



Neutral citation number: [2024] UKFTT 520 (GRC)

Case Reference: EA/2023/0475

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

**Decided without a hearing
On: 6 June 2024
Decision given on: 20 June 2024**

Before

**JUDGE HAZEL OLIVER
MEMBER SUZANNE COSGRAVE
MEMBER ROSALIND TATAM**

Between

DONNA CLARKE

and

INFORMATION COMMISSIONER

Appellant

Respondent

Decision: The appeal is Allowed.

Substituted Decision Notice:

1. Torrridge District Council was not entitled to withhold the Article 4 Direction report under regulations 12(3), 12(4)(e) or 12(5)(b) of the Environmental Information Regulations 2004. Torrridge District Council is to disclose the following information to the Appellant: the Article 4 Direction report dated 12 July 2022 (as contained in the closed bundle).
2. On the balance of probabilities, Torrridge District Council did hold further information within the scope of part 2 of the request, consisting of a letter to the Council from the Department for Levelling Up, Housing and Communities dated 8 August 2022 (a redacted version of which is at page A18 in the open bundle). The Council is to disclose this information to the Appellant, and any other information held falling within part 2 of the request, subject to any exceptions that it relies on to withhold all or part of this information.

3. Torridge District Council is to take these steps within 42 days of the date when this decision is sent to them.
4. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 25 October 2023 (IC-245249-T3Q3, the “Decision Notice”). The appeal relates to the application of the Environmental Information Regulations 2004 (“EIR”). It concerns information about an Article 4 Direction associated with Braddon Woods requested from Torridge District Council (the “Council”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. On 21 February 2023, the Appellant wrote to the Council and requested the following information (the “Request”):

“I am currently reviewing the Article 4 Direction with respect to Braddon Woods. I would be grateful if you could confirm the following and provide the following information as detailed below as I have been unable to find this information on the Council’s website.

- 1. Dates of relevant local planning authority decisions and consideration of the Article 4 Direction – for example Committee and officer’s reports – and where I may locate them;*
- 2. Copies of correspondence with DHLUC with respect to the Article 4 Direction as required by Schedule 3 of the GPDO 2015;*
- 3. Confirmation as to the type of Direction sought – immediate or non-immediate;*
- 4. Copies of the consultation letters sent to the legal owners of the land subject to the Article 4;*
- 5. A map confirming the land to which the Article 4 Direction specifically relates;*
- 6. The date on which the notice with respect to the proposed Direction was served/published and a copy of the notice;*
- 7. The date on which consultation on the Direction expired;*

8. The date on which the Council confirmed the Direction and a copy of the notice of confirmation;

9. The justification for the Direction in relation to paragraph 53 of the NPPF (local amenity and well being) i.e what are the LPAs particular concerns.

4. An Article 4 Direction is made under Article 4(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015, and allows a local planning authority to restrict permitted development rights. The Article 4 Direction and applicable public notices must be sent to the Secretary of State at the Department for Levelling Up, Housing and Communities (“DLUHC”). The Council made a Direction restricting certain types of developments in Braddon Woods in order to preserve the amenity of the area.

5. The Council responded on 31 March 2023. They provided information in response to all the questions except for number 1, where they withheld an internal report under Regulation 12(4)(e) (internal communications). This report is the withheld information.

6. The Appellant requested an internal review on 10 May 2023, and set out various documents she said they had failed to disclose. The Council responded on 7 July 2023 and confirmed that no further information was held, addressing each of the Appellant’s points. The Council informed the Appellant that the report withheld under item 1 was now being withheld under Regulation 12(5)(b) (the course of justice).

7. The Appellant complained to the Commissioner on 11 July 2023. The Commissioner sent two requests to the Council for further information.

a. In their first response, the Council explained the extent of their searches for the requested information. They said that they were relying on Regulation 12(5)(b) on the basis of the effect on their ability to conduct an inquiry of a criminal nature, referring to potential enforcement action if the Article 4 Direction is breached. They also referred to possible legal actions against the Council. They confirmed there is some personal data within the document and that they relied on Regulation 12(3) to withhold this information. They did not address Regulation 12(4)(e) (internal communications) in any detail.

b. In their second response, the Council said that the withheld report was covered by legal privilege and contains information that would damage the Council’s interest.

8. The Commissioner decided:

a. The Council had conducted appropriate and adequate searches, and on the balance of probabilities no further information was held.

b. Regulation 12(5)(b) was engaged as disclosure would adversely affect the Council’s ability to carry out an inquiry. The planning matter remained live at the time of the Request because enforcement action may have been necessary, and the options presented to the Council’s legal team in this case may be relevant to future enforcement action in different but similar cases.

c. The balance of public interest favoured maintaining the exception.

The Appeal and Responses

9. The Appellant appealed on 14 November 2023. Her grounds of appeal are:
 - a. The Council withheld information that was correspondence with DLUHC and the supporting request, and there were no valid grounds to withhold these documents.
 - b. She provided copies of two documents that were provided by DLUHC in response to a separate EIR request – a letter from DLUHC to the Council about an Article 4 Direction dated 8 August 2022, and the report that is the withheld information in this case.
 - c. The Request did not concern historic, current or future plans by the Council to take enforcement action – it only related to procedural matters and the supporting documentation.

10. The Commissioner’s response maintains that the Decision Notice was correct.
 - a. In relation to the letter from DLUHC dated 8 August 2022, this relates to an earlier Direction rather than the revised Direction of 8 September 2022. The only Article 4 Direction in place at the time of the Request was the one of 8 September 2022, and it was reasonable for the Council to interpret the Request as being about this Direction. In addition, this letter is a holding response and so was not a substantive response.
 - b. The Article 4 Direction was live at the time of the Request, and it was therefore necessary to consider whether disclosure would impact the Council’s ability to take enforcement action in respect of the direction, should the need arise.
 - c. When assessing the balance of the public interest, it was entirely appropriate for the Commissioner to take into account not just the impact that disclosure would have on enforcement in relation to the Council’s direction in Braddon Woods but also to other cases involving similar consideration.
 - d. The balance of the public interest would inevitably be resolved in favour of maintaining the exception since the Appellant had failed to point to any public interest factor capable of outweighing the inbuilt public interest in favour of maintaining legal professional privilege.
 - e. The fact that DLUHC chose to disclose information to the Appellant does not show that either the Council or the Commissioner made an error.

Applicable law

11. The relevant provisions of the Environmental Information Regulations 2004 (“EIR”) are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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;

.....
5(1) *...a public authority that holds environmental information shall make it available on request.*

.....
12(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....
12(3) *To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*

.....
12(4) *...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.

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

.....
12(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.

.....
13(1) *To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if— (a) the first condition is satisfied...*

.....
13(2A) *The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations— (a) would contravene any of the data protection principles...*

11. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

12. **Regulation 12(4)(e) (internal communications).** This is a class-based exception, meaning it is engaged automatically for information that consists of internal communications without the need for to show that disclosure would cause harm. It is still subject to the public interest balancing test. The concept of “internal communications” is broad, and covers information intended to be communicated to others. The purpose of the exception is to preserve the public authority’s private thinking space, which is particularly relevant when a matter is live.

13. **Regulation 12(5)(b) (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).** This exception can cover both criminal and civil inquiries and enforcement proceedings. It is subject to the public interest test.

14. The test under Regulation 12(5) is that disclosure “would” have an adverse effect. This means that it needs to be more likely than not. The Commissioner’s detailed guidance on the EIR explains this as follows – *“For you to apply an EIR exception, you must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect... The fact that EIR uses only “would” and not “would be likely” means that the test for engaging these exceptions is more stringent than FOIA prejudice-based exemptions. A public authority cannot engage an exception if they cannot show that the adverse effect is more likely to happen than not (ie if there is a less than 50% chance).”*

15. **Regulation 12(5)(b) (course of justice - legal professional privilege).** Legal professional privilege (“LPP”) protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context (***Three Rivers District Council v Governor and Company of the Bank of England (no 6)*** [2004] UKHL 48). Legal advice privilege also extends to wider communication of privileged advice, such as internally to a client’s Board of Directors (***Civil Aviation Authority v R Jet2.com Ltd*** [2020] EWCA Civ 35).

16. Unlike under the exemption for privileged material in FOIA, LPP is not specifically covered by an exception under EIR. However, it is well established that disclosure of material which is subject to LPP can be refused under Regulation 12(1)(b) EIR on the basis of an adverse effect on the course of justice.

17. **Regulation 12(3) (personal data).** Section 3(2) of the Data Protection Act 2018 (“DPA”) defines “personal data” as “any information relating to an identified or identifiable living individual”. The “processing” of such information includes “disclosure by transmission, dissemination or otherwise making available” (s.3(4)(d) DPA), and so includes disclosure under FOIA.

18. The data protection principles are those set out in Article 5(1) of the UK General Data Protection Regulation (“UK GDPR”), and section 34(1) DPA. The first data protection principle under Article 5(1)(a) UK GDPR is that personal data shall be: “processed lawfully, fairly and in a transparent manner in relation to the data subject”. To be lawful, the processing must meet

one of the conditions for lawful processing listed in Article 6(1) UK GDPR. These include where “the data subject has given consent to the processing of his or her personal data for one or more specific purposes” (Article 6(1)(a)). It also includes where “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.” (Article 6(1)(f)).

19. The balancing of interests test under section 6(1)(f) involves consideration of three questions (as set out by Lady Hale DP in **South Lanarkshire Council v Scottish Information Commissioner** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and UK GDPR. This should now reflect the words used in the UK GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

20. **Is further information held.** In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority’s records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with regulation 12(4), the information is that held at the time the request is received.

Issues and evidence

21. The issues are:

- a. Was further information held by the Council at the time of the Request which should have been disclosed under EIR?
- b. Was the Council entitled to withhold the withheld information under Regulation 12(5)(b) EIR (the course of justice)?
- c. If not, was the Council entitled to withhold the withheld information under Regulation 12(4)(e) EIR (internal communications)?
- d. If not, was the Council entitled to withhold any of the withheld information under Regulation 12(3) EIR (personal data)?

22. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information and an unredacted version of some of the correspondence between the Council and the Commissioner (with a redacted version in the open bundle).

Discussion and Conclusions

23. We have considered the issues in turn.

24. *Was further information held by the Council at the time of the Request which should have been disclosed under EIR?* We have considered whether we are satisfied that the Council carried out appropriate and adequate searches for the requested information. We considered the information about searches that was provided by the Council to the Commissioner, and the Council's answers to detailed questions from the Appellant as part of the internal review.

25. The Appellant makes a specific complaint in her appeal that the Council failed to disclose correspondence with DLUHC. This would potentially fall under part 2 of the Request (copies of correspondence with DLUHC with respect to the Article 4 Direction). She has provided a copy of a letter from DLUHC to the Council dated 8 August 2022, which was provided by DLUHC in response to a separate request. The Commissioner's position is that the only Article 4 Direction in place at the time of the Request was the one of 8 September 2022, meaning it was reasonable for the Council to interpret the Request as being about this Direction only, and this letter is a holding response only.

26. The Appellant's request for an internal review asks about, "*The responses from DHLUC with respect to the original and revised Article 4 Direction...*". The Council's internal review response is, "*I can confirm that no response was received from DHLUC [sic]*". The Commissioner suggests that the parties were at cross-purposes and the Council understood this as asking about the current Direction only. However, the Appellant's question was clear. The Council did not say that they were only dealing with a revised Direction. Instead, they expressly stated that no information was held. We therefore find that the Council did regard this correspondence as being within scope of the Request, and so they failed to disclose the information. We also consider that the original and revised Article 4 Directions should be considered together, as they all form part of one process which led to the final Direction. We note that the Council referred to there being an "amendment" to the original Direction rather than a new Direction in September 2022 (for example, in the disclosed correspondence at page C56 of the bundle). On the balance of probabilities, further information was held within the scope of the Request. The Council should disclose this information, subject to any applicable exceptions that they wish to rely on. There may also be other related correspondence which falls within part 2 of the Request, which should also be disclosed if it exists (subject to any applicable exceptions).

27. *Was the Council entitled to withhold the withheld information under Regulation 12(5)(b) EIR (the course of justice)?* We start with the issue of **legal professional privilege**. We have considered the applicable test to decide whether the exception is engaged.

28. Firstly, is this a communication between a client and their legal adviser? The communication is addressed to the Development Manager and Head of Legal Services, so it does appear to have been sent to the Council's internal legal adviser. Secondly, was the adviser acting in a professional capacity? The communication was sent to the Head of Legal Services as part of their professional role.

29. Thirdly, was the communication for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context? We have found the Council's position on this

exception somewhat confusing. In their communication to the Commissioner of 18 September 2023 they reply “N/A” to a question about whether they rely on legal professional privilege (page D83 open bundle). However, in their communication of 24 October 2023 they say, *“it is correspondence that is covered by legal privilege and contains information that would damage the Council’s interest. The information relates to legal advice sought from the Council’s Legal Team in a professional capacity and the information was created for the dominant purpose of securing legal advice”*. The same paragraph then goes on to refer to enforcement action.

30. We have considered the content of the withheld information. Although it is addressed to the Head of Legal Services, it does not contain a request for legal advice, and it does not refer to legal advice. It contains information and asks the Head of Legal Services to consider making an Article 4 Direction. Legal professional privilege only applies where the “dominant purpose” of a communication is seeking or giving legal advice. Not every communication to an internal legal adviser is covered by this privilege – it depends on the content and context. The Council did not explain to the Commissioner why they say the information “relates to legal advice” or how the report’s “dominant purpose” was securing legal advice. There is no request for legal advice anywhere in the document. In the circumstances, we are not satisfied that this communication is covered by legal professional privilege.

31. We therefore find that the course of justice exception is not engaged due to legal professional privilege.

32. The Council has also relied on their ability to **conduct an inquiry of a criminal nature**. The Council’s argument is that publication of the report could affect future enforcement if the Article 4 Direction is breached. We have considered the Council’s representations to the Commissioner on this point. The Commissioner asked *“Please clearly explain how disclosure of the withheld information would adversely affect an inquiry. Please ensure that this explanation demonstrates a causal relationship between disclosure of the information that has actually been withheld and any adverse affect”*. The Council’s reply was *“The inquiry is an Article 4 Direction on Braddons Woods, if an Article 4 is breached this can lead to enforcement”* (page D83 in the open bundle). The Council did not explain how disclosure would affect such an inquiry. The Council provided a further explanation (pages D85 to 86 in the open bundle). It is somewhat unclear whether these representations all relate to legal professional privilege, but we note the comment, *“Disclosure would reveal the strengths and weaknesses of the different options available in respect of possible enforcement action, which would make it harder for the Council to take action in future if it proves necessary to revisit this matter”*.

33. We accept that material contained in a report on an Article 4 Direction might make enforcement action more difficult in some cases. However, the Council has not explained what content in the withheld information would cause this effect in this case. The relevant test is that disclosure “would” adversely affect the course of justice, meaning this is more probable than not. Having seen the representations from the Council and the withheld information, we are not satisfied that disclosure would have this effect.

34. We note that the Council’s representations to the Commissioner also refer to the potential for legal action against the Council. They do not explain how and why any of the information would have this effect. This may be an argument that disclosure would affect their right to a fair trial. However, having viewed the withheld information, we do not find that any of it would be likely to result in legal action against the Council in a way that would affect their right to a fair trial.

35. We therefore find that the course of justice exception is not engaged in relation to an inquiry of a criminal nature, or in relation to the right to a fair trial. As the exception is not engaged, it is not necessary for us to go on to consider the public interest test.

36. ***If not, was the Council entitled to withhold the withheld information under Regulation 12(4)(e) EIR (internal communications)?*** We can address this point quite briefly, as it appears that this was not only an internal communication at the time of the Request. This exception is intended to provide safe and private thinking space, and so cannot be relied on if the relevant communication has already been sent to third parties. This is acknowledged in the legal summary in the Commissioner's response (see the quote from C-619/19 ***Land Baden-Wurtemberg v DR***, "*information that circulates within a public authority and which, on the date of the request for access, has not left the public authority's internal sphere*". The Appellant was provided with a slightly redacted version of the withheld report by DLUHC. This shows that the report was provided to a third party. It was provided in response to a request to DLUHC dated 6 July 2023. Although this was after the Request in this case, it appears very likely that DLUHC would have been sent the report at the time the Article 4 Direction was being considered. Therefore, at the time of the Request this was not a purely internal communication and so the exception is not engaged. The document may initially have been drafted with the intention of facilitating internal discussion, but the exception is not available after it was sent outside the Council. We also note that the Council only appears to have relied on this exception in relation to one section of the report in any event (as shown by the response to the Commissioner on page D83 in the open bundle). As the exception is not engaged, it is not necessary for us to go on to consider the public interest test.

37. ***If not, was the Council entitled to withhold any of the withheld information under Regulation 12(3) EIR (personal data)?*** This exception was not considered by the Commissioner in his decision or response to the appeal. The withheld report contains the names of four Councillors and of the Planning Manager. This is personal data about those individuals, and so we have considered whether processing of this data is lawful under the DPA and UK GDPR. The only applicable lawful basis for the processing is Article 6(1)(f).

38. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests? Although the Appellant has not provided arguments on why she requires this information, there is a general legitimate public interest in full transparency about who was involved in discussions about the Article 4 Direction.

39. Is the processing involved necessary for the purposes of those interests? Yes, there is no obvious alternative way to obtain this information.

40. Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data? The Council has not addressed the position of the Planning Manager in their representations to the Commissioner and so it is not clear that they are relying on this exception for this individual. In any event, we would expect the name of a Council's Planning Manager to be public knowledge, and we do not see that disclosure of their name would override the interests in transparency in this case.

41. In relation to named Councillors, the Council has said in their response to the Commissioner, "*The councillors named on the document could be contacted in relation to this matter, this could be in a positive or negative manner and could cause them to be targeted*".

Our starting point is that Councillors hold a public office and so would expect their name to be published in connection with public matters such as the making of an Article 4 Direction. They would not have any reasonable expectation of privacy. The Council did not provide any further information as to how or why the Councillors might be “targeted”. We note that two of them are Councillors for the Ward where the Article 4 Direction applies, so it would have been known that they were connected with the matter in any case. The other two Councillors are simply copied in. In the circumstances of Councillors holding public office, we do not agree that publication of their names in association with this matter would prejudice their privacy rights to the extent that this would override the interests in disclosure.

42. The Council’s second response to the Commissioner (page D85 in the open bundle) refers to the need to protect the identity of individuals who make a complaint about a breach of planning control. We do not understand the relevance of these paragraphs as no such personal data is contained in the report.

43. We therefore find that the personal data exception is not engaged.

44. ***Other matters.*** We note that section 6 in the Appellant’s appeal document asks the Tribunal to determine whether the Council were in breach of section 77 of the “FOI Act”. We do not have jurisdiction under FOIA or EIR to address this issue.

45. We allow the appeal. On the balance of probabilities, the Council did hold further information within the scope of the Request. In addition, the Council was not entitled to rely on the exceptions in regulations 12(3), 12(4)(e) or 12(5)(b) to withhold the withheld information. We issue the Substituted Decision Notice set out at the start of this decision.

Signed: Judge Hazel Oliver

Date: 15 June 2024