First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0365

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Jean Nelson
and
Malcolm Clarke

Heard at Leeds Magistrates' Court, 18 February 2020

Between

Andrew Dickinson

Appellant

and

The Information Commissioner

Respondent

The Appellant represented himself

The Commissioner was not represented

DECISION AND REASONS

Background

1. The Appellant made a request of the City of York Council ('the Council') on 18 February 2019 in the following terms:-

> Can you send me the advice given to [named councillor] referenced in the email below please. Can you also provide me with all formal and informal advice offered to councillors who sit on the planning committee with regard to meeting members of the public.

2. The background to the request was that the Appellant had written to the councillor named in the request (who sits on the planning committee of the Council) asking for a meeting to discuss concerns about a planning matter. She responded, on 14 February 2019, to say that she had taken advice and would not be taking up the invitation to meet, and that it would not usually be appropriate for members of the planning committee to meet either applicants or objectors 'to avoid any charges of bias'. The Appellant queried this and the councillor responded to say that 'the advice has always been that meeting developers or objectors outside the formal committee process should be treated with great caution'. She said that on this occasion she spoke to the 'Ass Director', which we take to mean 'Assistant Director' (perhaps of the Planning Department).

3. The Council refused to respond to the request on the basis that it was manifestly unreasonable for the purposes of regulation 12(4)(b) EIR. The basis for this was that the request would require an unreasonable diversion of resources from the Council's core activities.

The decision notice

4. The Appellant complained to the Commissioner, and the Commissioner's decision notice is dated 30 September 2019. The Commissioner thought that the circumstances of this case were very similar to the request considered

previously by her in a decision notice dated 29 March 2019. In that decision the Commissioner agreed with the Council that the request by this Appellant for 'rules' given to councillors about contact with members of the public in planning matters was manifestly unreasonable. We note a major reason for that decision appears to be the acceptance by the Commissioner of the Council's position that the Appellant knew at time of his request that no rules had been issued or existed. In the present case the Commissioner concludes that, likewise, the Appellant could 'have anticipated that no recorded information was likely to be held' (paragraph 35). This seems to be based, largely, on the fact that the councillor said that she had spoken to the Assistant Director who gave her advice (paragraph 33), and presumably the Appellant was expected to deduce from that, that nothing had been recorded as information. Therefore, the Commissioner concluded that the request was manifestly unreasonable.

The hearing

5. At the hearing the Appellant represented himself and no other party attended the hearing or was represented. The Appellant told us that he was concerned about unfairness in the planning decision-making process. His view was that council planning officers often discussed applications with developers but were less likely to liaise with objectors or individuals. He thought it was important that councillors on the planning committee should meet local people and discuss their concerns about planning applications. He was aggrieved that councillors routinely declined to meet with him, and he pointed to local and national guidance that at least suggested that such meetings could take place without the objectivity and independence of councillors on the planning committee being compromised. As to this guidance he pointed to the *Plain English guide to the Planning System* issued by the Department for Communities and Local Government in January 2015 (and see page 30 of the bundle) which states:-

> 8. Local people should take the lead in shaping their neighbourhoods and elected councillors have a key leadership role in this process. The role of councillors in district, county or single tier councils will vary depending on whether they sit on the planning committee (which makes decisions on planning applications) or not. However, all councillors have a role to play in representing the views and aspirations of residents in plan-making and when planning applications affecting their ward are being considered.
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> 9. Changes in the Localism Act 2011 clarified the ability of councillors to be able to discuss matters which may relate to a planning application prior to voting on that application at committee, as long as they can show that they are going to make their judgement on the application with an open mind, listening to all the evidence and not having pre-determined their decision

6. In addition the Council has issued a *Code of Good Practice for Councillors involved in the Planning Process* dated November 2016, which is also referred to in the bundle for this hearing. The relevant part of this reads:-

> 6.1 In order for the planning system to work effectively public concerns must be adequately aired. It is an important part of a Member's role to listen to residents' views and put these views forward within the Council. However, it is important that Members of the Planning Committees make decisions based on the full facts having considered all representations made and all other relevant considerations. Members will usually need a report from officers to help them to do this.
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> 6.2 Members of a Planning Committee should be wary of giving the impression that they have made up their mind about a particular matter. Discretion is always advisable. A good approach is to say something like: "From what I know at the moment I support (or have reservations about) this application, but I won't make a final decision until I have all the facts before me at Planning Committee".

7. The Appellant accepted that he had been told in the course of the previous request that there was no guidance or rules which prevented councillors speaking with objectors, but explained that that was not the focus of the

current request, which had come about because a councillor had told him she had been given advice on the issue from a senior council official. The Appellant was aware that the advice may not have been given in writing, but if it was then he asked for its disclosure. Having been told by one councillor that she had received advice, the Appellant had also asked for disclosure of any other advice of the same kind that may have been given to other councillors.

The Law

8. In this case there is no dispute that the information sought in this case is 'environmental information' as defined in regulation 2 of the EIR.

9. Regulation 5 of the EIRs obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIRs. Regulation 12 of the EIRs provides, insofar as relevant:

> "(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.
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–
> ….
> (b) the request for information is manifestly unreasonable".

10. In relation to the guidance on the law, the Upper Tribunal in *Vesco v (1) Information Commissioner and (2) Government Legal Department* [2019] UKUT 247 (AAC) underlined the importance of access to environmental information to enable people to participate in decisions about the environment. The UT explained that:-

> 13… These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters ("**Aarhus**"), which led to adoption of the Directive. The EIRs are part of the UK's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive (*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 paragraph 8; *The A-G for the Prince of Wales v Information Commissioner and Mr Michael Bruton* [2016] UKUT 154 paragraph 15).
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> 14. It is clear from the extracts from the Directive set out in the governing legislation section above that the purposes of the Directive include guaranteeing rights to access environmental information. Public authorities hold information on behalf of the public, and are to support and assist the public in seeking access to information. As the Court of Justice of the European Union ("**CJEU**") has said:
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> > "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).

11. At paragraph 16 of the UT decision it is explained that it is important that all of the tests in the EIRs are applied before a public authority decides to refuse to disclose information and that '[i]t is clear from the terms of the Directive and CJEU authority that grounds for refusal of requests for environmental information must be interpreted restrictively'. The UT then sets out the tests to be applied:-

….For public authorities to be entitled to refuse a request for environmental information on the basis that it is manifestly unreasonable, a three stage test applies, on the wording of Regulation 12:

> Is the request manifestly unreasonable? (Regulation 12(1)(a))
> 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))
> Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

12. In relation to whether the request is manifestly unreasonable, the UT explained at paragraph 17 that it is helpful to set out the guidance from the UT in full in relation to all three stages:-

> 17. …The starting point is whether the request has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public, judged objectively (*Dransfield v Information Commissioner* [2015] 1 WLR 5316 at paragraph 68, *Beggs v Information Commissioner* 2019 SLT 173 paragraphs 26-29). The hurdle of satisfying the test is a high one. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 at paragraph 28. These are:
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> (1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being squandered;
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> (2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious (*Beggs*, paragraph 33);
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> (3) the value or serious purpose of the request;
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> (4) the harassment or distress of staff.

13. The UT also commented that this is not an exhaustive checklist.

Discussion and reasons

14. We agree with the Appellant that this request is not the same as the recent request covered by the Information Commissioner's decision notice in March 2019.

15. In that case the Appellant asked for any rules which were relevant to the question as to whether councillors on the planning committee should speak to objectors. He had already been told that no rules or guidance existed, and on that basis it is understandable that the Commissioner agreed with the Council that the request was manifestly unreasonable.

16. This appeal deals with a different matter. The Appellant was told by a councillor that she had sought advice from an Assistant Director within the Council and, as a result of that advice, had decided not to meet with the Appellant. The Appellant has asked for that advice to be disclosed.

17. It is not the case, in our view and contrary to the view of the Commissioner, that he can anticipate that the information is likely not to be held. It is true that the councillor says that she 'spoke to' the Assistant Director. But it seems not unlikely that either the councillor of the Assistant Director made a note of the advice given (or received), or that the councillor is making reference to a conversation by email (or via another platform). In our view the factual basis for finding that the previous request was manifestly unreasonable simply is not applicable to the present request.

18. In this case, we note that the national and local guidance referred to above does not prevent councillors on the planning committee speaking to members of the public about planning applications, and indeed indicates that this may be appropriate in some circumstances, and it is valid to ask for information about advice given to councillors on the issue, especially when one councillor states that she has, indeed, sought and received advice. In our view there is a reasonable foundation for thinking that the information sought would be of value to the Appellant and to the public or a section of the public, so that the Appellant and others know what is being said to councillors about the issue.

19. We note that the hurdle of satisfying the 'manifestly unreasonable' test is a high one. We bear in mind the limited nature of the Appellant's request, the genuine motive of the Appellant to be able to participate more fully in planning and environmental issues, and value of the request which we have addressed above.

20. In relation to the councillor who communicated with the Appellant it will be a simple matter for the Council to acknowledge whether it holds the information or not. If it does hold the information then there may be exemptions upon which it wishes to rely to support non-disclosure, but that is not a matter for this Tribunal. It seems to us that responding to the first part of the request will not be onerous.

21. In relation to the second part of the request, which relates to similar advice provided to other councillors, the Council has not advanced any arguments as to what work might be entailed in responding, and the Commissioner has not made a decision that the breadth of the request is an issue. Given the wording of the request, our initial thoughts are that this would entail asking members of the planning committee at the time of the request, whether they have a record of advice received on the issue, and maybe identifying individual officers (like the Assistant Director) who may have given such advice.

22. Taking account of all these factors, again bearing in mind that the reg 12(4)(b) EIR exemption should be interpreted restrictively, we do not find that either part of the request, or the request as a whole, is manifestly unreasonable.

23. Having reached that conclusion, we do not need to consider the public interest test. However, it seems to us that there is a public interest in the public being aware of the basis upon which advice is given to councillors not to discuss planning issues with members of the public.

24. We understand that the Council may feel some frustration with the Appellant, and may be of the view that it has been made clear to him that it is felt generally that it is not a good idea for members of the planning committee to meet objectors and members of the public prior to a planning committee decision. However, we also note the presumption in favour of disclosure, which in our view has not been rebutted in this case by this frustration, where there has been a reference to specific advice having been provided.

25. As a result of our decision, the appeal is upheld and the Council will need to respond to the Appellant's requests on the basis that they are not manifestly unreasonable.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 3 March 2020.

Promulgated: 4 March 2020