



Neutral Citation number: [2023] UKFTT 882 (GRC)

Case Reference: EA.2022.0432

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

**Heard by: determination on the papers**

**Heard on: 4 August 2023**

**Decision given on: 19 October 2023**

**Before**

**TRIBUNAL JUDGE FOSS  
TRIBUNAL MEMBER EDWARDS  
TRIBUNAL MEMBER de WAAL**

**Between**

**MALCOLM REEVES**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Decision:** The appeal is **ALLOWED**. The Information Commissioner's Decision Notice, referenced as IC-194854-X2S6, is not in accordance with the law.

**Substituted Decision Notice:** Wiltshire Council must, by no later than 4.00 p.m. on 16 November 2023, either supply to the Appellant the digital photographs described in the Appellant's request to Wiltshire Council of 15 August 2022 (having redacted therefrom any personal data) or, by this same date, confirm to the Appellant and the Information Commissioner any grounds on which Wiltshire Council relies to refuse disclosure (save for section 6(1)(b) of the Environmental Information Regulations 2003, from which Wiltshire Council is precluded on relying).

# REASONS

## Introduction

1. The Appellant appeals against the Decision Notice of the Information Commissioner of 13 December 2022, referenced as IC-194854-X2S6, which found that the public authority was entitled to rely on regulation 6(1)(b) of the Environmental Information Regulations 2004 (EIR) to refuse to provide to the Appellant digital versions of photographs it had published on its website in portable document format (PDF).

## Mode of Hearing

2. The parties in the Appeal consented to it being determined by the Tribunal without a hearing.
3. The Tribunal considered that the Appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way for the Appeal.

## Background to the Appeal

### *The Request*

4. On 15 August 2022, the Appellant made an email request (“the Request”) of Wiltshire Council (“the Council”) as set out below. In his email, the Appellant named three individuals. The Tribunal does understand that the identity of these individuals is relevant to the Request or the issues the Tribunal has to decide, and we have not, therefore, included the names of the individuals in our citation of the Request.

*“Under the Freedom of Information Act I request better copies of the photos made public in appendix 11 pdf pages 4 – 7. These have been sent in an email from [name] to [name], 7 April 2021 which was a forwarded email from [name], 7 April 2021.*

*Electronic copies are acceptable and preferred. The digital original photos attached to the email are the most preferred and I can view any file format. This will give the best image resolution as it will avoid multiple recompressions of the image. The issue with appendix 11 images is their very poor quality.”*

5. The photographs in question are four photographs of land between the Appellant’s property and a road (“the Relevant Land”), which was, and may still be, the subject of an application under the Commons Act 2006 to be registered as a Town or Village Green (“TVG”). They were provided to the Council by email dated 7 April 2021. There is no evidence before the Tribunal either as to the author of the photographs or when they were taken, and it is not clear who provided them to the Council, but it does not appear that those things are relevant to any question which the Tribunal has to decide. The Council subsequently published the photographs on its website in

PDF as part of an appendix of material relating to the agenda of the Council's Planning Committee meeting held on 25 May 2022, which included consideration of the TVG application.

### ***The Council's Reply and subsequent review***

6. The Council replied to the Appellant on 25 August 2022, as follows:

*"Under the Environmental Information regulations 2004 (EIR) the Council is obliged to make environmental information, that it holds, available to the public by electronic means.*

*I can confirm that Wiltshire Council holds the information you have requested, however Regulation 6 (1) (b) removes the obligation to provide you with the information as it is reasonably accessible to you by other means. I can confirm that the information you have requested can be found here: ... [the Council provided the link to its website, and the agenda and material we have referred to above].*

7. The Appellant responded, saying that his request was for "better copies" of the photographs as the ones which were publicly available were of low resolution as they were in PDF format, and that the original photographs would be better resolution. He stated that low resolution and high(er) resolution photographs were not equivalent data.
8. The Council reviewed its handling of the Appellant's request. By letter to the Appellant dated 2 September 2022, it maintained that the Appellant's request had been handled correctly. It said:

*"Regulation 6(1)(b) of the Environmental Information Regulations removes the obligation to make environmental information available in a particular form or format where the information is already publicly available and easily accessible in another form or format.*

*I appreciate the comments about the quality of the images, but please kindly note that the Environmental Information Regulations concerns access to information, rather than documents, and the information you have request [sic] is already available to you."*

### ***Complaint to the Information Commissioner***

9. On 1 October 2022, the Appellant complained to the Information Commissioner. He said that photographs attached to the email of 7 April 2021 sent to the Council:

*"will contain 'information' that is not in the supplied pdf because the process of printing the email with the low res inline image will have lost information. Pdf will be using a lossy compression so by definition image detail has been lost. For example say this was a CCTV image, the original of which allowed one to distinguish a face or car license plate. And a compressed version of the CCTV image with a lower resolution did not allow the*

*face to be recognisable or the license plate to be read. Would the low resolution CCTV image be the same as the high resolution one? Clearly not, and clearly it is not all the information the public body holds, the public body is holding back information (the face and the license plate). Similarly the email might have contained a photo of a document. Printing the inline photo does not result in text that is readable whereas the attached image is readable. Again I would suggest it is clear that the public body is not disclosing all the information it has. Hence as a general principle if an image has been changed then it is not the same as the data the public body holds, and changing the image includes compressing and shrinking the image, both of which lose detail as well as the more obvious black redacting.”*

10. On 7 December 2022, the Information Commissioner contacted the Council, noting that while it might be correct that regulation 6 EIR was applicable, in the interests of resolving the matter informally, he was inviting the Council to consider providing the Appellant with higher resolution copies of the photographs.
11. The Council responded to the Information Commissioner by email dated 13 December 2022. The Tribunal has been provided with a redacted and an unredacted version of that email. By a case management direction dated 17 July 2023, the Tribunal Registrar ordered that the email should be held, pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, on the basis that it will not be disclosed to anyone except the Information Commissioner and Wiltshire Council. The Registrar was satisfied that disclosure of the email would prematurely reveal the nature/content of disputed information or otherwise defeat a purpose of the appeal; and that it would be necessary for the Tribunal to consider the email. Consequently, the redacted version has appeared in an open bundle provided to the Tribunal and, so the Tribunal understands, the Appellant, and the unredacted version has appeared in a closed bundle provided to the Tribunal (and the Information Commissioner). The Tribunal has reviewed the unredacted version in the course of its deliberations and concluded that the significance of the redacted words is of no relevance to the issue it has to decide but that that is not to say that the redaction sought was not and may not remain appropriate for other reasons.
12. By its email dated 13 December 2022, the Council told the Information Commissioner that *“The only copies of the photographs the council holds are the ones that were emailed to us which were then published in the document on our website.”*
13. The Council went on to observe that:

*“...Mr Reeves has, in the past 12 months, made seven FoI requests and one SAR on the matter which is in dispute in the village he lives in. Three of his FoI requests he has asked us to review and two of those he has asked yourselves to investigate. We also have records of him making a further nine requests related to the same*

*matter dating back to August 2018, some of which were reviewed and some were taken forward to the ICO as complaints.*

*As a consequence of his repeated requests the council takes the view that the regulations should be applied in a manner that gives Mr Reeves access to the same information that anyone else would be entitled to should they request it, and as the requested information is available by electronic means to the public as required by regulation 4(1)(a), the council maintains that regulation 6(1)(b) applies to his and any other persons request (should one be made) for the information to be made available in a different form or format."*

### ***The Information Commissioner's Decision Notice***

14. By a Decision Notice dated 13 December 2022, the Information Commissioner decided that:

*"...the council is entitled to rely on regulation 6 (1) (b) request [sic] as the relevant information it holds is easily accessible to the complainant in another form or format. He does not require the council to take any steps."*

15. In the reason for that decision, the Information Commissioner noted that the Council had confirmed that the photographs published on its website were the only version of the photographs which it held, and that the Council did not hold the requested higher resolution photographs. The Information Commissioner concluded that the information requested was already accessible to the Appellant in another form, namely photographs *"of a certain resolution published on the council website."*, and that as the Council did not hold the photographs in the higher resolution requested, his decision was that the Council was able to apply regulation 6 (1) EIR to refuse to provide the information in the format requested in this instance.

### ***The Appeal and the Information Commissioner's Application to strike out the Appeal***

16. By Notice of Appeal dated 16 December 2022, the Appellant appealed the Information Commissioner's decision. Whilst acknowledging all the matters stated in his grounds of appeal, the Tribunal considers that for current purposes the grounds can be summarised as follows:

- a. It cannot not be the case that the Council does not hold the requested higher resolution photographs because were the photographs published by the Council versions of the originals, so low is their resolution that they must have been taken by a digital camera of such great age as to be unlikely. The alternative is that the photographs have been reduced in resolution before being sent to the Council, which is also unlikely. On the balance of probabilities, therefore, the photographs published by the Council are just from a print-out of the original email supplying the photographs with inline, low resolution, large thumbnails.

- b. There is clear evidence of an inadequate search by the Council, indicated by the fact that all the Council had to do was download the photographs attached to the 7 April 2021 email.
  - c. There is clear evidence of reluctance on the part of the Council to carry out a proper search, indicated by the fact that if the photographs were taken by a device likely as old as the Appellant had assessed, then, as the Appellant put it, “*case closed*”; the Council’s reluctance to download the attachments to the 7 April 2021 email showed a reluctance to carry out a proper search.
  - d. The Council has a motive to withhold information, namely that the Council has a bias to deny the Appellant anything which might assist him in his objection to the application for the Relevant Land to registered as TVG, which appears to be the subject of separate legal proceedings between the Appellant and the Council or at least a planning inquiry in which the Appellant has been legally represented. The Appellant has elaborated under this ground of appeal some of the history of the background to the TVG application.
17. On 15 February 2023, the Information Commissioner contacted the Council, asking it to confirm whether it held the original email to which the photographs were attached and whether the original photographs attached to that email were received in exactly the same format as the published version of the photographs published on the Council’s website. The Information Commissioner explained that the request was urgent as his response to the appeal was due to be filed the next day, 16 February 2023.
18. In the event, the Council was unable to respond to the Information Commissioner by 16 February 2023. Whilst acknowledging all the matters stated in the Information Commissioner’s response to the appeal, the Tribunal considers that for current purposes his points of response can be summarised as follows:
- a. The Appellant does not dispute the Information Commissioner’s decision that the relevant request was for environmental information for the purposes of EIR.
  - b. None of the Appellant’s speculation as to the means by which the photographs were taken to the Council is relevant to the Information Commissioner’s decision on the application of regulation 6(1) (b) EIR.
  - c. The Information Commissioner was correct to take at face value the Council’s position that the information requested was publicly available, and the sufficiency of the Council’s searches.
  - d. The Council’s conduct in separate legal proceedings is irrelevant to the Information Commissioner’s decision in this matter.
  - e. There is no evidence of motive on the part of the Council to withhold information.
  - f. The Appellant has failed to state why the Decision Notice is not in accordance with the law or why the Information Commissioner should have exercised his discretion differently.

19. The Information Commissioner also sought a direction that the appeal be struck out pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, on the basis that there was no reasonable prospect of the Appellant's case, or any part of it, succeeding.
20. In the event, the Council responded to the Information Commissioner's request of 15 February 2023 on 20 February 2023 i.e. four days after the Information Commissioner had filed his response to the appeal. It confirmed that it did still hold a copy of the original email but that "*...the photographs were not attached to the email as separate image files they were imbedded into the body of the email. The photographs were not manipulated, the whole email was converted to a pdf and that pdf was merged into the lager [sic] pdf file of the Northern Area Planning Committee Meeting Agenda 25<sup>th</sup> May 2022.*"
21. On 22 February 2023, the Appellant filed a response to the Information Commissioner's application seeking to strike out the appeal. He held to his original grounds of appeal, and additionally submitted "*I have also shown that images of different resolution are not equivalent data (i.e. information). Hence "form or format" cannot include resolution. Therefore Regulation 6(1) EIR does not apply.*"
22. Also on 22 February 2023, the Information Commissioner contacted the Tribunal, copying in the Appellant, to provide the email exchange which the Commissioner had had with the Council over 15 – 20 February 2023, and noting that the Information Commissioner's response incorrectly referred to the photographs being attached to the email of 7 April 2021 when, in fact, the Council had confirmed that the photographs had been embedded within the email. He maintained nonetheless that the appeal should be struck out given that the Appellant already had access to the requested information online, and that regulation 6(1)(b) EIR applied.
23. Later that evening, the Appellant sent the Information Commissioner and the Tribunal a photograph of some fly-tipping (unrelated to the Relevant Land). He sent it in two formats: (1) embodied in an email; and (2) attached as two PDFs, one set to what he described as the setting for printing images on a "*real printer*" and his usual setting, and the other chosen to print for screen viewing. He noted that both PDF images were of much lower quality than the image embodied in the email. He noted that images in emails are always displayable in their full resolution, even if they appear inline or embedded, and that it is only when the image is printed to PDF that the lower resolution image is captured. He concluded that this proved that the information in PDF form was not the same as the information in the email and that regulation 6(1) EIR did not therefore apply. In response, by email to the Tribunal of 23 February 2023, the Information Commissioner maintained that regulation 6(1) EIR did apply for the reasons previously given.
24. On 6 April 2023, Judge Alison McKenna, by determination on the papers, refused the Information Commissioner's application to strike out the Appellant's appeal. She ruled that the Appellant had raised a triable issue, which was whether regulation 6(1) EIR is engaged by photographs of different resolution and thus whether the Decision

Notice contained an error of law. Accordingly, she was content to allow the addition of this as a ground of appeal.

25. On 18 July 2023, the Information Commissioner asked that the following request be considered by the Tribunal:

*“Should the Tribunal wish to verify the Appellant’s argument about the quality (high or low resolution) of the original photographs emailed to the Council on 7 April 2021, compared to the photographs published by the Council, without any prior manipulation, the Tribunal may:*

*(1) ask the Council to provide a copy of the original email dated 7 April 2021 (either by joining the Council as a party to the appeal under rule 9 of the GRC Rules 2009 or as a non-party under Rule 5(2)(d); and*

*(2) compare and contrast the copy of the original photographs received by email with the published photographs to verify whether they contain the same recorded information i.e. whether it is possible to (a) glean higher resolution photographs from the original email and if so, (b) whether they contain any additional information, within the scope of the Appellant’s request, which is not available from the published photographs.”*

### **The Tribunal’s powers and role**

26. The powers of the Tribunal in determining the appeal are set out in section 58 of the Freedom of Information Act 2000 (which applies pursuant to regulation 18 EIR), as follows:

*“(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.”*

27. For the purposes of the appeal, therefore, the Tribunal’s remit is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Information Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may come to a different decision regarding those facts.



28. Accordingly, the primary issue for the Tribunal to determine with regard to the appeal is whether or not the Information Commissioner was correct to decide, by way of the Decision Notice, that the Council was entitled to rely on regulation 6(1)(b) as the information requested was easily accessible to the Appellant in another form or format.

### **The law**

#### *The statutory framework*

29. Requests for environmental information held by a public authority must be dealt with under EIR.

30. The term 'environmental information' is defined in regulation 2(1) EIR as follows:

*"...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;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

31. It is not in dispute that the information requested by the Appellant is environmental information as defined by regulation 2 (1) EIR.

32. Regulation 5(1) EIR provides individuals with a general right of access to environmental information held by public authorities. It provides:

*“...a public authority that holds environmental information shall make it available on request.”*

33. Accordingly, under regulation 5(1) EIR, a person who has made a request to a public authority for environmental information is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of EIR, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) EIR (that is, the wording immediately preceding the extract quoted above) provides:

*“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...”*

34. Regulation 5(1) EIR does not, therefore, provide an unconditional right of access to any environmental information which a public authority holds.

35. Regulation 6(1) EIR provides:

*“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.”*

36. The Information Commissioner’s decision in this case has proceeded by reference only to regulation 6 (1)(b) EIR.

37. Any matter which is capable of being recorded and communicated by a digital photograph is information. The information requested by the Appellant was the information recorded by the digital photographs.

38. An image of such low resolution as to make unintelligible the content of a unit of information which is itself intelligible e.g. digits on a licence plate or the features of a person’s face, does not convey the information which a higher resolution image does in rendering the digits or features intelligible. The images are plainly communicating different information. Resolution differences may also mean that a unit of information which is not as such intelligible at all in a PDF of a photograph is intelligible by review of the digital photograph. In both those cases the intelligible information is additional to that provided by the PDF, but an inherent part of the overall information unit constituted by the original photograph.

39. The Tribunal considers that a digital photograph, with its specific structural properties, which include not just resolution capabilities but interrogation features, offers different visual information from a PDF of that photograph. There may be an

element of commonality in information terms between the visual product of the two items but taken individually, the information in each is, or has the potential to be, distinct.

40. Moreover, unlike a PDF, a digital photograph will offer technical, descriptive, and administrative metadata which forms part of the information it communicates. It may, of course, be the case that such metadata conveys information, such as identity of the photograph's author, which might otherwise justify a public authority in refusing to provide the photograph, but that is not a question before this Tribunal.
41. Accordingly, while the images resulting from the digital photograph and the PDF may be similar, even very similar, and it may be evident that they are images of the same thing, they will not record and communicate the same information. There is more likely than not a qualitative difference in the information available from each.
42. By email to the Tribunal dated 18 July 2023, the Information Commissioner has suggested that the Tribunal might compare the original digital photographs with the published PDFs in this case *"to verify whether they contain the same recorded information ie whether it is possible to (a) glean higher resolution photographs from the original email and, if so, (b) whether they contain any additional information, within the scope of the Appellant's request, which is not available from the published photographs."*
43. The information within the scope of the Appellant's request is that defined by regulation 2(1) EIR already referred to. Taking regulation 2(1)(a) EIR alone for current purposes, the information is *"any information in written, visual, aural, electronic or any other material from on 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."*
44. Any autoptic assessment of the images by this Tribunal for *"any"* information within the broad scope of that definition would necessarily be subject to a number of factors e.g. the individual viewer's optical processing capabilities, or their knowledge of or interest in any particular aspect of the visual content. Consequently, one image or the other may be more or less specifically informative to them. That assessment would not, therefore, be reliably determinative of whether the information offered by the different images could be said to be qualitatively the same or different. For that reason, the Tribunal does not consider it necessary or appropriate to take up the Information Commissioner's invitation to conduct its own assessment of the images in this case. The properties of a digital photograph and a PDF of that photograph are, in the Tribunal's view, sufficiently inherently different to make it more likely than not that there is a qualitative difference in the information offered by each, and that, accordingly, the Information Commissioner was wrong to conclude that the Council was entitled to rely on regulation 6(1)(b) EIR as the information requested was *"easily accessible to [the Appellant] in another form or format."* In determining that the information was accessible in an alternative form or format he wrongly disregarded

the qualitative substance of the information sought; he was wrong to assume that PDF and digital formats of the same photograph provide access to the same information.

45. For completeness, we address the following issue: the Information Commissioner has submitted that the Appellant raises a number of matters by way of his grounds of appeal which are not matters within the jurisdiction of this Tribunal. Those matters include what the Information Commissioner characterises as speculation or unevidenced assumptions by the Appellant as to what images the Council retained, the adequacy of the Council's search, and a bias by the Council against the Appellant resting, in part, at least, in other proceedings or disputes between them. The Tribunal does not consider that these are matters which relevantly directed the Information Commissioner's decision as to the application of regulation 6(1)(b) EIR, and accordingly, makes no finding in relation to them.

#### **Matters arising after the Tribunal's consideration of the appeal on 4 August 2023**

46. After the Tribunal's consideration of the appeal on the papers, the Tribunal was provided with further material from each of the Appellant and the Information Commissioner, which by oversight (not on the part of either party) had not been provided to the Tribunal on 4 August 2023. That material consisted of (1) the Appellant's Final Representations dated 29 July 2023 and (2) an email to the Tribunal, copied to the Appellant, from the Information Commissioner dated 9 August 2023.
47. The Appellant's Final Representations may be summarised as (1) a complaint that he has not received the unredacted version of the Council's email to the Information Commissioner of 13 December 2022, which prevents him from being allowed to address what might be said about him in the redacted section, but that the unredacted parts of the email are still sufficient to show the Council's bias against him; (2) a rejection of what he characterises as the Council's attempt to trivialise the matters as a neighbour dispute and his previous FOI requests since 2018 as excessive; (3) further inferential argument as to the impact of the Council's processing of the photographs on their original quality, and a submission that it is not for the Tribunal to identify whether the original photographs contain any information which is not available from the published photographs.
48. The Information Commissioner's email of 9 August 2023 made two brief points: (1) that while the Appellant asserted in his Final Representations that the Council had printed the photographs, the Council had never stated that it had printed them; and (2) the Information Commissioner had not invited the Tribunal to make a judgment on whether any potential additional information in the photographs was of use to the Appellant.

49. The Tribunal reconvened to consider the further material. It did not consider that the further material submitted by either party altered the views reached by the Tribunal on its consideration of the papers on 4 August 2023.

50. The appeal is allowed.

Signed: ***Judge Foss***

Date: 13 October 2023