



Case Reference: EA-2023-0374
Neutral Citation Number: [2024] UKFTT 290 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard at: On the papers.

Heard on: 11 March 2024
Decision given on: 04 April 2024
Promulgated on: 11 April 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER PAUL TAYLOR

Between

KATE SHARP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed in part.

Substituted Decision Notice:

Organisation: Herefordshire Council.

Complainant: Ms Kate Sharp

The Substitute Decision - IC-235651-T9K9

1. For the reasons set out below Herefordshire Council ('the Council') were entitled to withhold the requested information under regulation 12(4)(e) (internal communications) of the Environmental Information Regulations 2004 ('EIR') save for the information set out in paragraph 2.
2. The Council were not entitled to withhold the email from the ward councillor at page A43 of the closed bundle.
3. The Council must take the following steps:
 - a. Disclose the email from the ward councillor to the appellant within 42 days of the date this decision is sent to the Council by the tribunal.
4. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal by Ms. Sharp against the Commissioner's decision notice IC-235651-T9K9 of 25 July 2023 which held that Herefordshire Council ('the Council') were entitled to withhold the requested information under regulation 12(4)(e) (internal communications) of the Environmental Information Regulations 2004 ('EIR'). The Council was not required to take any steps.

Factual background

2. The request relates to a planning application (214270) made by Ms. Sharp on 19 November 2021 in respect of the construction of a single-storey, low carbon dwelling and outbuildings on amenity grassland, "to include renewable technologies, reinstatement of heritage orchard and significant biodiversity enhancements".
3. Question 12 of the application form asked whether there was "a reasonable likelihood of the following being affected adversely or conserved and enhanced within the application site, or on land adjacent to or near the application site?". In response, the Appellant confirmed that (i) there were protected and priority species on land adjacent to or near the proposed development; and (ii) there were designated sites, important habitats or other biodiversity features on the development site itself.

4. The planning application was refused on 28 September 2022. Ms Sharp appealed the decision to the planning inspectorate in March 2023. The main objector to the planning application was Ms Sharp's neighbour, Parish Councillor Priddle.
5. There are two relevant incidents. We do not need to make findings as to what happened on these occasions, but this is a summary of what we understand occurred.
6. The first incident occurred the day before the planning committee. The case officer did not visit Ms Sharp's property until the Committee site visit the day before the application was to be determined. It transpired during that visit that the case officer and the historic buildings officer had in March 2022 visited the property of the neighbouring Councillor who had objected to the visit. When the Ward Councillor arrived, she was made aware of this and there was, in Ms Sharp's words, 'talk of biased conduct'. At some stage the case officer became very upset. Ms Sharp states that when the members arrived and saw the case officer in tears, 'we somehow got the blame as if we were responsible for upsetting a case officer'.
7. The Council's position, set out in the lead development manager's letter to Ms Sharp of 21 November 2022, was that:

"[the case officer's] distressed state was brought on as a result of what she perceived to be a very unsettling, accusatory personal attack of her professional conduct. I accept that you have maintained in very clear terms that you have not received a good service from the Council, but within the context of her preparing for an impending Committee site visit, my view is that this was not the time or the place for you to take out your frustrations on an individual."

8. Ms Sharp received emails from Simon Withers, development manager at the Council, about the incident which stated, inter alia:

"I am taking legal advice on the implications of what happened at the site visit today and if I can provide a further up-to-date update today I will. However for the time being you should be assured that the item will progress."

...

"I should say that I'm in the process of reviewing the way in which the application was assessed prior to the recommendation being formulated as, until yesterday, I was unaware of the specific invite to [the neighbouring property] and the invite that you extended."

9. The second incident is as follows.

10. In January 2022 Councillors from the Parish Council visited the site and unanimously voted in favour of the planning application in January 2022. In June 2022 the monitoring officer at the Council found that Councillor Priddle had breached the Parish Council's Code of Conduct because he appeared to have used his position as a parish councillor in attempt to further his personal interests and had breached the general code of conduct principles of Selflessness; Integrity; Openness and Honesty by sending an email relating to the planning application to all Parish Councillors excluding Ms Sharp's husband, and when the Chair of Parish Council refused to intervene further in the matter of the contentious planning application, shouting at the Chair, although it is acknowledged that he then apologised.
11. On 23 September 2022 the chair of the Parish Council was advised by the Hertfordshire Association of Local Councils (HALC) not to attend the planning committee after which he resigned. On 27 September 2022, the day before the planning committee meeting, HALC wrote to the Parish Councillors in the following terms:

"I thought it might be helpful to outline the advice given to your outgoing chair by HALC

a. PLANNING APPLICATION

Because of the current level of hostility in the parish concerning the interpretation of the NDP and the apparent link to the planning application coming before Herefordshire Council's planning committee tomorrow, it would be in the best interests of the Parish Council to rely on their minuted support for the application which is printed within the Planning Officer's report and is in the public domain. I do not believe that the Parish Council has previously agreed who would attend planning committee meetings on behalf of the Parish Council and therefore any councillor who chooses to attend, even though he/she may have the tacit support of other councillors, is not officially there on behalf of the parish council. Even though the outgoing Chair was not connected to the application, HALC's advice was for him not to attend and possibly state something which was not the official view of the Parish Council.

Since the Chair's resignation, the suggestion for who should attend the Planning Committee on behalf of the Parish Council has come from the applicant himself, who has a financial interest in the application, and the person he has suggested has participated in lobbying all Herefordshire Councillors on the Planning Committee concerning an interpretation of the NDP which would benefit the application. It could therefore be construed that the councillor in question is not impartial and it puts that councillor in a

very sensitive position in the eyes of 'Joe Public' from a code of conduct point of view.

The only view that is genuinely from Callow and Heywood Parish Council is the one sent into the Planning Officer by the previous Clerk. There is absolutely no point in any councillor going along to the meeting to read that statement when it is already in the Planning Officer's report. The integrity of any councillor who attends under the current circumstances could be brought into question, as well as the integrity of the parish council as an entity.

The advice therefore is for councillors to leave the decision making to the responsible body (Herefordshire Council) and not run the risk of personal opinions being put forward as the view of the parish council.

..."

12. Ms Sharp suspects bias, prejudice and predetermination in the Council's treatment of the planning application because of her prior dealings with the Council.
13. Those prior dealings are as follows. In about 2014-2018 she was part of a lobbying anti-road group who vehemently protested about plans for a new bypass. Ms Sharp asserts that 'incompetence in the Planning Department and amongst Council employees was revealed and exposed' and 'due process was not followed'. She states that the plans were abandoned and the Council lost funding. Further in 2019 she made an application for planning permission for safer access to her property. She asserts that the Council's handling of the process was 'far from satisfactory'. Permission was granted when she reapplied.

Request

14. Ms Sharp made the following request to the Council on 15 February 2023:

"From November 2021 to the present day, I request any and all communication (sent or received) between Council employees and Councillors that refers to planning application 214270.

Details of meetings and phone records should also be included. Correspondence regarding the administration of application 214270 between parties must be included and also, correspondence of events before, during and after the site visit and before, during and after the planning committee meeting.

To include but not to limited to: Elsie Morgan, Simon Withers, Kevin Bishop, Christy Bolderson, all members of the Planning Committee, any other Councillor or Council employee, any officer involved in the

planning process (NDP manager, Historic Building Officer etc) members of legal services etc..”

15. The Council replied by letter dated 15 March 2023. It dealt with the matter under EIR. It stated that some information was not held, and some had already been provided in response to a previous EIR request. It provided some information. It refused to provide some emails under regulation 5(3) (personal data) on the grounds that the information was Ms Sharp’s personal data but provided them under the subject access provisions. It redacted names etc. under regulation 13 (third party personal data). It withheld some emails under regulation 12(4)(e) (internal communications) and some emails under regulation 12(5)(b) (course of justice).
16. On internal review the Council disclosed some further information but in essence upheld its position by letter dated 17 April 2023. In response to a further letter from Ms Sharp the Council disclosed some additional information by letter dated 28 April 2023.
17. During the course of the Commissioner’s investigation the Council relied on regulation 12(4)(e) in the alternative in relation to the information withheld under regulation 12(5)(b).

Decision Notice

18. In a decision notice dated 25 July 2023 the Commissioner decided that the regulation 12(4)(e) was engaged and that the public interest favoured maintaining the exception.
19. The Commissioner was satisfied that the withheld information, which consisted of emails between council staff, fell within the definition of internal communications.
20. The Commissioner considered that the underlying rationale for the exception at regulation 12(4)(e) was to protect a public authority’s need for a private thinking space. He considered that the extent to which disclosure would have a detrimental impact on internal processes would be influenced by the particular information in question and the specific circumstances of the request.
21. In relation to Ms Sharp’s allegation of partiality, the Commissioner found that disclosure would ensure transparency and, if relevant, provide reassurance that decisions made followed correct procedures.
22. The Commissioner recognised that there is a general public interest in transparency and accountability, particularly in cases where decisions can have a direct impact on the environment. He was mindful that access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.

23. The Commissioner acknowledged the complainant's argument that refusing to disclose the information suggested that the Council might be covering up wrongdoing. The Commissioner stated that in his experience there are many cases where the withheld information may be relatively innocuous, but the act of disclosure would have a detrimental effect on the public authority's ability to conduct its business effectively. In any event, the Commissioner had not seen any evidence of wrongdoing, therefore he concluded that the complainant's argument did not carry significant weight in this case.
24. The Commissioner concluded that disclosure was not necessary to raise and address concerns in relation to the planning application.
25. The Commissioner was satisfied that there is a significant public interest in protecting the council's ability to exchange internal communications in a "safe space" and that the public interest in disclosure in this case did not counterweigh this protection. He concluded that the Council correctly applied regulation 12(4)(e) in this case and did not go on to consider the Council's application of regulation 12(5)(b).

Appeal

26. The grounds of appeal are, in essence:
 - 26.1. The EIR do not apply.
 - 26.2. The public interest favours disclosure.

The Commissioner's response

27. The Commissioner was not asked to address this in his decision notice but submits in any event that the request was properly a request for 'environmental information'.
28. The Commissioner submits that the proposed construction of the dwelling would affect elements of the environment under reg 2(1)(a) EIR and would involve factors within the scope of reg 2(1)(b) EIR. The Council's processing of the planning application therefore also involved extensive consideration of measures within regulation 2(2)(c) EIR and at least some consideration of matters within regulation 2(1)(e) and (f).
29. The Commissioner submits that this is not a case, as in **DBEIS v Information Commissioner and Henney** [2017] EWCA 844, where the environmental nature of the information may not be "apparent on the face of the information itself". To the extent that the requested information does not directly address environmental matters, it was nonetheless information "on" measures and activities "affecting or likely to affect the elements and factors as well as measures or activities designed to protect those elements" within the meaning of reg 2(1)(c).

30. The Commissioner submits that there is no basis for arguing that the Commissioner wrongly applied the exception on a blanket basis. As Ms Sharp accepts that the communications were internal, the only issue is the balance of the public interest.
31. The Commissioner submits that it is not part of his function to investigate any allegations of wrongdoing. The Commissioner took account of the matters raised by the Appellant in considering the balance of the public interest but concluded, having viewed the closed material, that he had “not seen any evidence of wrongdoing”. The Commissioner argues that none of the matters raised by the Appellant in her grounds of appeal come close to showing that disclosure would be warranted. As the Commissioner noted in his DN, moreover, it is submitted that the Appellant has other remedies to challenge the lawfulness of the Council’s decision.

Legal framework

32. Regulation 2(1) of the EIR defines environmental information as 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

33. In **BEIS v IC and Henney** [2017] EWCA Civ 844 (**‘Henney’**) the Court of Appeal held that:

35. ...an approach that assesses whether information is “on” a measure by reference to whether it “relates to” or has a “connection to” one of the environmental factors mentioned, however minimal...is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.

37. ...It is therefore first necessary to identify the relevant measure. Information is “on” a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is “on”.

42. Furthermore, Mr Choudhury accepted that it is possible for information to be “on” more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question “what measure or activity is the requested information about?”. Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was “a” or “the” relevant measure.

43. It follows that identifying the measure that the disputed information is “on” may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

34. The relevant part of regulation 12 EIR provides that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies under regulation 12(4) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) a public authority must apply a presumption in favour of disclosure.

35. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that–

(e) the request involves the disclosure of internal communications.

36. If the conditions of 12(4)(e) are met, the information must only be withheld to the extent that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

The Task of the Tribunal

37. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was

not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

38. The issues we have to determine are:

- 38.1. Does the EIR apply?
- 38.2. It is accepted that the withheld information is internal communications.
- 38.3. Does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

Evidence and submissions

39. We have read an open and a closed bundle of documents.

40. The closed bundle contains the withheld information. It also contains information that has already been disclosed to Ms Sharp where that forms part of the same email trail/forms part of a withheld email. It is necessary to withhold the withheld information from Ms Sharp, otherwise the purpose of the appeal would be defeated. It is not necessary to withhold the information that has already been disclosed, but it is included in the closed bundle as a matter of convenience.

41. The content of the closed bundle is summarised at page 137 of the open bundle. The following table applies that summary to the pages in the closed bundle. Any pages that do not appear in the table below have not been withheld. The numbering of the email trails comes from p 137. The page numbers refer to pages in the closed bundle.

Email trail	Page no.	Description
1	A49-A50 and A84-85	An email trail within which planning officers have sought legal advice in regard to concerns being raised by Mrs Sharp regarding the planning application process.
2	A8	A conversation between two officers (an officer and their line manager) deciding how they will handle a complaint made by Mrs Sharp, who the Investigating Officer will be and how they will respond to it.
3	A1	A conversation between two officers (an officer and their line manager) who are discussing the decision made at planning committee and also the actions which led to a planning officer becoming upset and breaking down during a site visit, and how that officer will be supported going forward.
4	A36	A conversation between two officers (an officer and their line manager) regarding the upcoming

		planning committee and a decision made not to respond to Mrs Sharp's latest email prior to the outcome of the committee.
5	A43	An email from the Ward Councillor asking for an update.
6	A57	Duplicate - appears in email trail 8 - an officer asking for advice from their line manager how to proceed given capacity issues
7	A65	Two emails between officers and a Councillor discussing the ongoing issues with the planning case. The third email on this page is in the open bundle at p 212.
7	A66	This is in the open bundle at p 212, save for irrelevant personal information that has been redacted.
8	A75	Conversations that are a continuation of email trail 6 and the advice given by a line manager to a member of their team around how best to respond.

Discussion and Conclusions

EIR

42. Although Ms Sharp is concerned about the application of EIR, the tribunal notes for her benefit that EIR regime is, in general terms, more likely to lead to disclosure of information than FOIA. Although the equivalent exemption under FOIA (section 36(2)) requires prejudice to be shown before the exemption is engaged, similar factors will be taken into account at the public interest balance stage and there is a presumption of disclosure under EIR. If the information was considered under FOIA in this appeal the tribunal would not have disclosed any more information.
43. In any event, we agree with the Commissioner that EIR is the appropriate regime. In our view this is, however, a case where the environmental nature of the information may not be "apparent on the face of the information itself". We find that the requested information does not directly address environmental matters, however it is information "on" measures and activities "affecting or likely to affect the elements and factors as well as measures or activities designed to protect those elements" within the meaning of reg 2(1)(c), because it relates to the process of considering Ms Sharp's application for planning permission. That application for planning permission was an activity or measure affecting or likely to affect the elements and factors set out in regulation 2(1)(a) and (b).

Internal communications

44. Regulation 12(4)(e) is engaged where the information is internal communications. Having reviewed the withheld information we conclude that it consists of internal communications and the exception is engaged.

Public interest balance

45. Regulation 12(4)(e) is not an absolute exception. Employees of a public authority exchanging internal documents are expected to be aware that such documents are potentially disclosable under the EIR. Any general chilling effect is likely to have been caused by the enactment of the EIR, not by disclosure in this particular appeal. Public servants are expected to be robust in expressing their views and appropriate in any comments in written communications. Disclosure in this appeal would not change that. We do not accept that there is a public interest in avoiding disclosure on the basis of any general chilling effect that might arise from our decision.
46. When considering the public interest in maintaining the exception we note the purpose behind the exception of preserving a private space for internal communications.
47. We accept that there is a clear need for a safe space for candid discussion and for council officers and councillors to discuss and give their opinions on issues as part of a robust decision-making process. In particular we accept that officers must be able to communicate freely with their line managers and must be able to raise issues and concerns and seek advice on complex or sensitive matters. The need to protect this safe space is strongest where the issue in question is still live.
48. In this appeal, the response to the request was issued on 15 March 2023. In her reply to that response, also dated 15 March 2023 Ms Sharp states: 'I would be grateful if you could provide these...as a matter of urgency as I am currently writing the Appeal to my planning application and the information I requested is time sensitive'. Given that the matters to which this information relates were live at the time of the response to the request, we place very significant weight on the need to maintain this safe space. It is not conclusive, but it carries very significant weight in the balance.
49. We have reviewed each email contained in the closed bundle separately. In relation to the email labelled 'email trail 5' which is at A43 in the closed bundle we have concluded that disclosure of this email would not impinge significantly on the safe space. It is an email from the Ward Councillor asking for an update. There is a no substantive discussion of the issues. There is an ambiguous comment in the email which may or may not be a comment on the process, but it is not part of any discussion or seeking of advice and is so broadly expressed that we do not consider disclosure would impact on the safe space, even while the matter was live. On the other hand, the email adds nothing substantive to transparency because it has no

substantive content. The public interest is evenly balanced in our view, with both sides of the scales being almost empty. Taking into account the presumption of disclosure, we conclude that the Council was not entitled to rely on the exception in relation to that email.

50. In relation to the remainder of the emails, they contain informal and frank discussions, including officers seeking advice from more senior officers as to how to respond to Ms Sharp's complaints, officers seeking support with difficult issues and emails seeking and providing legal advice. These matters were still live at the relevant date. We have concluded that there is a very strong public interest in maintaining the exception because the matter remained live at the date of the response to the request.
51. Turning to the public interest in favour of disclosure, we accept that there is a general public interest in relation to the Council's decision-making process relating to planning applications.
52. We accept that there would be a very strong public interest in disclosure if the withheld information showed evidence of wrongdoing by the Council, but having reviewed the withheld information we do not accept that is the case.
53. Although we agree with the Commissioner that the emails contain no evidence of wrongdoing we accept that some of the emails do cast some light on Ms Sharp's concerns and there is a public interest in understanding fully and transparently how matters are dealt with by the Council where issues such as the two incidents highlighted in the factual background arise in the context of a planning application. Although we can see no 'smoking gun' in the withheld information, there is a clear value in transparency which can often assist in allaying concerns. This is reduced to some extent because the planning application process provides another route for addressing Ms Sharp's concerns.
54. Although the emails do contain candid and occasionally frankly worded discussions, in our view the discussions are not unprofessional or inappropriate. This does not in our view add to the public interest in disclosure.
55. We have taken into account all the matters set out above, and we bear in mind the presumption of disclosure in reg 12(2). Despite the fact that there is a clear public interest in transparency due to the matters set out in paragraph 53, we find that, while this matter remained live, in all the circumstances the very weighty public interest in maintaining the exception outweighs the public interest in disclosure in relation to the remaining withheld information.
56. For the reasons set out above, the appeal is upheld in part. We find that the Council was not entitled to withhold the email at page A43 of the closed bundle, but was entitled to withhold the remaining withheld information.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 4 April 2024