**Appeal Number: EA/2021/0116**

**Between:**

**SUSAN STARKIE**

**Appellant:**

and

**THE INFORMATION COMMISSIONER**

**Respondent:**

## DECISION

**Tribunal: Brian Kennedy QC, Alison Lowton and Kate Gaplevkaja.**

**Date of Hearing: 7 October 2021.**

**DECISION: The Tribunal allows the Appeal.**

## REASONS

**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as modified by regulation 18 of the Environmental Information Regulations 2004 ("the EIR"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 12 April 2021 (reference IC-54098-Q9Y5), which is a matter of public record.

**Factual Background to this Appeal:**

**[2]** Full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Northumberland County Council ("the Council") correctly engaged regulation 12(4)(a) EIR.

**HISTORY AND CHRONOLOGY**

19 April 2020 — The Appellant wrote to the Council and requested information in the following terms:

*"Under the Freedom of Information Act, I should like to request a copy of the [1] 'confidential development viability appraisal' document, which played an instrumental part in the granting of planning permission for application l6/00078/OUT. This document was said to make a case for the 150 houses that were deemed necessary in order to fund the TRSA element of the development, which promised 352 jobs.*

*It is now evident that any confidentiality that may have been attributed to this document no longer applies. The Reserved Matters applications that have been submitted for the housing (l9/0l362/REM) and the TRSA (18/03394/REM) have two totally independent developers. As the link between these two elements of the outline planning consent has been severed, it is now incumbent on Northumberland County Council to make this document available for public scrutiny.*

*Further, under the Freedom of Information Act, I should like to request [2] copies of any emails or minutes of meetings in which the appraisal document was*

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| | *discussed, together with the names of the personnel involved."* |
| 7 July 2020 | The Council responded stating that the information was being withheld under regulation 12(5)(f) EIR. |
| 8 July 2020 | The Appellant wrote to the Council seeking clarification and for the Council to respond to request [2]. |
| 27 July 2020 | The Council informed the Appellant that after an internal review it incorrectly referred to regulation 12(5)(f), the information was withheld on the basis of regulation 12(5)(e), and that the internal review upheld this position. Further, in response to request [2], the information was withheld on the basis of regulation 12(5)(e) and regulation 12(4)(e). |
| 2 August 2020 | The Appellant wrote to the Council requesting that the viability appraisal document ('the Viability Appraisal') should be disclosed and that there was no longer an economic interest in protecting planning application (16/00078/OUT), which was split into two parts (19/01362/REM and 18/03394/REM). |

**RELEVANT LAW:**

**r5 EIR - 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.
(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the 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.
(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.
(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.
(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

**r12 EIR - 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.
(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
(a)it does not hold that information when an applicant’s request is received;
(b)the request for information is manifestly unreasonable;
(c)the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
(d)the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
(e)the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(a)international relations, defence, national security or public safety;

(b)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;

(c)intellectual property rights;

(d)the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e)the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f)the interests of the person who provided the information where that person—

(i)was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii)did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii)has not consented to its disclosure; or

(g)the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

(10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information

which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

**COMMISSIONER'S DECISION NOTICE:**

**[3]** The Council advised the Commissioner that it had made all endeavours on behalf of the local residents to release the information. However, it was not in a position to do so. The Commissioner was sympathetic to the Council, however in terms of the EIR, more substantial arguments are required. The Commissioner reminded herself of her guidance on regulation 12(5)(e) and stated that the Council need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure.

**[4]** The Commissioner referred to *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011), where the Tribunal found:

*"Statements by interested parties that harm might or could be caused are insufficient [...] The use of words such as 'could' or 'may' do not in our view provide evidence of harm or prejudice to the required standard of proof".*

**[5]** The Commissioner took the view that insufficient evidence had been provided regarding the harm that would result from the disclosure and required the Council to disclose the Viability Assessment.

1. Regulation 5(1) states: "*a public authority that holds environmental information shall make it available on request".* The Commissioner was mindful of the Tribunal's decision in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it stated on the balance of probabilities,

*"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."*

**[6]** The Council argued that no information was intentionally deleted. Further, due to the change of personnel over a five-year period, emails would have been deleted through normal working processes. The Commissioner found that the Council provided a reasonable explanation as to why the identified information is not held and that the Appellant has no firm grounds to dispute the same. The Commissioner held that the Councils efforts to source further information was adequate and that in the absence of any firm evidence on the contrary, on the balance of probabilities, the Council does not hold any further information within the scope of the request.

**GROUNDS OF APPEAL:**

**[7]** The Appellant argued that the Council provided erroneous and misleading information to the Commissioner, upon which the Commissioner reached her Decision. The Appellant provided the evidence, which formed the basis of her appeal:

*"1. Executive Summary (ES) from the 'Allegations' investigation.*
*2. Appendix 6 of the Executive Summary regarding the viability appraisal.*
*3. Appendix 20/21 of the Executive Summary with examples of District Valuer's assessments. 4. Case Officer's report to the Strategic Planning Committee dated 19.8.16.*
*5. Application form for 16/00078/OUT.*

*6. Email from 1st IC Case Officer demonstrating that neither he nor NCC were abiding by the protocols for responding to requests/appeals.*
*7. Email from 2nd IC Case Officer indicating that the Council were not responding to requests."*

**[8]** The Appellant asserted that the opposition to this development remains strong; therefore, it is in the public interest that such a vital document be disclosed. The Appellant highlighted that the Executive Summary revealed how viability appraisals should be independently evaluated. The Appellant contended that if the Executive Director had been approached regarding the communications from 2016, she would have been aware that the 'Allegations' investigation she commissioned in 2020 revealed the documents which were the subject of the FOIA request. Further, in relation to the 'Allegations' investigation, the Appellant noted, if no information held in the scope of request [2] was explicitly deleted or destroyed, how was it available to the investigator from July 2020 onwards.

**[9]** The Appellant commented on how long-serving planning officers involved in processing applications remained despite the contention of personnel changes in 5 years since outline consent was granted. The Appellant argued that there are specific statutory reasons for retaining the information requested.

**[10]** The Appellant referred to evidence of the Council's planners consenting to changes to conditions proposed by the developer's agent and acceptance of the Section 106 Agreement proposed by the developer. The Appellant took the view that the Council was reluctant to comply with its responsibilities when handling her FOIA request.

**COMMISSIONER'S RESPONSE:**

**[11]** The Commissioner considered that the Appellant's grounds of appeal are as follows:

i) The Commissioner erred in concluding that the information provided by the Council fell within the scope of part 2 of the request;

ii) The Commissioner erred in concluding, on the balance of probabilities, that no further information was held falling within the scope of part 2 of the request.

**[12]** In response to Ground 1: Scope, the Commissioner accepted that the internal emails provided by the Council post-date of the request. Further, the emails fall outside the scope of the Appellant's request and as a result the Commissioner erred in applying exception 12(4)(e) EIR. The Commissioner requested that the Tribunal issue a substituted decision to reflect this.

**[13]** In response to Ground 2: Whether further information is held, the Commissioner stated that she must decide on the balance of probabilities. The Commissioner referred to *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) at paragraph 13:

*"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis*

*of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."*

**[14]** The Commissioner contended that the same principles apply under the EIR. Therefore, the Commissioner asked the Council to confirm what searches it had carried out in order to establish that no further information is held. The Council responded that all files / folders / systems had been checked. The Commissioner consulted with the Council on communications regarding the viability appraisal.

**[15]** The Commissioner stated:

*"The Tribunal in Clyne v IC and London Borough of Lambeth EA/2011/0190 ('Clyne') held that the 'issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained.' ([38], emphasis added). The Tribunal was satisfied that a gap in the public authority's documentary records reflected 'inconsistent and poor administrative practice' but this did not amount to a breach of FOIA. As the Upper Tribunal commented in Commissioner for the Metropolitan Police v IC & MacKenzie [2014] UKUT 479, 'FOIA is not a means of reviewing a public authority's record-keeping and in some way testing it against best practice' [37]."*

**[16]** The Commissioner submitted that she was entirely correct to rely on the representations of the Council made to her during the course of her investigation. The Commissioner upheld that, on the balance of probabilities, no further information is held by the Council falling within the scope of the request.

**APPELLANT'S REPLY:**

**[17]** The Appellant stated that the issue becomes whether 'further information is held'. The Appellant asserted that the information did exist and was held as the 'Allegations' investigator had access to and copied it for the purposes of the Executive Summary. The Appellant questioned how the original form of the information in the scope of request [2] has been lost if it exists in redacted form as part of the Executive Summary.

**[18]** The Appellant maintained that as the viability appraisal was significant in gaining outline consent, it is in the public interest that the correspondence be made available for public scrutiny.

**[19]** In response to the decisions made 'on the balance of probabilities', the Appellant disagreed with the Commissioners reliance on *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072). The Appellant contended that her FOIA request [2] is distinguishable from the principle applied by the Commissioner.

**[20]** The Appellant considered *Clyne v IC and London Borough of Lambeth EA/2011/0190,* and noted:

"*The issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained. The Tribunal has not received an explanation that satisfies it that no recorded information was generated, nor an adequate explanation as to why if generated it has not been retained."*

**[21]** The Appellant asserted that the Council have not given a satisfactory explanation on why the documentation has not been retained.

**[22]** The Appellant argued that both the Council and the Commissioner failed to abide by their codes of conduct, protocols and the Nolan principles. Further, the Appellant requested that the Council be involved in the appeal to explain the disparity between the evidence that documents falling under the

scope of request [2] exist in the 'Allegations' Executive Summary and the inability to 'discover' them. The Appellant relied on the reasoning of Mr Justice Dove in *R (on the application of) Holborn Studios Ltd v London Borough of Hackney & Anor* [2020] EWHC 1509 (Admin) (11 June 2020) to state that the general public should have access to viability assessments.

**HEARING BUNDLE RESPONSE:**

**[23]** On receipt of the 'Hearing Bundle', the Appellant stated that she did not believe a just outcome would be reached. The Appellant highlighted that the disclosure of the viability appraisal under FOIA request [1] questions the legality of the outline consent for development 16/00078/OUT. Further, it is not clear why the Council failed to rely on a legal obligation when refusing to disclose the documents relating to the viability request.

**[24]** The Appellant maintained that the 2016 correspondence remains in existence if no documentation has been deleted/destroyed. The Appellant contended that in relation to the Councils response under regulation 12(4)(e), the Commissioner fails to identify the documentation which is referred to.

**[25]** The Appellant questioned why the original emails surrounding the viability appraisals are yet to be produced by the Council if they have not been destroyed or deleted. Especially as they, for the purposes of application 16/00078/OUT, are part of the public record. The Appellant submitted that the Council has a case to answer and should be joined to the proceedings.

**[26]** The Appellant maintained that the Council failed to adhere to its codes of conduct, protocols, the Nolan principles and its duty of care to the residents of Northumberland.

**[27]** The Commissioner took the view that joining the Council would not advance matters further.

**TRIBUNAL FINDINGS:**

**[28]** The request concerns the state of the Environment through the Council's process, and the Council's policies and activities for the management of this issue. This means the correct regime is that of the EIR. The issue is important for the Appellant and the Tribunal find that the Appellant's motive is serious and not driven by personal interest..

**[29]** At the hearing, the Tribunal had to determine whether or not the Commissioner's conclusion that at the time of the Appellant's request, the Council did not hold the information, was in error of law, or, where the Commissioner exercised a discretion in this matter it should have been exercised differently. We do agree with the Commissioner, that the joining of the Council as an additional Respondent would not advance matters further.

**[30]** There are comparisons from EA/2021/0113. The Appellant drew the Tribunal's attention to "mislabelled documents" and documents she claimed were missing from the bundle. Similarly she argued, the Tribunal had to decide whether the public authority had provided any or all of the requested information. The Tribunal found it relevant to scrutinise whether the Respondent (who is the Respondent in this context) was correct to rely on the representations of the Council in the course of her investigation and whether the Council attempted to mislead the Commissioner.

**[31]** **R**egulation 12(5)(e) EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

**[32]** In considering the refusal to disclose the information we refer to document D310 of the 'Updated ICO bundle' to which at paragraph 45 the Council make explicit reference to Appendix 12 stating:

*"In considering input from developer/agent, a number of email exchanges were identified and these dealt with the following items:*

- *7 April 2016 email from the agent to the case officer and Senior Planning Manager regarding a meeting to cover an update on four items that the agent wished to cover - Core Strategy Major Modifications, Neighbourhood Plan ratification and the current planning application (taken to mean 16/00078/OUT) and appeal matters (taken to mean 15/01285/OUT). There is no evidence of the notes of this meeting.*
- *3 May 2016 email from the agent to the case officer regarding consultee comments on the application, amendments to the scheme and the approach to getting the scheme to committee.*
- *13 June 2016 email from the Senior Planning Manager to the agent requesting a viability appraisal.*
- *16 June 2016 email from the Senior Planning Manager to the case officer regarding the viability appraisal and the timing of a public consultation exercise on amendments the scheme.*
- *15 July 2016 email from the agent to the Senior Planning Manager attaching a letter setting out the viability headlines for the scheme.*
- *1 August 2016 email from the agent to the case officer regarding the planning conditions set out in the committee report due to go to the Strategic Planning Committee on 2 August. In the email the agent notes that "it may be that potential amendments to the conditions would need to be reported to committee tomorrow as an addendum to the main report".*
- *8 August 2016 email from the case officer to the agent regarding a building conservation consultation response and whether there was a need for an impact assessment. The case officer responds that "if we can make it a 'non- issue' all well & good"."*

**[33]** This e-mail correspondence identifies relevant information within the scope of the request. We find, on the balance of probabilities this information was in the possession of the Public Authority at the time of the request. This is the evidence that persuades us that information was withheld for the appeal and the Council failed to comply with regulation 5 EIR. Further, the Council described what searches they conducted, never provided the interested parties with details of their searches. This is inadequate.

**[34]** The Appellant has provided the Tribunal with a detailed explanation of her concerns as outlined in her Grounds of Appeal and as set out above. She provided us with correspondence and additional evidence to support her grounds of appeal. This enhanced the weight the Tribunal gave to the public interest arguments in favour of the Appellant's request. After careful consideration of *Linda Bromley v The Information Commissioner and the Environment Agency* (EA/2006/0072) and the documentation exhibited by the Appellant during the course of her appeal, we are persuaded that on the balance of probabilities that the Council is holding relevant information beyond which has already been disclosed. The Appellant has persuaded us that 'further information is held'.

**[35]** For the reasons referred to above we allow the appeal and in the circumstances we set aside the Commissioner's DN made on 12 April 2021 under reference IC-54098-Q9Y5,

**[36]** The Commissioner accepted that the internal emails provided by the Council post-date of the request. Further, that the emails fall outside the scope of the Appellant's request. The Commissioner erred in applying exception 12(4)(e) EIR to this information. The Tribunal therefore substitute that part of the DN as requested by the Commissioner by disallowing the application of exception 12(4)(e) EIR to that information.

**[37]** The Tribunal direct that the Council should identify the documentation as clearly described by the Appellant and issue a fresh response to the request of 19 April 2020 which cannot seek to rely on regulation 12(4)(e) EIR.

**Brian Kennedy QC**

**(First Tier Tribunal Judge)**

**Date of Decision: 24 October 2021.**

**Date Promulgated: 02 November 2021.**