



Case Reference: EA/2023/0446
Neutral Citation Number: [2024] UKFTT 00903 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers
Heard on: 2 October 2024
Date of Decision: 14 October 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PIETER DE WAAL
TRIBUNAL MEMBER SUSAN WOLF

Between

PENNY BENCE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision:

1. The appeal is allowed in part.

Substituted Decision Notice:

Organisation: Cornwall Council

Complainant: Ms Penny Bence

The Substitute Decision – IC-243711-H9P2

1. For the reasons set out below:
 - a. The Council was entitled to rely on regulation 12(5)(b) of the Environmental Information Regulations 2004 (EIR) to withhold communications with its legal department.
 - b. The Council was not entitled to rely on regulation 12(5)(b) to withhold pre-existing documents or pre-existing emails either attached to or forwarded by those communications referred to in (a) and which do not themselves fall within (a).
 - c. The Council was in breach of its obligations under EIR by failing to respond to part two of the appellant's revised request sent to the Council on 10 February 2023.
 - d. The Council was not entitled to rely on regulation 6 EIR (information requested in a particular form or format) to withhold the title numbers and screenshots of land registry searches on pages 45-49, 54, 62-66, 70, 73-77, 80, 84-88 and 92 of the closed bundle.
 - e. The Council was entitled to rely on regulation 13 EIR to withhold the following personal data of third parties:
 - i. Email addresses
 - ii. Home addresses
 - iii. Telephone numbers
 - iv. Names of more junior employees of Cormac and the Council (identified in the closed annex)
 - v. The name of one senior employee of the Council (identified in the closed annex)
 - vi. Names of people not employed by Cormac or the Council other than Councillors (identified in the closed annex)
 - vii. Personal data of members of the public (identified in paragraph 39 of the reasons below)
 - f. The Council was not entitled to rely on regulation 13 EIR to withhold the following personal data of third parties:
 - i. Names of other senior employees of Cormac and the Council (identified in the closed annex).
 - ii. The name of a Councillor (identified in the closed annex)
 - g. The Council was not entitled to rely on regulation 13 EIR to withhold the following information because it is not personal data:

- i. Complaint reference numbers.
 - ii. Other information identified in the closed annex.
 - h. The Council was entitled to rely on regulation 5(3) EIR to withhold the personal data of the appellant.
- 2. The Council shall take the following steps within 35 days of the date this decision notice is sent to the Council by the tribunal:
 - a. Respond to part two of the appellant's revised request sent to the Council on 10 February 2023 by either disclosing the requested information or providing a refusal notice under the EIR.
 - b. Disclose to the appellant an amended redacted version of the requested information with the following information unredacted:
 - i. The title numbers and screenshots of land registry searches.
 - ii. The names of the individuals specified in paragraph 1 of the closed annex.
 - iii. Complaint reference numbers.
 - iv. The 'other information' specified in paragraph 3 of the closed annex.

REASONS

Introduction

1. The parties and the tribunal agreed that this appeal was suitable for determination on the papers.
2. This is an appeal against the Commissioner's decision notice IC-243711-H9P2.
3. This decision should be read with the tribunal's decision of 31 May 2024 (and its closed annex) in which the tribunal decided that:
 - 3.1. The Council was entitled to rely on regulation 12(5)(b) to withhold communications with its legal department.
 - 3.2. The Council was not entitled to rely on regulation 12(5)(b) to withhold pre-existing documents or pre-existing emails either attached to or forwarded by those communications referred to in 3.1 and which do not themselves fall within 3.1.
 - 3.3. The Council was in breach of its obligations under EIR by failing to respond to part two of the appellant's revised request sent to the Council on 10 February 2023.
 - 3.4. Some of the documents in the closed bundle are outside the scope of the request.

4. In the May decision the tribunal decided that it would determine the application of any other exceptions put forward by the Council in relation to the remaining information before it issued a substitute decision notice.
5. Since the May decision the Council has disclosed most of the remaining information. It now relies on the following exceptions:
 - 5.1. Regulation 5(3) EIR (personal data of which the appellant is the data subject). This is relied on to redact the appellant's name and email address.
 - 5.2. Regulation 13(2A) EIR (personal data of third parties). This is relied on to redact the following:
 - 5.2.1. Names
 - 5.2.2. Contact details
 - 5.2.3. A small amount of other information said to be personal data.
 - 5.3. Regulation 6(1)(b) EIR (information requested in a particular form or format). This is relied on to redact title numbers and screenshots of HM Land Registry searches for the relevant area. The Council submits that these are available via a paid for service from HM Land Registry.
6. This decision contains a closed annex. The closed annex only contains a table identifying the matters referred to in the substitute decision notice above. A copy of the closed annex has been sent to the Commissioner and the Council. It has been withheld from the appellant. It is necessary to withhold the annex from the appellant because otherwise the purpose of the appeal would be defeated. This will be reviewed by the Judge on the conclusion of these proceedings and/or at the conclusion of any appeal.

Factual background to the appeal, request, response, decision notice, grounds of appeal, response and reply

7. These are set out in the tribunal's decision of 31 May 2024.

Legal framework

8. As the Court of Justice of the European Union ("CJEU") has said:

"The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to

refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal". (**Office for Communications v Information Commissioner Case C-71/10** at paragraph 22).

9. This is why the EIR is deliberately different from the Freedom of Information Act 2000 ("FOIA") in that all exceptions are subject to a public interest test and there is a presumption in favour of disclosure.
10. The EIR do not contain an express obligation to interpret grounds for refusal in a restrictive way, but, given the obligation to interpret the EIR purposively in accordance with the Directive the overall result in practice ought to be the same: the grounds for refusal under the EIR should be interpreted in a restrictive way (**Vesco v (1) Information Commissioner and (2) Government Legal Department** [2019] UKUT 247 (TCC))
11. The relevant provisions of the EIR are regs 5(1) and (3), 6(1), 12(1) to (3) 13(1) and (2A):

Regulation 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.

...

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 6 Form and Format of information

(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

Reg 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 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.

...

Regulation 13 Personal data

(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, or

(b) the second or third condition is satisfied and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(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, or...

12. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

13. 'Identifiable' means a living individual who can be identified, directly or indirectly. It must be possible to identify an individual using all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer. Identifying a pool that contains or may contain a person is insufficient. It is not sufficient to say that a person is reasonably likely to be covered by the data (**NHS Business Services Authority v Information Commissioner and Spivak** [2021] UKUT 192 (AAC)).

14. Regulation 5(3) EIR provides that to the extent that the information requested includes personal data of which the applicant is the data subject,

the duty to provide environmental information on request does not apply. This is not subject to the public interest test.

15. Article 5(1) GDPR states that personal data must be processed 'lawfully and fairly'. In order to be lawful, one of the lawful bases of processing in article 6(1) GDPR must apply. The only potentially relevant basis here is article 6(1)(f):

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 requires protection of personal data, in particular where the data subject is a child.

16. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

17. The public interest test under the EIR requires us to analyse the public interest. The starting point is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (**Export Credits Guarantee Department v Friends of the Earth** [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are "the values, policies and so on that give the public interests their significance" (**O'Hanlon v Information Commissioner** [2019] UKUT 34 at paragraph 15). "Which factors are relevant to determining what is in the public interest in any given case are usually wide and various", and will be informed by the statutory context (**Willow v Information Commissioner and the Ministry of Justice** [2018] AACR 7 paragraph 48)

The Task of the Tribunal

18. 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 she 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

19. The issues we have to determine are:

Regulation 6(1)

- 19.1. Has the appellant requested that the information be made available in a particular form or format?
- 19.2. If so, is part of the information already publicly available and easily accessible to the applicant in another form or format?

Regulation 5(3)

- 19.3. Is part of the requested information the personal data of the appellant?

Regulation 13

- 19.4. Is part of the requested information the personal data of a third party?
- 19.5. If so, are the conditions in article 6(1)(f) met i.e.
 - 19.5.1. Is the data controller or the third party or parties to whom the data is disclosed pursuing a legitimate interest or interests?
 - 19.5.2. Is the processing involved necessary for the purposes of those interests?
 - 19.5.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?
- 19.6. In all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?
- 19.7. Does the presumption in favour of disclosure mean that the information should be disclosed?

Evidence and submissions

20. We have taken account of the information before the tribunal at the previous hearing i.e.:

- 20.1. An open and a closed bundle of documents.
- 20.2. An email from the appellant dated 5 February 2024 which contains some additional submissions.

21. We have also taken account of submissions and documents provided by the parties since the previous hearing, in particular:
- 21.1. Email to the appellant from the Council dated 14 June 2024.
 - 21.2. Submissions/questions from the appellant dated 4 July 2024.
 - 21.3. Submissions from the Council dated 19 July 2024.
 - 21.4. A GRC5 application dated 19 July 2024 from the Council with annex showing the redacted information.
 - 21.5. Submissions from the appellant dated 1 August 2024.
22. The closed bundle contains the withheld information and a redacted version of correspondence in the open bundle. The redactions are limited to those that reveal the content of the withheld legal advice. The tribunal is satisfied that it is necessary to withhold that information from the appellant and that it is not possible to reveal any further information about the content of the closed bundle otherwise the purpose of the proceedings would be defeated.
23. There are no closed submissions.

Written submissions/questions from the appellant dated 4 July 2024, the Council's response and the appellant's reply of 1 August 2024.

24. The appellant raises a number of issues in her email of 8 July 2024. We have taken them all into account, but the most relevant are as follows.
25. The appellant believes that not all the information in scope of her request has been provided. She requested information between April and September 2021 and notes that the emails provided only date from April and May 2021. She notes that only emails have been provided and no other communications. She states that a letter she received on 3 September has not been included.
26. The Council's response is that all the emails within the scope of her request for communications between 'Highways and Legal' were provided to the tribunal and the appellant has been provided with redacted versions of any that the tribunal had determined she was entitled to.
27. The appellant asserts that the Council is not entitled to redact dates or the names of Council departments because they are not personal data. The Council asserts that it has not redacted dates or the names of Council departments.

28. The appellant asserts that land registry details cannot be obtained without the title numbers, which have also been redacted. The Council responds that a search can be made by location and the appellant is aware of the exact details of the location which is included in the disclosed information. The appellant asks for the dates of correspondence to which HM Land Registry details have been attached. She submits that access to MH Land Registry requires a reference number or address to access. The appellant would like to check the accuracy of the dates she has been given as to when her deeds were forwarded to the legal department for advice. The appellant submits that she has no way of knowing whether it is her deeds or the deeds of other properties that have been redacted.

Submissions from the Council

Regulation 6(1)(b)

29. Title numbers and screenshots of HM Land Registry searches have been withheld. These were obtained via a paid for service by HM Land Registry. The Council submits that the appellant has not presented any evidence to suggest that they are unable to access information through HM Land Registry and accordingly it is submitted that this is an accessible means of accessing this information.

Regulation 13

30. The Council submits that names of individuals, some specific job titles and reference numbers relating to complaints made by members of the public are personal data because they could be used to identify individuals and provide information relating to them.

31. The Council accepts that the appellant has a legitimate interest in understanding the rationale behind the decisions made to install the bollards and in reviewing information so they could consider challenging the outcomes of complaints they had made. The Council submits that disclosure of personal data is not necessary for the purposes of that legitimate interest.

Discussion and conclusions

32. The appellant has, since our previous decision, queried whether the Council holds further information within the scope of the request. We do not consider this to be within our remit, as it was not dealt with in the decision notice or raised in the grounds of appeal, but we note that the Council has

confirmed that the information in the closed bundle contained all the information within the scope of the appellant's revised request. Although the appellant identifies other correspondence that has not been disclosed, part 1 of the revised request was specifically for communications and attachments between 'Highways and Legal' and we accept that the other communications are not within the scope of the request.

Regulation 6(1)(b)

33. Regulation 6(1) EIR is not the equivalent of section 21 of the Freedom of Information Act 2000 (FOIA). Under section 21 FOIA information which is reasonably accessible to the applicant otherwise than under section 1 FOIA is exempt information. Regulation 6(1)(b) is not an exception to the duty to make environmental information available under regulation 5 EIR. It is an exception to the duty in regulation 6(1) to make information available in a particular format. That duty only arises where an applicant has requested that information be made available in particular form or format.

34. Regulation 6(1) provides:

"(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—
(a) it is reasonable for it to make the information available in another form or format; or
(b) the information is already publicly available and easily accessible to the applicant in another form or format."

35. In this case, the appellant did not request that the information be made available in a particular form or format. The duty under regulation 6(1) therefore does not arise and there is no need for the exception under 6(1)(b) to be relied on. Regulation 6(1)(b) does not create a general exception for information that is otherwise publicly available and easily accessible.

36. On that basis we find that the Council was not entitled to rely on regulation 6(1)(b) to refuse to provide the title numbers and screenshots of land registry searches.

Regulation 5(3) - is part of the requested information the personal data of the appellant?

37. We accept that the Council is entitled to withhold the personal data of the appellant i.e. her name and contact details under regulation 5(3) EIR.

Regulation 13

Is part of the requested information the personal data of a third party?

38. We accept that the following is personal data of a third party:

- 38.1.1. Email addresses
- 38.1.2. Home addresses
- 38.1.3. Telephone numbers
- 38.1.4. Names

39. We accept that the following information is personal data because it relates to an individual and a motivated intruder would be able to identify that individual:

- 39.1. The substantive text redacted on page A66 (and duplicates).
- 39.2. Most of the substantive text redacted on page A69 (and duplicates) save for three words identified in the closed annex.

40. We do not accept that the following information is personal data because it has not been explained to us how a motivated intruder would be able to identify the individual concerned from that information and we are not persuaded that it would be possible to do so:

- 40.1. The three words on page A69 (and duplicates) identified in the closed annex.
- 40.2. The substantive text redacted on page A108 (and duplicates)
- 40.3. Complaint reference numbers (e.g. on page A71).

41. The Council is not entitled to withhold the information that we have held is not personal data because it is not exempt under regulation 13.

Is the appellant pursuing a legitimate interest or interests?

42. We accept that the appellant has a legitimate interest in understanding the Council's decision-making process in relation to the installation of the bollards and the Council's response to complaints about the installation. This reflects the public interest that we identified in our previous decision.

Is the processing involved necessary for the purposes of those interests?

43. We do not accept that it is necessary to know the contact details of any individual for the purposes of that legitimate interest. On that basis we find that the Council is entitled to withhold email addresses, telephone numbers, addresses etc.
44. We do not accept that it is necessary to know the names of more junior employees or members of the public in order to understand the decision-making process or the Council's response to complaints. It is not necessary to know the names of those who are not responsible for making those decisions. For that reason we find that the Council is entitled to withhold the names of more junior employees and members of the public. These names are listed in the closed annex.
45. In our view in order properly to understand the decision-making process and the Council's response to the complaints it is reasonably necessary to know the names of the more senior individuals who took part in those processes. This includes those employed by Cormac, which is part of the Conserv group of companies which is wholly owned by the Council. It also includes the names of senior individuals outside the Council such as Councillors. One more senior individual named in the bundle simply forwarded an email and did not take part in the relevant processes. We have found that there is no legitimate interest in that individual's name.

Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

46. Even if we had found that there was a legitimate interest in the names of more junior employees, we would have found that these interests were overridden by the fundamental rights and freedoms of more junior employees, because they have a legitimate expectation that their names would not be made public.
47. In relation to more senior employees of public bodies (and their wholly owned companies like Cormac) or Councillors acting in their official capacity in our view there is no legitimate expectation that their names would be kept private and we find that the legitimate interests are not overridden by their fundamental rights and freedoms.
48. For those reasons we find that the Council was not entitled to withhold the names of the more senior individuals identified in the closed annex.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 11 October 2024

Promulgated on: 14 October 2024