



NCN: [2024] UKFTT 802 (GRC)

Case Reference: EA-2023-0093

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

Considered on the papers on 21 August 2024

Decision given on: 05 September 2024

Before

**DISTRICT JUDGE REBECCA WORTH
(authorised to sit as a Tribunal Judge in the GRC)
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER ROSALIND TATUM**

Between

EMMA TRISTRAM

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) NATIONAL HIGHWAYS**

Respondents

Decision: The appeal is Allowed

Substituted Decision Notice: The request falls under the Environmental Information Regulations 2004 (SI 2004/3391) (EIR). Applying the EIR to the request, the information request is not held by National Highways and the public interest balance falls against requiring National Highways to analyse the raw data so as to hold the information sought. No steps are required of the public authority.

Definitions: “DN”the Decision Notice which is the subject of this appeal, namely IC-214901-X3V5 dated 17 February 2023

- “EIR” Environmental Information Regulations 2004 (SI 2004/3391)
- “FOIA” Freedom of Information Act 2000
- “ICO” The Information Commissioner’s Office
- “PA” The Public Authority (as defined by Schedule 1 of FOIA), namely National Highways
- “the Requester” the person who applied for information – referred to in FOIA, section 1 as the applicant
- “the Rules” The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2010/43), as amended¹

Mode of hearing: The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Rules.

REASONS

The Law

1. As far as is relevant, the EIR provides:

2 Interpretation

- (1) ...

“environmental information” has the same meaning as Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or 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 those elements;

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

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into 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 Duty to make available environmental information on request

- (1) 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, a public authority that holds environmental information shall make it available on request.
- (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3)

12 Exceptions to the duty to disclose environmental information

- (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.
- (2) A public authority shall apply a presumption in favour of disclosure.
- (3) To the extent that the information request 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.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
 - (a) it does not hold that information when an applicant's request is received;

2. As far as is relevant, FOIA provides:

General right of access to information held by public authorities

- 1(1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) ...

3. (4) FOIA defines “Information” as section 84 which provides:

Interpretation

84 “information” (subject to sections 51(8) and 75(2)) means information recorded in any form;

4. There is a process of challenge – the first challenge is for the Requester to apply to the ICO for a Decision Notice (FOIA, section 50). If either side (the Requester or the PA) wishes to challenge the ICO’s Decision Notice, they are entitled to appeal to this Tribunal (FOIA, section 57).
5. This Tribunal’s powers are found in FOIA, section 58 (via Regulation 18 of the EIR) which provide:

EIR

2 Interpretation

- (1) In these Regulations –
- “the Act” means the Freedom of Information Act 2000;
- ...

18 Enforcement and appeal provisions

- (1) The enforcement and appeals provisions of the Act shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in this regulation.

....

FOIA

Determination of appeals

- 58(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.

6. In determining whether information is, or is not, held, we apply the normal civil standard of proof which is the balance of probabilities (see *Preston v ICO and Chief Constable of West Yorkshire Police* [2022] UKUT 344 and *Bromley v IC and Environment Agency* [2007] UKIT EA_2006_0072 (31 August 2007)).

Background

7. Dr Tristram seeks to know about responses to a consultation, run from January to March 2022, about a road scheme in the Arundel area.

- 7.1. On 10 December 2022, Dr Tristram asked National Highways for information. The request is found at Open Bundle page B91 and is reproduced below as a screenshot:

Dear National Highways Limited,

In the Feedback Form for the Jan-March 2022 Statutory Consultation on the Arundel bypass, you stated 'We would like to know what you think about our proposals' (p.2) and 'In this Feedback Form, you are invited to comment on any Section of the proposed route, the proposals for downgrading the existing A27 through Arundel, or the scheme as a whole' (p. 4). There is no specific question in the Form about the 'proposals' in general or 'the scheme as a whole', but comments on both subjects were invited in the Form.

Please let me know how many people responded saying they objected to the proposals in general, or objected to the scheme as a whole, and express this as a percentage of the total responses.

Yours faithfully,

- 7.2. On 06 January 2023, the PA responded, explaining:

As question 8 in our statutory consultation feedback form is a 'free text' open question, we have not extracted sentiment feedback (support/objection) as a percentage of total responses.

...

- 7.3. Dr Tristram request that this response be reviewed. Upon review, the PA wrote to Dr Tristram on 06 February 2024, stating:

Question 8 on the statutory consultation feedback form was an open question and this feedback has not been extracted because this was not the purpose of the consultation and it would have taken too long to do the analysis of the responses.

....

In conclusion, I am satisfied that we do not hold the number of objections to the proposal and no further action is required.

- 7.4. Following its investigation, the ICO issued a DN, dated 17 February 2023, which found: “the PA does not hold information relevant to the complainant’s request and has complied with section 1(1) of FOIA” (see paragraph 2 of the DN). The DN recognised that the PA holds the building blocks to the information (i.e. the raw data) and concluded that the manipulation of those building blocks to provide the information would require particular skills and expertise.

8. Dr Tristram appeals to this Tribunal against the DN dated 17 February 2023, her Notice of Appeal is dated 18 February 2023.

Grounds of Appeal

9. The Grounds of Appeal on which Dr Tristram relies are:

- 9.1. The request was misrepresented in the DN and responses to the consultation were not merely invited on the feedback form, but could have been by email or by correspondence. A publicly available overview in May 2022 stated that there were 2000 on the feedback form and 2000 responses by email. The DN was unclear as to how the figure of 4429 responses was reached. She surmised that emails were likely to be objections to the scheme.

- 9.2. The fact that Question 8 was an ‘open question’ and answers would require analysis is not enough reason to neglect to extract the information about the number of objections from the responses overall.

- 9.3. As 93% of responders supported a different route or ‘do nothing’ at the Arundel Bypass 2019 consultation, it is possible that a large proportion of responses objected to the Arundel scheme at the 2022 Statutory Consultation.

- 9.4. The decisions not to include a question about whether you support or oppose the scheme, not to analyse 'sentiment feedback', and not to count the number of objections, appear to be decisions to hide the opposition of the scheme.
10. Dr Tristram states that she is "seeking to know the number of responses to the Jan-March 2022 Statutory Consultation on the Arundel Bypass which objected to the scheme, and the proportion of objections as a percentage of the total number of responses".

Response

11. The ICO responded to the appeal on 29 August 2023. The response was:
- 11.1. On an objective reading, the request was about the Feedback Forms.
- 11.2. The Tribunal would probably be assisted by joining the PA to receive further information about how the Feedback Forms are held and whether any electronic search of their contents could be made.
- 11.3. Even if the information is considered to be held, it is likely that section 12 of FOIA (costs of compliance exceed the limit) would apply as the PA may not, within the relevant limit, be able to locate the information.

Appellant's Reply

12. Dr Tristram replied to the ICO response in two documents. She repeats that she is interested in all responses (not just those in the Feedback Forms). She identifies what she says was a fault in the consultation – no direct question was asked such as "Do you support the scheme?" with a yes/no response available.

National Highways – joinder and response

13. The PA was, in Case Management Directions dated 12 October 2023, joined as a party to the Appeal. They responded to the appeal on 15 December 2023. Their response was based on the figure of responses being 4,180 (which appears to be wider than the scope found by the ICO). Their response was:
- 13.1. It would be significantly time-consuming and costly to analyse all the responses in order to find the percentage figure that is requested by Dr Tristram.
- 13.2. It would be possible to conduct an electronic search of the raw data held in response to the consultation but any key word search would then need to be reviewed and examined in context.
- 13.3. They set out a way of searching and assessing the raw data to find the percentage and estimate that this would take, in total, well over 300 hours.

- 13.4. They “continued to rely on” section 12(2) of FOIA to withhold information, as the estimated cost of complying with the request would exceed the appropriate limit.

Provision of the raw data

14. The PA provided a sample of the raw information, on a Closed basis to the Tribunal and the Information Commissioner, which was dealt with by Case Management Directions dated 26 January 2024 which stated that “The Tribunal has received a copy of the disputed information”.
15. In response to those Case Management Directions, Dr Tristram made submissions that this must mean that the information is held.

Mode of hearing

16. The Panel convened to discuss the case on 21 August 2024 and agreed that it could be dealt with by way of consideration without a hearing.

Evidence and submissions

17. The Tribunal considered:
- 17.1. An Open Bundle comprising of 108 pdf pages.
- 17.2. Closed documents, namely a sample of Feedback Forms, emails and letters giving responses to the consultation.
- 17.3. Submissions from the PA in a document sent/received on 09 February 2024 and titled “National Highways’ Final Comment”.
- 17.4. Emailed submissions from the ICO sent on 09 February 2023 at 2:57 p.m.

Discussion and decision – which information regime applies?

18. As this information is about a road scheme, the first consideration must be whether FOIA or EIR is the appropriate regime to apply to Dr Tristram’s request. In the DN, the ICO concluded at paragraph 15 that FOIA was the appropriate scheme because:

... the requested information constituted a percentage relating to opinions about an environmental issue. These opinions did not constitute part of an economic analysis as described in regulation 2(1)(e), rather a public consultation.

19. The Tribunal Panel, however, considered this afresh and decided that, as the Arundel Bypass (a road scheme) has clear effects on the environment that information about the consultation fell within EIR regulation 2(1) as it meets the

criteria as set out in (c) under “environmental information” see above by being a “measure”.

20. As under FOIA, the EIR provides that a public authority does not need to provide information which is not held (see EIR, Regulation 12(5)(a)). Therefore, the arguments already before the Panel about whether the information was, or was not, held could be used irrespective of which regime was being applied to the request. The Panel recognises that there is also a public interest test to apply under the EIR (Regulation 12(1)(b)) but considered that, with its specialist knowledge of the area of information rights, it was appropriate to apply the current information provided by parties to that test and make a decision about the merits of the appeal.

Discussion – the scope of the request and what was sought?

21. The DN found that the request for information was for a percentage derived from a Feedback Form. It is Dr Tristram’s case before the Tribunal that she was not just seeking the percentage from the Feedback Form but from all responses to the consultation – so as to include any emails and letter. It seems that the PA, when responding to the request, treated the request as being only about the Feedback Forms; during the course of the appeal, they have widened their arguments to encompass the wider interpretation now favoured by Dr Tristram.
22. The request itself (as set out above) specifically refers to a “Feedback Form”. Paragraph 1 clearly refers to such Form in four places. The request for information is made in a second paragraph.
23. The PA’s response (see bundle page B92) stated “As question 8 in our statutory consultation feedback form is a ‘free text’ open question, we have not extracted sentiment feedback (support/objection) as a percentage of total responses”. When seeking a review, Dr Tristram did not mention anything about other forms of response (i.e. those which may not have been an “answer to question 8”). It seems to us that it was only during the ICO investigation that she raised the issue of her request being interpreted too narrowly.
24. Looking at the request, in the context that Dr Tristram set it out, we find that the DN was correct to find that (whatever Dr Tristram may have intended), the actual wording of the request was for a percentage figure of those who, when using the Feedback Form, objected to the proposals in general or the scheme as a whole.

Discussion – is the information held or not held?

25. When considering if the information is, or is not, held, it is important to be clear about what information, Dr Tristram asked for. She asked for a number – the percentage of those who, within the January to March 2022 consultation, objected to the proposals in general or to the scheme as a whole.

26. The PA says (and there is no evidence to disbelieve them) that they did not have this percentage. They did, however, have raw data from which it may be possible to calculate the percentage. To do that calculation, a person would need to know (a) how many responses there were and (b) how many responses were objecting to the proposals in general or the scheme as a whole. From those two figures, a percentage can be calculated.
27. It seems to us that finding the number of Feedback Forms which were received by the PA was relatively straight forward. It is the PA's position (see paragraph 32 of their Response, bundle page A80) that there were 1,861 Feedback Forms Received.
28. The next question is what was held about "how many responses were objecting to the proposals in general or the scheme as a whole" as that figure was needed if the PA was going to provide the percentage figure requested by Dr Tristram. From now we will refer to this aspect as "the Opinions".
29. The DN found that, for the PA to find the Opinions required the PA to process and/or manipulate the Feedback Forms to such an extent that it was reasonable to conclude that the information itself – the percentage figure – was not held within the terms of information rights.
30. It is Dr Tristram's case that it would not have taken "too long" because 93% of responders to a previous consultation in 2019 supported a different route or that nothing be done. Therefore, she argues, "it is possible that a large proportion of responses objected to the Arundel scheme at the 2022 Statutory Consultation."
31. The PA's position seems to invoke an additional potential exemption (cost exceeding compliance), but we will interpret their response as being that the DN was right – due to the time it would take to find the Opinions, the information (percentage figure) was not held.
32. The starting point is that there was no question in the January to March 2022 consultation which asked: "do you object to the proposals in general or to the scheme as a whole?". Therefore, for the PA to find out how many persons gave the Opinions, the PA would have to read each response. They would need to make a subjective decision whether what they read was "objecting to the proposals in general" (in which case it counted to the figure needed for the Opinions), or was it "objecting to the scheme as a whole" (again, it would count for the Opinions figure), or was it doing neither of these things.
33. An average time of 5 minutes (per form) does not appear to us to be unreasonable for a person to read what is said in the form and make their own decision whether it counted for the Opinions figure. For 1861 forms, 5 minutes per form is over 155 hours. Even if one calculated the average time as 1 minute per form (which would seem to us to be unreasonable) that would still be slightly over 30 hours' work on finding the Opinions figure.

34. On the above basis, and given that there would have to be a subjective decision by a person in the PA as to whether feedback being read was counted to the figure for the Opinions, we find that the PA would have had to manipulate the raw data to such an extent that the ICO was correct to find that the PA did not “hold” the information.
35. We are aware that Dr Tristram’s case is that she wanted all the feedback (not just on the forms). By including additional information whether gathered by email or letter, that increases the amount of hours’ work needed to find the figure for the Opinions. That would make the point even stronger that this amount of processing/manipulation was beyond what could reasonably be considered as information “held”.

Public interest test

36. As we have found that the EIR is the appropriate regime to apply to this information, we must consider whether in all the circumstances of the case, the public interest in maintaining that the PA did not hold the information outweighs the public interest in requiring the PA to read the Feedback Forms and find the figure for the Opinions. We are aware that the parties have not made submissions about this as they applied the FOIA regime to the request. However, as a specialist Tribunal, it appears to us that we are able to proceed to consider the public interest test.
37. We looked at the stage that had been reached, in January 2022, about this bypass. According to the evidence, the planning decision had been made: there would be a bypass, referred to in this Statutory consultation as “The Scheme”.
38. We looked at the purpose of this consultation and it is clear to us that the question for this consultation were relating to sections of the Scheme, and the PA sought views about aspects of that proposed route.
39. In the above context, answers were given to the question: “Do you have any further comments or suggestions regarding the information presented in **this** consultation?” (emphasis added).
40. Those responding, therefore, were expected to say, in light of the planning decision being that there would be a bypass, what view they had about the Scheme. Some may have tried or wished to reignite the question of whether there would be any bypass, but that was not the purpose of this consultation.
41. In the above context, it would seem to us that the public interest (which is different from “things the public may want to know”) lies with finding that the PA, although in receipt of raw data, should not be required to manipulate that data to provide the information (percentage figure) that Dr Tristram sought. This consultation was not about the Opinions, it was about something different and it would be against the public interest to enable almost misuse of the raw data as

conclusions may be drawn which were never intended to be by those who wrote to the PA with their views.

Information provided following the Panel's discussion

42. The Panel met on 21 August 2024 to discuss Dr Tristram's appeal. On Friday 23 August 2024, Dr Tristram sent an email to the Tribunal, copying in the ICO and National Highways. The email was forwarded to the Panel. In her email, Dr Tristram wrote:

Dear GRC and Information Commissioner

I am still waiting for the result of the appeal brought by me, Emma Tristram, under section 57 of the Freedom of Information Act 2000 against the Information Commissioner's decision notice of 17 February 2023 (ref IC-214901-X3V5). The last correspondence in this case, apart from my inquiring three months ago when a result would be given, was in February this year.

The road scheme at issue – the Arundel Bypass – has now been cancelled by the Labour Government. See [A27 Arundel bypass - National Highways](#). From National Highways' point of view, there should now be no impediment to my being given the information I asked for (the number of objections to the scheme in the 2022 Statutory Consultation).

Prior to the Labour government's decision, the Conservative Transport Minister had delayed the scheme by two years in a statement in March 2023 (<https://questions-statements.parliament.uk/written-statements/detail/2023-03-09/hcws625>). The announcement included the need for 'scope and design changes to ensure stakeholders' views are fully considered'.

The history of the scheme, which may be of use in future discussion of it, cannot be complete without the information I requested, i.e. those 'stakeholders' views'.

43. The cancellation of the Scheme does not affect this Tribunal's conclusion that the information was not held by National Highways for the reasons as set out in this decision.

Conclusion

44. For the above reasons, we conclude:
- 44.1. The request should have been considered under the EIR.
- 44.2. The information sought (percentage figure) was not held by the PA at the time of the request.
- 44.3. The public interest balance is that the PA should not be required to manipulate such data as they do possess in order to "hold" the information requested by Dr Tristram.

45. We substitute the DN in the terms at the beginning of this Decision.

Signed: *District Judge Worth*

Date: 30 August 2024

Promulgated: 05 September 2024