



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

Appeal Reference: EA/2020/0071(P)

**Decided without a hearing
On 1 December 2020**

Before

**JUDGE SOPHIE BUCKLEY
MARION SAUNDERS
ALF MURPHY**

Between

ALISTAIR PINKERTON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

Mode of hearing: The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The form of remote hearing was a paper determination which is not provisional (P).

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FER0866197 of 21 January 2020 which held that Hertsmere Borough Council ('the Council') was entitled to rely on regulation 12(5)(b) of the Environmental Regulations 2004 (EIR) (adverse effect on the course of justice) to withhold the information.

Factual background to the appeal

2. On 4 March 2019 the Council served an abatement notice on Mr. Pinkerton's farm in relation to odour nuisance. Mr. Pinkerton appealed to the Magistrates' Court against that notice. It is unclear on exactly what date Mr. Pinkerton's appeal was filed but it had been filed by 30 March 2019 when the Council responded to the request.
3. Mr. Pinkerton's appeal in the Magistrates' Court against the Council's abatement notice was listed on 8 May 2019 and was adjourned until 12 June 2019. It was then listed for three days on 12 November 2019 and was adjourned part heard. The Magistrates' Court allowed the appeal on 18 March 2020.
4. The request is for the information underlying the decision to issue the abatement notice

Request, Response and Decision Notice

5. Mr. Pinkerton made the request which is the subject of this appeal on 26 March 2019:

I am making a request under the Environmental Information Regulations 2004 for all environmental information held by Hertsmere Borough Council pertaining to odour at Blackbirds Farm at 2019. The request includes disclosure of any complaints made in relation to odour together with the location and identity of any such complaints. The request also seeks disclosure of any drafts, emails, correspondence with neighbours, recordings of telephone conversations etc. produced or received in respect of the odour at Blackbirds Farm, including but not limited to the spreading of digestate in 2019.

I would also request for disclosure of any policies that Hertsmere Borough Council has in relation to digestate spreading within the Borough.

6. The Council replied on 30 May 2019 stating that it withheld the information under regulation 12(5)(b) (adverse effect on the course of justice), regulation 12(5)(f) (adverse effect on the interests of the person who supplied the information) and regulations 13(1) and (2) (personal data).

7. The Council carried out an internal review and upheld its decision to withhold the information under regulation 12(5)(b) on 14 August 2019.
8. Mr. Pinkerton complained to the Commissioner on 14 August 2019. The Council indicated in a telephone conversation of 15 January 2020 that it no longer wished to rely on the regulation 12(5)(b) exemption, because it had already presented its case in relation to the appeal. It set out the grounds upon which it had relied on this exemption in detail in an email dated 16 January 2020.
9. In a decision notice dated 21 January 2020 the Commissioner concluded that the information represented evidence that, at the time of the request, relate to a live and ongoing matter, namely to the issuing of an abatement notice and the complainant's appeal. Disclosure would inhibit the Council's ability to effectively conduct an enquiry and would damage public confidence in such enquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties. The Commissioner was satisfied that it was more probable than not that the disclosure of the information would adversely affect the course of justice and therefore regulation 12(5)(b) was engaged.
10. In relation to the balance of public interest, the Commissioner took account of the strong inherent public interest in this exemption. She recognised that Mr. Pinkerton has a personal interest in accessing the information but that the public interest in this context refers to the broader public good.
11. The Commissioner found that it was highly likely, given the time of the request, that disclosing the information would damage the Council's ability to undertake its environmental duties and compromise its legal position. She stated that she had not been presented with any evidence that there were grounds for circumventing the legal mechanisms and remedies which exist and are already in train in relation to this matter.
12. The Commissioner concluded that the public interest favoured maintaining the exception.

Grounds of Appeal

13. The Grounds of Appeal are:
 - 13.1. The Commissioner was wrong to hold that disclosure would adversely affect the course of justice and/or
 - 13.2. The Commissioner was wrong to hold that the public interest favours maintaining the exception.

Ground 1

14. Disclosing relevant information underlying the decision to issue an abatement notice would not adversely affect the course of justice. On the contrary, failure to disclose that information would be unfair and contrary to the rules of natural justice.
15. There is a fundamental principle that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it.
16. The Council is under a duty of candour and cooperation to assist the court. This undermines the finding that disclosure would adversely affect the course of justice.
17. The Commissioner's reliance on the protection of identities/location data is fundamentally misconceived. The identity of the witnesses is highly relevant to the appeal against the abatement notice. The approach runs contrary to the principles of open justice. The suggestion of interference with witnesses is absurd. In the alternative, any risk can be avoided by redaction of personal details.
18. The fact that the Magistrate's Court Rules 1981 do not explicitly require pre-trial disclosure strengthens the case for disclosure under the EIR.
19. There is no basis for a finding that the information was provided confidentially.
20. The Commissioner's reliance on the timing of the appeal is misconceived. It is in the interests of justice that the information is available before a decision is reached.

Ground 2

21. For substantially the same reasons the public interest favours maintaining the exception. There is a strong public interest in disclosing environmental information. Disclosure is in the interests of justice. The interest in disclosure is not personal: there is a public interest in justice being done and being seen to be done, which includes the fundamental principle that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it.

The Commissioner's response

22. The Commissioner's response states that she took into account the fundamental principle of fairness and open justice and the fact that justice needs to be done and seen to be done but did not consider these points to be so persuasive as to conclude that the exception was not engaged, or that they mean that the public interest test favoured disclosure.
23. The references in the Decision Notice to the possibility of any pre-trial interaction between Mr. Pinkerton and any witnesses are to arguments by the Council and did

not form part of the basis on which the Commissioner concluded that the exception was engaged.

24. The indication by the Council that it no longer relies on regulation 12(5)(b) because it has already presented its case in relation to the abatement appeal does not affect the decision because the time at which to consider the public interest was at the time at which the public authority refused the request. The circumstances therefore have to be considered as at August 2019, prior to the Council putting its case in the Magistrates' Court.
25. If the tribunal were to reach a different conclusion than the Commissioner on regulation 12(5)(b) it should go on to consider the application of regulations 12(5)(f) and 13.

The Council's submissions

26. The Council relies on the arguments and reasoning advanced by the Commissioner in the Decision Notice and her response. The Council endorses the Commissioner's submission in relation to the power to consider the applicability of regulations 12(5)(f) and 13 EIR.
27. The Council contends that the appropriate forum for requesting disclosure of information of the type requested was the Magistrates' Court during the course of the appeal against the service of the abatement notice.
28. The Council is prepared to disclose the identities of witnesses who gave evidence in the Magistrates' Court proceedings because they disclosed their names and addresses in those proceedings.
29. The Magistrates' Court allowed the appeal in its proceedings on 18 March 2020.
30. In relation to regulation 12(5)(f), people who report nuisances have a reasonable expectation that their reports are kept confidential and their personal data not disclosed to the world at large.
31. In relation to regulation 13, disclosure to the world at large would contravene article 5.1 (b) GDPR and s 36 Data Protection Act 2018. A reasonable expectation of the data subject is that their personal data would only be used for the specified purpose of enabling the Council to investigate alleged nuisances and not to be widely disseminated.

Further submissions by the Commissioner

32. The Commissioner addresses the alternative exceptions in regulations 13 and 12(5)(f). Given the tribunal's conclusions on regulation 12(5)(b) it is not necessary to set these out.

Legal framework

33. 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).

34. 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.

35. 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 EIRs should be interpreted in a restrictive way (**Vesco v (1) Information Commissioner and (2) Government Legal Department** [2019] UKUT 247 (TCC))

36. A three stage test applies, on the wording of Regulation 12:

1. Would disclosure adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature? (Regulation 12(5)(b))
2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
3. Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

37. The public interest test 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)

38. The statutory context includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the

public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

39. If application of the first two stages has not resulted in disclosure, we must go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was “common ground” in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

The Task of the Tribunal

40. 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

41. The issues we have to determine are:
 - 41.1. Would disclosure adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature?
 - 41.2. In all the circumstances of the case, does the public interest in maintaining the exception outweighs the public interest in disclosing the information?
 - 41.3. Does the presumption in favour of disclosure mean that the information should be disclosed?

Evidence and submissions

42. We have read an open and a closed bundle of documents, which we have taken account of where relevant.

Discussion and conclusions

43. We agree with the parties that the EIR are the appropriate regime on the basis that the requested information is environmental information for the purposes of the EIR.
44. The tribunal’s approach has been informed by the judgments of the Supreme Court in **Kennedy v The Charity Commission** [2014] UKSC and the Court of Appeal in **R (on the application of Guardian News and Media Limited) v City of Westminster Magistrates’ Court**. [2012] EWCA Civ 420. The tribunal has taken

account of the fact that these cases concerned an absolute exemption under the FOIA, whereas this appeal concerns an exception under the EIR subject to a public interest balance, but the judgments contain relevant passages about, for example, the applicability of the principle of open justice in the Magistrates Court.

45. The information requested by Mr. Pinkerton consists of complaints and/or other relevant information held by the Council in relation to the investigation of and decision to issue an abatement notice. At the date of the response Mr. Pinkerton had appealed the notice to the Magistrates' Court. It is clear from the bundle and Mr. Pinkerton's submissions that the information requested is relevant to his appeal, which was ongoing at the time of the response and internal appeal.
46. We are unaware if Mr. Pinkerton made an application for disclosure in the Magistrates' Court. The grounds of appeal state that 'the Council has repeatedly refused to disclose that information, as a result of which the Appellant appealed to the ICO'. We note that the letter to the Council from Mr. Pinkerton's representatives dated 6 August 2019 complaining about the refusal to provide the information in response to the FOI/EIR request states '...we suggest that the material be disclosed in the context of the litigation and court proceedings in any event. Failing this, we seek to progress the matter through your complaints procedure to the Information Commissioner's Office and/or apply to the Magistrates' Court for disclosure'.
47. The question of whether or not documents relevant to an appeal against an abatement notice in the Magistrates' Court should be disclosed by one party to those proceedings to another party to those proceedings is, in our view, a matter for the Magistrates' Court. The question of whether or not the principle of open justice requires those documents to be disclosed is a matter for the Magistrates' Court acting in accordance with any applicable Convention Rights.
48. The principle of open justice is not absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be. The Magistrates' Court has to carry out the balancing exercise, which will be fact-specific.
49. In our view it is for the Magistrates' Court to determine the requirements of the principle of open justice, subject to any statutory provision, in relation to information relevant to ongoing proceedings in its Court. It has an inherent jurisdiction to determine how the principle should be applied. Parliament has determined the framework within which that should operate in the Magistrates' Court.
50. The parameters for disclosure of evidence in relation to an appeal against an abatement notice are for the Magistrates' Court. A disclosure under the EIR would disrupt the Magistrates' Courts case management of the appeal. It would undermine the Court's control of its processes and procedure. There is a division of responsibilities between the Magistrates' Court and the tribunal and the Court

dealing with appeal against the abatement notice is best placed to determine what information should be disclosed. Disclosure in this case would circumvent and undermine the legislative process applicable to abatement notice appeals and the control of the Magistrates' Court over its processes. This would weaken the effectiveness of the Magistrates' Court in controlling its own proceedings.

51. On this basis we conclude that disclosure would have an adverse effect on the course of justice and the exception is engaged.
52. We turn now to the public interest balance. We take account of the fact that disclosure is to the world, not to this individual and that this information is environmental. Taking into account the backdrop of the Directive and Aarhus discussed above, and the policy behind the recovery of environmental information, we find that there is a general public interest in transparency in relation to environmental information held by public authorities. There is also, we find, a specific public interest in the public understanding the Council's investigatory and decision making processes in relation to complaints of odour nuisance.
53. We accept that the principle of open justice weighs in the balance towards disclosure. There is a public interest in the individual who is subject to an abatement notice being aware of all information held by the Council relevant to the issuing of the notice. However the weight of this particular public interest is limited by the opportunity for that individual to appeal against an abatement notice to the Magistrates' Court, which must act in accordance with any applicable Convention rights and the principles of open justice.
54. The public interest in favour of maintaining the exemption is, in our view, very strong. We have found that disclosure in this case would circumvent and undermine the legislative process applicable to abatement notice appeals and the control of the Magistrates' Court over its processes. It would weaken the effectiveness of the Magistrates' Court in controlling its own proceedings.
55. Taking into account all the above, and taking account of the presumption of disclosure, we find that the very strong public interest in not undermining the operation of the justice system in the way set out above outweighs the public interest in disclosure.
56. This appeal is dismissed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 21 December 2020

Date Promulgated: 22 December 2020