



Neutral citation number: [2023] UKFTT 764 (GRC)

Case Reference: EA/2022/0380

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

Heard by: remote video hearing (cloud video platform)

Heard on: 13 April 2023

Decision given on: 19 September 2023

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER KATE GRIMLEY EVANS
TRIBUNAL MEMBER DAVE SIVERS**

Between

CATHERINE LOUISE HOLDEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: in person

For the Respondent: did not appear and was not represented

Decision: The appeal is Allowed in part

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0380, set out below, is substituted for the Commissioner's Decision Notice reference IC-177862-T4C8 dated 2 November 2022 with regard to the request for information made to Hartlebury Parish Council by Catherine Louise Holden dated 16 March 2022.

Substituted Decision Notice

1. Hartlebury Parish Council is entitled to rely on section 41(1) of the Freedom of Information Act 2000 to refuse to disclose the withhold information which was provided to the Tribunal.

2. Hartlebury Parish Council must make a fresh response to the request for information. Unless the duty to confirm or deny does not arise in accordance with any applicable provision of the Freedom of Information Act 2000 or the Environmental Information Regulations 2004:
 - a. the fresh response must make clear whether or not any further information (beyond that referred to in point 1 above) is held within the scope of the request; and
 - b. if such further information is held, Hartlebury Parish Council must either disclose it (subject to any redactions of personal data pursuant to relevant provisions of the Freedom of Information Act 2000 or the Environmental Information Regulations 2004) or claim any relevant exemptions or exceptions to disclosure.
3. Hartlebury Parish Council must issue the fresh response within 30 days of the date on which the Information Commissioner sends them notification of this decision in accordance with the Directions below.
4. The fresh response will be subject to the rights given under s50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.
5. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

Directions

6. The Information Commissioner is directed to send a copy of this decision to Hartlebury Parish Council within 35 days of its promulgation, or (if either party applies to appeal this decision) within 14 days after there is an unsuccessful outcome to such application or any resulting appeal.

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Appellant	Catherine Louise Holden.
Commissioner:	The Information Commissioner.
Committee:	Hartlebury Parish Hall Management Committee.
Council:	Hartlebury Parish Council.
Decision Notice:	The Decision Notice of the Information Commissioner dated 2 November 2022, reference IC-177862-T4C8.
EIR:	The Environmental Information Regulations 2004.
EIR Public Interest Test:	The test (under the EIR) as to whether, in all the

circumstances of the case, the public interest in maintaining an exception outweighs the public interest in disclosing the information, pursuant to regulation 12(1)(b) of the EIR (set out in paragraph 45).

FOIA: The Freedom of Information Act 2000.

FOIA Public Interest Test: The test (under FOIA) as to whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the information, pursuant to section 2(2)(b) of FOIA (set out in paragraph 38).

Requested Report: The report which was requested by way of the Request.

Request: The request for information made to the Council by the Appellant dated 16 March 2022, more particularly described in paragraph 8.

Withheld Report: As defined in paragraph 78.

2. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

3. This was an appeal against the Decision Notice, which (in summary) held that the Council could rely on regulation 12(5)(b) of the EIR (course of justice) in order to withhold the Requested Report. The Decision Notice did not require the Council to take any steps.
4. We consider that it is important to stress what was outside of the scope of the appeal. The appeal was not about the merits or otherwise of the Council's activities regarding any property repairs or maintenance, nor the conduct of any individuals, nor any alleged breach of any lease, nor issues relating to the delivery of a community project. The appeal can only be determined with regard to the remit and powers of the Tribunal, to which we refer below.

Mode of Hearing

5. The proceedings were held by the cloud video platform. The Tribunal panel, the Appellant and the witnesses all joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
6. The Appellant was present in person. Also attending were the Appellant's two witnesses. The Commissioner did not attend the hearing and was not represented, having stated in his response to the appeal that he did not intend to attend.

Background to the appeal

7. The background to the appeal is as follows.

The Request

8. On 16 March 2022, the Appellant made a request to the Council for information in the following terms:

"I am writing to advise you that under the FOI act 2014 I would like access to the full car park report costing £3960, which the Parish Council requested in December 2021."

The reply

9. The Council responded on 7 April 2022. It refused the request on the basis that section 42 of FOIA (legal professional privilege) applied to the Requested Report.
10. The Appellant contacted the Commissioner on 24 June 2022 to complain about the Council's response to the Request.

The Decision Notice

11. The Commissioner decided, by way of the Decision Notice, that:
- a. the Council breached regulation 14(3) of the EIR as it incorrectly issued its refusal under FOIA (relying on section 42 of FOIA to withhold the Requested Report), rather than the EIR;
 - b. the Council was entitled to rely on the exception under regulation 12(5)(b) of the EIR (the course of justice) to withhold the Requested Report, as the EIR Public Interest Test favoured maintaining that exception.
12. The Decision Notice did not require the Council to take any steps.
13. The Commissioner's view, as noted in the Decision Notice, was that the Request ought to have been handled under the EIR as the Request was for environmental information on the basis that the Requested Report related to activities affecting or likely to affect the state of elements of the environment.
14. The Commissioner stated in the Decision Notice that the Council had explained that the sole purpose of the Requested Report was to gather evidence in order to instruct solicitors in respect of an ongoing dispute and that its disclosure at the time of the Request would prejudice the Council's case. Accordingly, the Commissioner's view was that the exception from disclosure under 12(5)(b) of the EIR (course of justice) applied.
15. The Commissioner noted in the Decision Notice that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the exceptions in regulation 12 of the EIR.
16. In respect of the EIR Public Interest Test, the Commissioner noted the timing of the Request, that the Council's investigation was ongoing and that litigation may follow. The Commissioner's view was that the balance of the public interests lay in maintaining the exception, rather than being equally balanced. The Commissioner considered that, where an investigation is ongoing and where that investigation could lead to litigation, it cannot be in the public interest to disclose information that is relevant to that investigation. The Commissioner's view was that the Requested Report was likely to be very relevant to the investigation and that if it were to be put

into the public domain then it could alert relevant parties and “enable them to take steps to ensure they avoid legal action”, consequently a community project could be adversely affected. The Commissioner considered that this would be against the public interest. Accordingly, the Commissioner concluded that the public interest was in favour of maintaining the exception.

The appeal

Grounds of appeal

17. Fundamentally, the Appellant’s appeal was based on the ground that the Commissioner did not have enough information upon which to judge the Request. The Appellant stated that she was appealing the Decision Notice on behalf of the Committee of which she was Vice Chair and had been a member for six years.
18. The grounds of appeal then laid out background information relating to the Request – the material points, in summary, being as follows:
 - a. There was an improvement project planned and initiated by the Council (under a previously constituted membership) relating to an overhaul of Hartlebury Parish Hall’s car park and play area.
 - b. The Council (following a change in its membership) had denigrated the new improvements and sought to disrupt access to these, motivated by personality conflicts and historical disagreements between various parishioners.
 - c. The Council had not adhered to the project maintenance plan for the car park and topped up small potholes with gravel. The potholes subsequently worsened.
 - d. Ultimately the Council blocked access to the car park and access remained blocked for a period of around 18 months.
 - e. The Committee had contacted the District Council (Wychavon District Council), which had subsequently issued an enforcement notice to remove the barriers to the car park. This notice was ignored by the Council and the car park remained blocked.
 - f. The inability to access the car park has had a significant impact on the Committee, particularly regarding the revenue that has been lost as a result of the car park being inaccessible for visitors to the Parish Hall.
 - g. Despite various requests, the Council did not repair or maintain the car park. Ultimately Worcestershire County Council’s highway department repaired the potholes at the request of the Committee.
 - h. The Council commissioned a structural report which was published on its website. Various threats of litigation followed but no information had been forthcoming regarding the nature of the report or any decision of the Council to commence litigation.
 - i. The Committee were told that the police were ‘involved’ but no reasons were given relating to this.

- j. In December 2021, the Council paid almost £4000 for a full structural report (being the Requested Report).
19. The Appellant also stated that:
- a. The Requested Report was funded by taxpayers' money as the Council is funded by a proportion of council tax.
 - b. No action had been taken in respect of the litigation threatened by the Council.
 - c. There was a lack of transparency by the Council regarding any proposed action or issues relating to the previous project or the threatened litigation.
 - d. If litigation was being sought against the builders then arbitration should instead be used, as that was within the terms of the builder's contract.
 - e. The builders had previously been willing to make any necessary repairs but had since 'retreated' given the various threats of legal action.
 - f. The Council had breached the terms of the lease between it and the Committee (relating to the use of the Parish Hall by the latter).
20. The Appellant also mentioned that there was reference in documents which had been provided in support of the appeal to issues relating to a defective patio wall. However, the Appellant stressed that it was the Requested Report (namely, relating to the car park) which was being sought, not any report relating to issues relating to the defective patio wall.
21. In respect of the outcome being sought by the Appellant in the appeal, the Appellant requested (in addition to production of the Requested Report) production of any evidence relating to the police advice, in respect of the alleged police 'involvement' referred to.

The Commissioner's response

22. The Commissioner commented that the Appellant's grounds of appeal provided some further context to the Request but nevertheless the Commissioner maintained the position set out in the Decision Notice - namely (in summary) that the Council could rely on regulation 12(5)(b) of the EIR in order to withhold the Requested Report.
23. The Commissioner relied on the reasons set out in the Decision Notice but made the following additional comments:
- a. a disclosure under the EIR is considered to be to the world at large; information disclosed is put in the public domain and is not just disclosure to the particular requester of the information;
 - b. events taking place after the date of the Request should not be taken into account; the relevant time for the Commissioner and Tribunal to consider is the time of the Request (namely, the circumstances as they existed at or around March 2021).
24. The Appellant did not submit a reply to the Commissioner's response.

The Tribunal's powers and role

25. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA¹, 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."

26. In summary, therefore, the Tribunal's remit for the purposes of this appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

The law

The relevant statutory framework

General principles - FOIA

27. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

28. In essence, under section 1(1) of FOIA, a person who has requested information from a public authority (such as the Council) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

"Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

¹ This section would also apply to appeals under the EIR, pursuant to regulation 18 of the EIR.

29. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold. The right of access to information contained in that section is subject to certain other provisions of FOIA, which we address below.

30. One of the exemptions under FOIA relates to 'environmental information'. Information which is within the scope of the EIR is exempt from disclosure under FOIA. Section 39(1) of FOIA (referring to the EIR as the 'regulations') provides:

"Information is exempt information if the public authority holding it –

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations."

31. Accordingly, requests for 'environmental information' held by a public authority must be dealt with under the EIR rather than FOIA.

32. Section 16 of FOIA relates to the duty of public authorities to provide reasonable advice and assistance to people who make requests for information. Section 16(1) of FOIA provides:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

General principles – EIR

33. The EIR provides individuals with a general right of access to environmental information held by public authorities, subject to some exceptions. Regulation 5(1) of the EIR provides:

"...a public authority that holds environmental information shall make it available on request."

34. The term 'environmental information' is defined in regulation 2(1) of the 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);”

35. Therefore, similar to the position under FOIA for other information, under regulation 5(1) of the 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 the 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) of the EIR (that is, the wording immediately preceding the extract of that regulation 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...”

36. Part 3 of the EIR contains various exceptions to the duty to disclose environmental information which has been requested. Again, as with FOIA, it is therefore important to note that the EIR do not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in regulation 5(1) of the EIR is subject to certain other provisions of the EIR.

37. Regulation 9 of the EIR contains provisions which are similar to those in section 16 of FOIA relating to the duty of public authorities to provide reasonable advice and assistance. Regulation 9(1) of FOIA provides:

“A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.”

Exemptions – FOIA

38. Section 2(2) of FOIA addresses potential exemptions to the duty to provide information pursuant to section 1(1)(b) of FOIA. Section 2(2) of FOIA provides:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

39. The effect of the above is that some exemptions set out in Part II of FOIA are absolute and some are subject to the application of the FOIA Public Interest Test. Where an applicable exemption is not absolute and the FOIA Public Interest Test applies, this means that a public authority may only withhold requested information under that

exemption if the public interest in doing so outweighs the public interest in its disclosure.

40. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. For the purposes of this appeal, the relevant sections are sections 41, 42 and 43 of FOIA. Section 41 is included in that list but sections 42 and 43 are not.
41. Accordingly, in summary:
 - a. the exemption under section 41 of FOIA is an absolute exemption, therefore if this exemption is engaged then the FOIA Public Interest Test does not need to be applied;
 - b. the exemptions under sections 42 and 43 of FOIA are qualified exemptions, so that the FOIA Public Interest Test has to be applied, even if those exemptions are engaged.

Section 41 – information provided in confidence

42. Section 41(1) of FOIA provides:

“Information is exempt information if–

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”.

Section 42 – legal professional privilege

43. Section 42(1) of FOIA provides:

“Information in respect of which a claim to legal professional privilege...could be maintained in legal proceedings is exempt information.”.

Section 43 – commercial interests

44. Section 43(2) of FOIA provides:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”.

Exceptions - EIR

45. As noted, Part 3 of the EIR contains various exceptions to the duty to disclose environmental information which has been requested. Within Part 3 of the EIR, regulation 12(5)(b) (the course of justice) is applicable for the purposes of this appeal. So far as is relevant, regulation 12 of the EIR provides:

“(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.

...

(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 – ...

(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;”.

46. Putting this into other words, a public authority may refuse to disclose environmental information which is requested under the EIR:

a. to the extent that its disclosure would adversely affect:

- the course of justice;
- the ability of a person to receive a fair trial; or
- the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature; and

b. if, in the circumstances at the time of the refusal, the EIR Public Interest Test favours withholding the information.

Relevant case law

Environmental Information

47. We turn first to case law regarding the definition of ‘environmental information’ set out in regulation 2(1) of the EIR.

48. It is well established that ‘environmental information’ is to be given a broad meaning in accordance with the purpose of the underlying European Council Directive which the EIR implement (Directive 2004/4/EC). The definition was explained by the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister für soziale Sicherheit und Generationen*² as follows:

“The Community legislature’s intention was to make the concept of information relating to the environment defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.”.

49. In the case of *Department for Business, Energy and Industrial Strategy v Henney and Information Commissioner*³, the Court of Appeal confirmed the appropriateness of a

² [2003] All ER (D) 145

³ [2017] EWCA Civ 8444

broad approach to defining environmental information, which may include information that is not directly connected to a measure. In that case, Lord Justice Beatson stated⁴:

"...Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole...

It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information... It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision making in a better way. None of these matters may be apparent on the face of the information itself."

50. Lord Justice Beatson also explained in the *Henney* case that identifying the measure which the disputed information is "on" includes applying the definition of 'environmental information' purposively. In essence, the Court of Appeal confirmed that determining whether, in a specific case, information qualifies as 'environmental information' (or, in other words, whether the information can be considered to be 'on' a given measure for the purposes of the definition of 'environmental information') should be decided by reference to the general principle that the EIR, Directive 2003/4/EC and the Aarhus Convention (which that Directive was designed to implement in EU law) must be construed purposively. In turn, this involves considering the purposes which they were trying to achieve. The Court of Appeal provided some general guidance, referring⁵ to the recitals to the Aarhus Convention and the Directive as a starting point: *"They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."*
51. Therefore it is clearly established that the definition of 'environmental information' in the EIR should be construed purposively. Lord Justice Beatson also stated in the *Henney* case: *"It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."* He went on to state: *"Determining on which side of the line information falls will be fact and context-specific."*⁶
52. We also remind ourselves, that, at paragraph 52 of his judgment in the *Henney* case, Lord Justice Beatson warned against an *"overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition."*

⁴ Paragraphs 42-43 of that case

⁵ Paragraph 48 of that case

⁶ Paragraphs 43 and 47 of that case, respectively

53. In summary, therefore, a purposive interpretation is required when considering what ‘environmental information’ is, but this will also be dependent on the specific facts in any given case. The Upper Tribunal in *Department for Transport and others v Information Commissioner and John Cieslik*⁷ put the point as follows: “...the principle established by the Court of Appeal in *Henney* and in *Glawischnig* [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect.”.
54. In very broad terms, there are six fundamental principles which derive from the *Henney* case:
- a. the EIR must be interpreted purposively;
 - b. the term ‘environmental information’ must be read broadly;
 - c. a broad construction of that term does not, however, mean there is an unlimited right of access to environmental information;
 - d. the focus should be on the statutory language;
 - e. the test is not what the information is directly or primarily ‘on’;
 - f. determining ‘what a measure is on’ may mean looking at the wider context.

Section 41 of FOIA – information provided in confidence

55. As we have noted, the exception under section 41 of FOIA applies where (in essence) the relevant information was provided to a public authority by another person and there would be an actionable breach of confidence if that information was disclosed.
56. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test established in the case of *Coco v AN Clark (Engineers) Ltd*⁸:
- a. Does the information have the necessary quality of confidence?
 - b. Was it imparted in circumstances importing an obligation of confidence?
 - c. Is there an unauthorised use to the detriment of the party communicating it?

Section 42 of FOIA – legal professional privilege

57. In respect of legal professional privilege, the House of Lords established, in the case of *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)*⁹, the relevant principles which must apply if legal professional privilege attaches to any particular material:
- a. the material must be between a qualified lawyer acting in their professional capacity and a client;
 - b. it must be created with the sole or dominant purpose of obtaining or providing

⁷ [2018] UKUT 127, paragraph 33

⁸ [1969] RPC 41

⁹ [2004] UKHL 48

legal advice; and

- c. it must be confidential.

Prejudice-based exemptions

58. The exemption under section 43(2) of FOIA uses the terms ‘would’ and ‘would be likely to’ prejudice the commercial interests of any person. This means that the prejudice in question is more probable than not or that there is a real and significant risk of it happening.

59. The following statement from a First-tier Tribunal case was subsequently confirmed by the Court of Appeal in the case of *Department for Work and Pensions v Information Commissioner & Frank Zola*¹⁰ as being the correct approach:

“On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”

60. Therefore for such exemption to apply, there must be some causative link between the potential disclosure of the relevant information and the prejudice to the commercial interests of a person. The prejudice must also be real, actual or of substance and it must relate to the interests protected by the exemption.

The hearing and evidence

61. The Tribunal read and took account of an open bundle of evidence and pleadings. The Tribunal also read and took account of a closed bundle. The closed bundle contained certain material which was not included in the open bundle, including a report which was withheld from disclosure (in respect of which we comment below), and contained some unredacted material which had been redacted in the open bundle.

62. We heard evidence from two witnesses on behalf of the Appellant in addition to a written witness statement provided by each of them which was included within the open bundle. To avoid identifying the witnesses personally in this decision, we refer to them just as “the first witness” and “the second witness”, respectively, and we mean no disrespect in doing so.

63. We also heard oral submissions from the Appellant. As noted, the Commissioner did not attend the hearing and was not represented.

The Appellant’s witness evidence

64. Various points were addressed in the two witnesses’ written witness statements and by way of oral evidence during the hearing. Relevant material issues are referred to below.

65. The first witness’s evidence was given in their capacity as a retired Chartered Quantity Surveyor and Arbitrator but also as a past member of the Council (in the period 2015 to 2019). The first witness gave details of their extensive qualifications, which they

¹⁰ [2016] EWCA Civ 758, paragraph 27 – see also *Carolyn Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.

stated had been retained despite their retirement.

66. The first witness gave some background information relating to the improvement project referred to in the Appellant's grounds of appeal, explaining that the works were designed by a landscape consultant and that the first witness had administered the construction contract between the Council and the appointed contractor.
67. The first witness supported the Appellant's arguments that certain individuals who took over the Council after the project had been completed had some personal dislike of previous members of the Council and had sought to discredit what had been achieved by pretending that the works were defective and unsatisfactory.
68. The first witness stated that the works were in fact used and enjoyed by the community and no significant problems or defects had come to light regarding the works. The only exception to that was relating to the brick walls and piers around a new patio area at the rear of the Parish Hall. It was discovered in March 2021 that they had become loose and unstable due to a latent problem with the mortar used, which had failed to withstand frost in the winter of 2020/2021, and consequently it was necessary to close the patio area. The first witness stated that the contractor had admitted liability for the problem with the patio walls and had agreed to rectify it free of charge.
69. The first witness further explained that, at around that time (March 2021), the Council had commissioned a structural report from a consultant which the Council published in the belief that it revealed serious deficiencies in the project works. The first witness considered that the report was unreliable for various reasons (which he explained).
70. The first witness considered that there were no other defects with the project works (apart from the patio walls issue), with nothing else coming to light since the project was completed in early 2019.
71. The first witness explained that the Council refused to allow the contractor to carry out their promised repairs to the patio walls. However, the first witness stated that the Council requested the contractor to address a number of other issues in relation to the patio works, which the first witness stated were unsubstantiated allegations relating to design and/or specification issues and which were not the responsibility of the contractor - and consequently the contractor had refused to deal with those other issues.
72. The first witness further explained that, as the contractor's offer to repair the patio walls had not been taken up, the Parish Hall had been deprived of use of the patio that was paid for as part of the improvement project. He believed it was not fair or correct to deny access to the Requested Report.
73. The second witness's evidence was given in their capacity as a retired resident in the parish of Hartlebury and as a past member of the Council (Parish Councillor from 2015 to 2019; Chair of the Council from 2017-2019). The second witness stated that, during the period that they were a member of the Council, they were the lead on the project which encompassed the improvement works referred to in the Appellant's grounds of appeal.
74. The second witness referred to the costs of the project and the Requested Report, paid for by public money, and stated that they believed that it was in the public interest for

the Requested Report to be disclosed, including for the interests of transparency.

75. Both witnesses referred to the litigation which had been cited by the Council in connection with its response to the Request. In essence, their collective view was that:
- a. whilst various complaints and allegations had been made by the Council regarding the project works, there was no evidence that the Council had approved or commenced any such litigation;
 - b. no arbitration proceedings had been pursued against the contractor of the works, as provided for the construction contract; and
 - c. the alleged litigation was a pretext for withholding the Requested Report which may hold information which is unfavourable to the Council's adopted position regarding the project works.

The Appellant's submissions

76. Whilst acknowledging all of the specific points which were made by the Appellant in the hearing, these generally related to the points made in the grounds of appeal and therefore we do not repeat them here.

Discussion and conclusions

Nature of the Request and the withheld information

77. We need to start by explaining that the report which the Council withheld from disclosure and which was included in the closed bundle provided to the Tribunal (and which was purportedly the Requested Report) was, in fact, a mortar sample analysis report. Based on the evidence available to us, we have concluded that this report related to the issue with the brickwork on the patio walls and piers, as referred to by the Appellant and the first witness (and not relating to the car park as envisaged by the Request), and that this was a report of an analysis of a mortar sample taken from the patio walls. We are satisfied that it is appropriate to state the nature of this report, notwithstanding that its contents are closed material, as it is critical to our findings in the appeal and to our ability to explain our reasons (and we consider there is no prejudice to any party, the Council or the author of the report in doing so). We also consider that the Council should have clarified this with the Appellant as part of its duties under regulation 9 of the EIR or section 16 of FOIA, which we discuss further below.
78. Given the fact that the mortar sample analysis report (which we shall refer to from this point as the "Withheld Report") is what the Council specified as being the subject of the Request, our analysis and conclusions below are based on the Request (and the Council's response to it, as well as the Decision Notice) as applicable to the Withheld Report. This is so notwithstanding that the Appellant stated that the Request related to a report relating to the Hartlebury Parish Hall car park.

Outline of relevant issues

79. The preliminary issue we needed to determine in the appeal was which regime (FOIA or the EIR) was applicable to the Request. The assessment of potential exemptions or exclusions (and in turn the application of applicable exemptions or exclusions) would

then depend on the outcome of that determination.

80. If we concluded that the EIR applied to the Request (as was decided by the Commissioner in the Decision Notice) then we would need to determine:
 - a. whether the exception in regulation 12(5)(b) of the EIR (the course of justice) was engaged in respect of the Request; and
 - b. if that exception was engaged, whether (in all the circumstances), the EIR Public Interest Test favoured maintaining that exception over providing the Withheld Report information which had been requested.
81. If we concluded that FOIA applied to the Request then we would need to determine:
 - a. whether there were any applicable exemption in FOIA which would be engaged in respect of the Request; and
 - b. (unless an absolute exemption applied) if any such exemption was engaged which was a qualified exemption, whether (in all the circumstances), the FOIA Public Interest Test favoured maintaining that exemption over providing the Withheld Report.

EIR or FOIA

82. As we have noted:
 - a. the relevant withheld information in this case was the Withheld Report, which related to a mortar sample analysis;
 - b. requests to a public authority for environmental information fall within the scope of the EIR and must be dealt with under the EIR, but otherwise FOIA would apply;
 - c. the term 'environmental information' is defined in regulation 2(1) of the EIR.
83. Whilst we remind ourselves of the six fundamental principles from the *Henney* case as outlined in paragraph 54, particular points merit specific mention for current purposes. First, we note that the that the EIR must be interpreted purposively and the focus should be on the statutory language. However, we also note that the term 'environmental information' must be read broadly and the wider context may need to be considered.
84. We have concluded that the Withheld Report does not constitute environmental information for the purposes of the EIR. This is for the following reasons:
 - a. When looking at the statutory language of the definition of environmental information (set out in paragraph 34) we do not see how the Withheld Report, given that it relates to an analysis of a sample of mortar taken from a patio wall, could be said to fall within any part of that definition. For example:
 - with regard to limb (a) of the definition, the Withheld Report is not information relating to "*the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites*" as it is merely information relating to an analysis of a sample taken from a building or

structure (specifically, a patio wall or pier);

- with regard to limb (b) of the definition, the Withheld Report is not information relating to “*substances... emissions, discharges and other releases... affecting or likely to affect the elements of the environment referred to in [limb (a) of the definition]*”, as it is not related to anything affecting the environment - but rather findings relating to a sample of material taken from a building or structure;
- with regard to limb (c) of the definition, the Withheld Report is evidently not “*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 [limbs (a) and (b) of the definition]*”; and
- with regard to limb (f) of the definition, the Withheld Report does not relate to “*the state of human health and safety*”. Whilst the information, insofar as it is reporting on a sample taken from a patio wall, would relate to “*built structures*”, it does not relate to them “*inasmuch as they are or may be affected by the state of the elements of the environment referred to in [limb (a) of the definition] or, through those elements, by any of the matters referred to in [limbs (b) and (c) of the definition]*”. Again, this is because the Withheld Report relates to information regarding a mortar analysis and therefore, of itself, does not relate to anything which is or may be affected by the state of the elements of the environment nor has any connection with the state of human health and safety.

- b. Whilst the concept of what constitutes environmental information must be construed broadly, a purposive interpretation is required (as we have noted) and it is important not to take an “*overly expansive reading*” as referred to by Lord Justice Beatson in the *Henney* case. For the reasons given above, we think there is no reasonable basis for concluding that the Withheld Report falls within the terms of the statutory definition in the EIR.
- c. In that regard, we also remind ourselves of the point made above (paragraph 53) in the *Cieslik* case that: “*information which has only a minimal connection with the environment is not environmental information.*”. We find that the Withheld Report has minimal connection (if any) with the environment.

85. As we have concluded that the Withheld Report does not constitute environmental information then evidently the EIR cannot apply to the Request.

Was the exception in regulation 12(5)(b) of the EIR engaged?

86. As we concluded that the EIR do not apply to the Request, it follows that the exception in regulation 12(5)(b) of the EIR does not apply and we do not need to consider the potential application of any other exceptions in the EIR.

Were any exemptions in FOIA engaged?

87. Given our conclusion that the EIR do not apply to the Request, we have considered any possible exemptions to disclosure under FOIA.

88. We first considered the exemption under section 42 of FOIA (legal professional

privilege), as this was relied on by the Council when refusing to disclose information in response to the Request. This exemption is clearly not applicable, as the Withheld Report (relating to analysis of mortar samples) was not prepared by a qualified lawyer nor for the purposes of obtaining or providing legal advice. It therefore cannot fall within the scope of that section (as per the *Three Rivers* case).

89. We then considered other possible exemptions and we concluded that the exemptions in sections 41 and 43 of FOIA could potentially be applicable to the Request.
90. As noted, section 41 relates to information which has been provided in confidence. The Withheld Report stated that it was personal to the client (the Council) and was confidential. We had no further evidence before us relating to the confidential nature of the Withheld Report or the expectations of the author of the Withheld Report. However, based on the information before us, we concluded on the balance of probabilities that the Withheld Report was prepared with an expectation of privacy and confidentiality such that disclosure of it would be actionable for breach of confidence.
91. We formed that view partly because there was information in the public domain relating to the cost of the Withheld Report (which was referred to in the Request). Accordingly, if the Withheld Report was disclosed then this would divulge details of what work (set out in the Withheld Report) was undertaken for the publicised cost. We considered that this could be damaging to the interests of the author of the Withheld Report (and was a reason why we also considered the potential application of section 43 of FOIA), not least because it could enable competitors to adjust their pricing for similar reports that they may be commissioned to undertake. In short, we considered that disclosure of it could give competitors a commercial advantage by knowing what was charged for the basis of the work detailed in the Withheld Report. In addition, as noted, the Withheld Report was marked as being for the personal use of the Council only and as being confidential. There was no evidence before us to refute any finding that the Withheld Report was confidential or could be disclosed without an actionable breach of confidence. For all of those reasons, we therefore concluded that there would be an expectation of confidentiality on the part of the author, breach of which would give rise to an actionable claim.
92. We recognise that if the Withheld Report was prepared for the purposes of potential litigation, it may become subject to disclosure requirements in connection with that litigation. However, as that is only a potential future possibility then this could not countermand our above conclusions.
93. Accordingly, we find that section 41(1) of FOIA was engaged in respect of the Request. As that exemption is an absolute exemption, the FOIA Public Interest Test does not apply. It follows that the Withheld Report is exempt from disclosure pursuant to that section.
94. Given our finding that the Withheld Report is exempt from disclosure, it is unnecessary for us to go on to consider the potential application of section 43 of FOIA.

Section 16 of FOIA – duty to provide advice and assistance

95. As we have noted, the Appellant was seeking a report commissioned by the Council relating to the Parish Hall car park but the Withheld Report relates to a mortar sample

analysis taken from the patio walls. It was clear from the Request that a report relating to the car park was being sought. The Council can have had no doubt that the Appellant was seeking information relating to the car park report and nothing else. If the Council had no such report then it should have stated so in its response to the Appellant, rather than responding by citing an exemption to disclosure (which, for the reason we have given, was evidently not applicable to the Withheld Report in any event).

96. Equally, if the Council considered that the Appellant may have been mistaken about the nature of the report which was the held by the Council then the Council should, pursuant to its duties under section 16 of FOIA, have sought to clarify the nature of the Request and/or provide a response which might help identify the specific information which the Appellant was seeking.
97. If the Council does not have a report relating to the Parish Hall car park (but only the Withheld Report) then, given that the Appellant was only seeking information relevant to the car park, then the entire process from the point of the Council's response to the Request up to this appeal could have been avoided. Not only do we consider that the Council failed in its duty to provide advice and assistance relating to the Request but in our view it was remiss of the Commissioner to not address this point as part of his investigation and, consequently, the Decision Notice.

Other points

98. As we have stated, the Council determined that the Withheld Report was within the scope of the Request and accordingly that is the basis for our reasoning above in respect of the Request. However, we cannot preclude the possibility that there may be other information falling within the scope of the Request (namely, there may be a report relating specifically to the Parsh Hall car park) and, especially given the Council's failure to provide advice and assistance as we have referred to, we consider that it is appropriate for the Council to make a fresh response to the Request.
99. As we have noted, the Appellant requested, in connection with her appeal, production of any evidence relating to the alleged police involvement which was mentioned. As any such information (whether or not it is held by the Council) did not form part of the Request, a separate request to the Council would need to be made relating to it and the Tribunal has no jurisdiction in respect of such information for the purposes of the appeal (the Tribunal's remit being as outlined in paragraphs 25 and 26).

Final conclusions

100. For all of the reasons we have given, we conclude as follows.
101. We find that the Commissioner erred in the exercise of his discretion and/or the Decision Notice involved an error of law in concluding that the EIR applied in respect of the Request and consequently that regulation 12(5)(b) of the EIR was engaged.
102. We find that section 41(1) of FOIA was engaged in respect of the Request insofar as the Withheld Report is concerned and accordingly that the Council is not required to disclose the Withheld Report.
103. The Council breached section 16 of FOIA by not providing reasonable advice and assistance in respect of the Request.

104. We therefore allow the appeal insofar as applicable to our determination summarised in paragraph 101 and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 14 September 2023