthmadog West, both dated 8 February 2023. We note that these are not formal witness statements (being in the form of an email and not including a statement of truth) but the Tribunal has broad discretion to accept evidence pursuant to rule 15(2)(a) of the Tribunal Rules. There has been no rebuttal to these emails (we comment on the Commissioner's position in paragraph 54) and no evidence to suggest that they are not an accurate reflection of the position of the matters referred to in them.
52. In essence, both those emails indicated that the Council was, at the very least, dilatory in progressing any enforcement regarding the alleged activities on the site in question.

The email from the current Gwynedd County Councillor for Porthmadog West also stated that no responses had been received from the Council's Planning and Enforcement Office to requests for updates regarding their intention to issue a warning under section 330 of the Town and Country Act 1990.

53. We also note that the Council's Planning Service stated in the letter to Porthmadog Town Council dated 30 June 2022 that "*the Council intends to publish a notice under Section 330 of the Town and Country Planning Act 1990 in the coming days*" but that there is no evidence of any such notice having since been published.
54. In his response to the appeal, the Commissioner stated that the emails referred to above did not disturb his finding in the Decision Notice that regulation 12(5)(b) of the EIRs was engaged. The Commissioner's view was that, if anything, those emails confirmed "*that an investigation of some sort by the Council is in fact occurring, albeit taking a long time to determine*".
55. However, regulation 12(5)(b) of the EIRs does not merely refer to an investigation of any nature being carried out by a public authority but it refers specifically to "an inquiry of a criminal or disciplinary nature". We have not had sufficient evidence to demonstrate that the inquiry in question was of such a nature. We say this on the basis that the inquiry does not appear to be one which could be categorised as being of a 'disciplinary' nature, nor has it been made clear in any evidence before us whether or not the alleged activities on the site would, if established, constitute a criminal offence or result in any trial. The regulation does, of course, also refer to the "course of justice" which is a broader concept and we accept that the matter in question could be said to relate to the course of justice.
56. However, we consider that those considerations (in the preceding paragraph) are not material for current purposes. This is because, even if we accepted that the matter in question was indeed an inquiry of a criminal or disciplinary nature or related to the course of justice, for regulation 12(5)(b) of the EIRs to be engaged, it must also be established that the disclosure of requested information "would adversely affect" that inquiry or the course of justice (or the ability of a person to receive a fair trial).
57. We have seen no evidence supporting the position that the disclosure of the Disputed Information would adversely affect any inquiry or the course of justice (or the ability of a person to receive a fair trial). We acknowledge the possibility that it might do. However, that is not what the legislation provides for. The test is whether it would (meaning that it is 'more probable than not')⁴. In this regard, we agree with the Appellant's arguments that there is an important distinction between whether something "could" happen and whether it "would" happen. In our view, the Commissioner erred by concluding that regulation 12(5)(b) of the EIRs was engaged because of the mere existence of an 'ongoing investigation' without having evidence that the investigation would be adversely affected by disclosure of the Disputed Information.
58. Our view on that point is reinforced by the evidence showing that the Council was aware of relevant matters for some time prior to the issue of the Decision Notice but had not actually resolved matters or taken any enforcement action. That said, we

⁴ See, for example (in the context of prejudice based exemptions in FOIA) the cases of *Department for Work and Pensions v Information Commissioner & Frank Zola* [2016] EWCA Civ 758, paragraph 27 and *Carolyne Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.

acknowledge that there was some attempt made by the Council to communicate with the relevant third parties. The Commissioner recorded in the Decision Notice that the Council had sought to resolve the matter and he had, essentially, concluded that the disclosure or possible disclosure of the Disputed Information “*could hamper the Council’s ability to have a candid discussion with the applicant and resolve the matter*”. However:

- a. as the Appellant pointed out, the desire for a “candid discussion” is not a valid ground for the purposes of regulation 12(5)(b) of the EIRs; and
- b. this merely refers to the possibility of discussions or a potential resolution being achieved. Again, this is reliance on ‘could’, rather than ‘would’ (which is what regulation 12(5)(b) of the EIRs requires).

59. The Appellant had argued that regulation 12(5)(b) of the EIRs would not be engaged on the basis of the Council seeking “informal resolution” of the matter. We think that this particular argument is slightly misconceived. We consider that seeking informal resolution of the matter could be a valid basis on which the regulation might be engaged. In other words, we consider that the ‘course of justice’ or a relevant ‘inquiry’ being conducted by a public authority (as referred to in regulation 12(5)(b) of the EIRs) could, depending on the circumstances, include steps to resolve matters without the need for formal action.

60. In this case, though, the issue is that there is no evidence that the prejudice required by regulation 12(5)(b) of the EIRs would (rather than ‘could’) occur. Indeed, the Commissioner, in setting out his reasons in the Decision Notice, referred to the Council’s position that “*disclosure of such correspondence will mean that interaction with the applicant is likely to be constrained*” (emphasis added). This illustrates that the Commissioner had erroneously relied on the possibility of such constraint, rather than evidence of any constraint being more probable than not. In any event, even if there *would* be such constraint, that does not necessarily amount to the prejudice required for regulation 12(5)(b) of the EIRs to be engaged.

61. For all of the above reasons, we find that regulation 12(5)(b) of the EIRs was not engaged in respect of the Disputed Information. As we have determined that that regulation is not engaged, it is not necessary for us to go on to consider the Public Interest Test. Likewise, it is unnecessary for us to comment on the presumption in favour of disclosure pursuant to regulation 12(2) of the EIRs.

Was regulation 12(5)(d) or regulation 12(5)(e) of the EIRs engaged?

62. As part of our ‘fresh review’ we also considered whether either regulation 12(5)(d) or regulation 12(5)(e) of the EIRs was engaged, relating to the confidentiality of information. There was no evidence before us to support the view that the Disputed Information had the necessary quality of confidentiality for the purposes of those regulations. Accordingly, we concluded that neither such regulation was engaged.

Were any other regulations of the EIRs engaged?

63. We also considered whether any other regulation of the EIRs was engaged with regard to the Disputed Information. We concluded that there was no other applicable regulation which would be engaged in the circumstances of this case.

Final conclusions

64. For all of the reasons we have given, we find that the Commissioner erred in the exercise of his discretion and/or the Decision Notice involved an error of law in concluding that regulation 12(5)(b) was engaged in respect of the Disputed Information.
65. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 10 November 2023