



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER0805032**

Appeal Reference: EA/2019/0262

**Considered on the papers at Worcester
On 22 January 2020**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ANN CHAFER & DAVE SIVERS

Between

JENNY PERRYMAN

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DECISION AND REASONS

1. Over a period of time Norfolk County Council developed a plan to build a refuse incinerator at King's Lynn which would have resolved many of the Council's difficulties with the disposal waste. There was a delay in the Secretary of State dealing with the planning application, there was significant public controversy about the scheme and in 2014 the Council withdrew from the contract and paid the contractor £33.7 million.

2. The Appellant in these proceedings has made 35 requests for information related to the project. On 18 June 2018 she made a further request: -

"Please provide a copy of all correspondence (including attachments and referenced documents) between Norfolk County Council and Defra between Nov 1st, 2011 and Mar 1st, 2012.

In the interests of time and efficiency I only require one copy of each rather than multiple copies."

3. The council supplied information in response to this request on 14 August stating that some duplicates had not been removed and some personal information had been redacted.
4. The Appellant sought a review. In the response to her the reviewer sent a memorandum of understanding with DEFRA which did not appear to be within scope of the request. With respect to other issues, the reviewer replied apologising for the delay in responding explain that the large volume of requests had placed the Information Compliance Team under pressure: -

"You have made a large number of requests (35 of which have been directly linked to this project) which have steadily grown in scope In addition to this you have pursued many of those requests to internal review, ICO complaint and subsequently to Tribunal, regularly claiming that the Council has not provided all of the information and repeatedly challenging the redaction of names of less senior officers.

This has become an increasing burden on the authority and the consequential pressure on staff has been considerable from dealing with the scope of multiple requests, the need to prioritise and sequence responses to requests and the necessity to carry out other work.

The Council has to consider the public interest in responding to these requests and bearing in mind the fact that the contract was terminated in 2014 and the amount of resource being diverted into dealing with your requests the Council may need to consider refusing high volume requests on this matter in future under Regulation 12(4)(b) the request for information is manifestly unreasonable"

5. However, despite this the reviewer went on to provide a memorandum of understanding which was not identified within the search. With respect to the question of names the reviewer replied: -

"officers involved in this project have in the past received threats and abuse. Your continued demands that the Council disclose the names of officers who do not have sufficient seniority to expect their names would be disclosed in the public domain begins to look like harassment of those individuals who are or where simply doing the job they were paid to do, rather than an attempt to hold the Council to account. The staff names redacted under Regulation 12(3) and 13(1) of the EIR are of current and former council employees who are all below tier 3, which means that in relation to the Council there are not a Chief executive, Director or Assistant Director. These

individuals were not themselves responsible for policy development or significant decision-making in relation to the incinerator project..."

6. The Appellant complained to the Information Commissioner (IC), she was concerned about the delays and the redaction of names. The IC, in her decision, noted the delays in the Council's processes but upheld its approach to personal data. She held that the names sought were personal data (DN 15-20). The data had to be processed lawfully, fairly and in a transparent manner in relation to the data subject in accordance with article 5(1)(a) of the General Data Protection Regulation (GDPR). She considered the most relevant lawful ground for the processing was 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 require protection of personal data, in particular where the data subject is a child"

7. The IC considered there was a legitimate interest in having access to information about the issues however

"36. The Commissioner considers however that knowing the identity of the individuals concerned would not greatly add to knowledge about what actually occurred as the content of the correspondence has already been disclosed in response to the request, including the job roles of the correspondents.

37. She also considers that as the correspondence relates to 2011-12 the value of knowing the identities of the correspondents is weak. The public are aware of what occurred and the main issues which were involved, and the senior council officer's details were disclosed along with the content of the correspondence.

38. Whilst the Commissioner considers that the public does have a legitimate interest in the information, she therefore considers that this is relatively weak in this situation."

8. In examining whether the disclosure of names was necessary to meet the public interest in transparency she considered the appellant's arguments that there was a legitimate interest in knowing names of people she regarded as acting in some decision-making capacity for the Council (DN42) and those acting for third parties (DN 56). The IC considered the argument of the Council that the holding of the organisation to account did not require the names of less senior staff (DN49), there had been a history of abuse for those involved in the project and the disclosure of identities could cause further distress (DN 50). She identified that the test to be applied was whether it is necessary for the information to be disclosed in order to meet the legitimate interests. She noted and endorsed the Council's approach: -

59. The Commissioner understands that the council's redaction of this information is on the basis that it is not necessary to disclose the actual names of the individuals in order to meet the public's legitimate interest in creating transparency over what occurred. However, it considers that it is necessary to disclose the job roles of senior

officers in order for the council to be transparent about the level (in terms of seniority) of the correspondence which was taking place, and this does feed into the legitimate interests of the public in identifying whether the actions of any parties were deficient.

60. In effect the council has made a judgement on the necessity of disclosing the actual names in order to meet the legitimate interests of the public, and it has decided that the legitimate interest can be met without the disclosure of identities in this instance. It considers that it is not necessary to disclose the actual identities of the individuals in order to meet the public's legitimate interests. The Commissioner agrees with this approach.

9. She further found that there was only a very weak legitimate interest in disclosing the names of junior and mid-level staff and that the ultimate responsibility for the Council's actions was the Council as a whole through the ballot box and while it may be appropriate for senior staff to be publicly accountable there was little public interest in that for more junior staff who had a legitimate expectation that their names would not be put into the public domain. Since disclosure was not necessary to meet the public interest there was no lawful basis for the disclosure.
10. In her lengthy notice of appeal, the Appellant raised a large number of detailed criticisms of the Council and the IC. She claims the Council is inconsistent, has acted improperly/ in bad faith, has concealed information, she attacked the Council for the warning set out at paragraph 4 above arguing that it was the Council's own fault for the burden of work involved. She criticised the IC for accepting the Council's account of various issues and for not giving her an opportunity to respond to the Council's response before issuing the decision notice.
11. Many of those are not germane to the issue the tribunal has to decide which is whether the redaction of the names of less senior individuals from the information disclosed in response to this request. However, before proceeding to consider that it is appropriate to make two more general observations. The first is that it is proper for a Council, when it considers that it is receiving burdensome requests for information, to remind a requester that it has limited resources and to encourage the requester to bear this in mind. It is a duty of public authorities to use the time of their staff efficiently and both EIR and FOIA contain provisions, such as the one mentioned in paragraph 4, to help them protect their staff's time. The second is that this tribunal's role is to consider whether, in the light of the relevant facts, the IC has come to the correct decision, the procedure the IC has adopted in coming to that decision is a secondary matter.
12. The issue is whether the three-stage test required by GDPR (the equivalent provision was contained in the Data Protection Act 1998) properly applied would prevent the disclosure of the names of more junior staff and the names of those not employed by the Council in ensuring the Council is properly held

accountable for its actions. It is important to recognise that the answer to that question is context specific and fact sensitive.

13. In this case we have a major project which potentially involved many hundreds of millions of pounds. In addition to the commercial partner there was extensive involvement of DEFRA and its Ministers. From the perspective of the Council decisions were made at the most senior level by the elected leadership and the most senior staff – the Chief Executive, Directors and Assistant Directors supported by their retained advisors over a period of years. The Council has correctly acknowledged that the accountability of the Council means that the names of these individuals responsible for the shaping of the decision-making around the project will be in the public domain and their roles can be scrutinised and subject to criticism as appropriate. In the context of such complex, protracted decision-making carried out at such a senior level the IC's conclusion that the legitimate interest in knowing the identities of more junior staff involved in 2011/2 when the public knows what happened, has seen the relevant correspondence and knows the identities of senior individuals involved is "relatively weak" is, it seems to the tribunal, if anything over-stated – the legitimate interest is negligible.
14. The legitimate interest is knowing how and why the Council made the decisions it did. That is accountability for the Council through its elected members at the ballot box and of the senior management team through the accountability systems in place by which elected members consider their performance. The IC considered the Appellant's claim that there was a vacuum of accountability within the Council. The Council's position was that it was not necessary for the public to hold less senior staff personally accountable when they were acting under the supervision of more senior staff and since less senior staff had a reasonable expectation that they did not work under the public eye. Furthermore, many of the staff had now changed jobs or left and it was not possible to obtain the consent of all those involved. The tribunal is satisfied that the test for necessity of the disclosure is not met. The Appellant's desire to have a public "audit trail" which would link each member of staff to any impugned step in the decision-making process appears to the tribunal to be a wholly improper intrusion into the private lives of the individual members of staff concerned which is of no legitimate interest and adds nothing to a proper understanding of the decision-making. With respect to the names of individuals in third party organisations the Council has redacted names but left in job titles which gives information about the seniority of the individual within organisations. This contributes to understanding how decision-making was carried forward and is relevant to the transparency of the Council, however disclosure of their names does not promote the accountability of the Council.
15. The tribunal is satisfied that the decision of the IC is correct in law and the appeal is dismissed.

16. This case has been dealt with as a request for information under the EIR. The relevant part of the definition of environmental information is Regulation 2(1)(c): -

“(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;”

17. To fall within the definition the scheme to build a waste incinerator has to be a plan or programme *affecting or likely to affect* the elements of the natural environment i.e. at the present time it is affecting or in the future it will affect those elements. At the time of the correspondence the plan was live and likely to affect the environment. However, at the time of the request the plan had been abandoned for some years there was therefore no *likelihood* of an impact; accordingly, it was not environmental information. Accordingly, the request should have been considered under FOIA; in this case the analysis of the issues around personal data would have been similar, however it is important to ensure that the correct framework of law is considered.

Signed Hughes

Judge of the First-tier Tribunal

Date: 4th February 2020