IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0067**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50277289
Dated: 14 February 2011

Appellant:	**Andrew Plumb**
Respondent:	**Information Commissioner**
Second Respondent:	**Babergh District Council**
Dates of paper hearing:	**20 September and 23 November 2011**

Before
Melanie Carter
(Judge)

and

Marion Saunders
Malcolm Clarke

Subject:
Regulation 12(3) Environmental Information Regulations 2004

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the Decision Notice and to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal arises from a letter of request dated 12 August 2009 from the Appellant, Mr Andrew Plumb to the Second Respondent, the Babergh District Council ("the Council"). This requested a range of information relating to an application for a certificate of lawful usage or development ("CLEUD") for a third runway at a privately owned airport in Suffolk. Briefly, there had been a long and somewhat complicated planning history to this airfield and its planning status. In 2003, the owners of the airfield applied for a CLEUD for a third runway on the basis that it had enjoyed 10 years of uninterrupted use without planning restriction.

2. The Council disclosed various documents in response to the request and the outstanding issues in this appeal relate to undisclosed information contained within a particular planning file, B/98/00528/CEU.

3. The Council had refused disclosure of certain of the documents in this file eventually relying upon the exceptions in regulation 12(3), 12(4)(e), 12(5)(b), 12(5)(f) of the Environmental Information Regulations 2004 ("EIR") . Mr Plumb complained to the Information Commissioner who, after investigation, issued a Decision Notice dated 14 February 2011.

4. The Decision Notice came to the following conclusions:

   (a) that the Council had been incorrect in relying upon the exception in regulation 12(4)(e) – whilst much of the information consisted of internal communications, the public interest was in favour of their disclosure such that the exception did not apply; and

   (b) that two of the documents properly fell within the exception under regulation 12(5)(b) (adverse effect on the justice);

   (c) that it should disclose all of the information held to the requester other than those two documents and the following set of personal data subject to the exception in regulation 12(3):

   "-information containing personal data relating to complainants, either for, or against the CLEUD application.

   - information containing personal data of complaints made outside of the CLEUD application.

   -the information which the Commissioner finds is subject to legal professional privilege."

5. The Decision Notice also found at paragraph 99, with regard to the claimed exception at regulation 12(5)(f) that:

"The Commissioner considers that this exception would not be applicable to individuals carrying out professional tasks for or in conjunction with the council. In this case, it could only apply to the information which has already been considered exempt under regulation 12(3) above; namely the complaints and the affidavits of those supporting or opposing the CLEUD application, or complaints about breaches of planning restrictions.

Given this the Commissioner has not considered the application of regulation 12(5)(f) further."

6. Mr Plumb has appealed this decision insofar as it upheld the Council's refusal to disclose the personal data set out above.

The appeal

7. Mr Plumb has argued in his Notice of Appeal that the Decision Notice is wrong in law on the basis that:

   (a) The Commissioner has incorrectly classified "consultation submissions for a CLEUD application as complaints about breaches of planning regulations";

   (b) There is evidence that the Council had in the past informed consultees as to a CLEUD application that responses may be made public and also that the Council had made disclosure of such responses;

   (c) That the criminal offence in section 194 of the Town and Country Planning Act 1990 is such that disclosure would be expected;

   (d) that the Commissioner should not have taken into account allegations of intimidation in the absence of supporting evidence.

The Law

8. The Tribunal's jurisdiction on appeal is governed by section 58 of the Freedom Of Information Act 2000. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the Commissioner ought to have exercised his discretion differently.

9. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

The Disputed Bundle and Non-compliance

10. The Tribunal was provided with a bundle of disputed information. On convening to hear the case on the papers, it was perturbed to find that a significant proportion

of the information within the disputed bundle went beyond the terms of the appeal and should already have been disclosed in accordance with the Decision Notice. The Council had not cross appealed such that it had no option but to comply with the precise terms of the Decision Notice insofar as it required disclosure.

11. Given this the Tribunal adjourned and asked the Council to specify which exceptions were being relied upon in relation to each document within the disputed bundle. Given the extent of apparent non-disclosure (ie: non-compliance with the Decision Notice) it also asked the Commissioner for submissions in relation to the documents.

12. The Council, on analysing the disputed bundle, acknowledged that a significant number of further documents had to be disclosed in light of the fact that the Commissioner had not upheld its reliance upon regulation 12(4)(e) (the exception for internal communications). However, the Council's submissions stated that they intended to redact personal data from these documents but did not specify specifically what and why. It appeared to the Tribunal, on consideration of the documents which were to be disclosed, that redactions of personal data would in many cases be in contravention of the Decision Notice in that they would not relate to the personal data specified in paragraph 4(c) above (essentially the personal data of those supporting/opposing the CLEUD and complainants). Indeed, in the Tribunal's view many of the documents in the disputed bundle, said by the Council to contain such personal data and to be subject to regulation 12(3), were not. For instance, there were documents from professional representatives of complainants which did not appear to contain any personal data of the complainants and simply contained arguments and evidence against the granting of the CLEUD.

13. There were also documents to and from third parties, for instance other local authorities who were consulted and third party contractors, which again, did not seem to fall within the set of information the Information Commissioner had found to be properly subject to the exception in regulation 12(3). The Council sought also, in its schedule as to the disputed bundle, to rely upon the exception at regulation 12(5)(f) in relation to many of the documents which fall outside the defined set of personal data which the Commissioner had held should not be disclosed. The Council's attention is drawn again to the defined set of personal data and to paragraph 99 of the Decision Notice in this regard. Even allowing for these limitations, the Council did not seem to grasp the precise scope of regulation 12(5)(f) and that it only applied to the interests of persons actually providing information.

14. Finally, in this regard, the Tribunal noted that the Council sought to rely upon the exception at regulation 12(5)(b) in circumstances in which it doubted very much whether the exception would apply.

15. These were matters however for the Commissioner to consider in relation to enforcement of the Decision Notice. These points ought to have been picked up by the Commissioner after the last set of Directions from the Tribunal which had asked both Respondents to address the nature of the documents in the closed

bundle. The Information Commissioner chose not to provide any submissions whatsoever, despite a specific direction that he do so.

16. Given the clear indication that the Council does not understand or is not prepared to comply with its obligations under the Decision Notice, the Tribunal strongly recommends that the Commissioner take steps to ensure compliance, including an analysis of the disputed bundle as against the proposed application of exceptions and redactions. It should not fall to the Tribunal, essentially unassisted, to address whether a large bundle of documents falls outside of the terms of the appeal and ought properly already to have been disclosed.

Consideration of the Appeal

17. With regard to the information which properly falls within this appeal, the Tribunal considered first Mr Plumb's arguments that the Commissioner had been incorrect in viewing CLEUD applications as closely akin to complaints about breaches of planning requirements. Mr Plumb argued that they should be viewed more akin to letters of support and challenge to applications for planning permission, which would, in the ordinary course of events and under planning law, be a matter of public record. Alternatively put, the CLEUD consultation process should be viewed as a public inquiry. Mr Plumb argues that a CLEUD has the same effect as a grant of planning permission as going forward it would regularise the position and provide effective planning consent.

18. The Tribunal took the view that the operative factor in this regard, was not so much the categorisation of the information, that is, whether they should be viewed as akin to complaints as to planning breaches, but rather the expectations of those providing information as to what would be done with their personal data. This goes to the heart of the Council's reliance upon regulation 12(3) and its argument that to disclose the personal data would be a breach of the fairness requirement of the First Data Protection Principle. The Commissioner quite rightly asked himself whether those data subjects would have a reasonable expectation that their personal data would not be disclosed in this way. The Tribunal took into account that there was no requirement in law that the Council make public evidence provided for and against a CLEUD application and no indication from the disputed information that the individuals had been told that this may be the case. It seemed to the Tribunal that just because the Council had undertaken a wider than normal consultation in response to the application, it did not mean that those responding would expect their submissions/evidence provided to be made public.

19. Mr Plumb had produced a letter from the Council in relation to a different CLEUD application in which the Council had specifically noted that any responses may be made public. This evidence was neutral in the Tribunal's view: it did not, on its own, indicate a widely known practice that such matters would eventually become public and arguably indicated that an express mention had to be made in that case, given that there were no requirements that the information be put into the public domain. The Tribunal accepted that evidence and submissions provided to the Council for and against a CLEUD application were essentially different to those provided in relation to a planning application. The Tribunal acknowledged that some might view it as anomalous that planning law should render one kind of communication public and the other private, given that

they both start and finish with a public announcement and are both in effect capable of resulting in a change in planning permission - that however was the law as it stood at the relevant time (ie: when they provided their personal data). What counted were the expectations of the data subjects under the circumstances as they applied at the relevant time and whether those expectations were reasonable. Just because planning law might be considered by some inconsistent in this regard, did not render the expectations of those providing evidence and submissions in relation to the CLEUD application unreasonable.

20. The Tribunal was satisfied that the same reasonable expectation would be held by those who had provided complaints as to actual potential planning breaches. Indeed, the position in relation to such complaints was clearer in that no one was suggesting to the Tribunal that these were made in any circumstances other than those of an expectation of confidentiality.

21. The Tribunal concluded that the personal data referred to in paragraph 4(c) above, was properly subject to regulation 12(3), the Decision Notice in accordance with law in this regard and in turn the Council required to refuse disclosure. Given that the Tribunal had agreed with the Information Commissioner and the Council that disclosure of the particular defined set of personal data would be unfair and therefore a breach of the First Data Protection Principle, it was not required to proceed to consider whether or not a condition in Schedule 2 of the Data Protection Act was satisfied, or indeed whether the exception in regulation 12(5)(f) applied.

22. With regard to the second ground of appeal, the Tribunal considered the terms of section 194 of the Town and Country Planning Act 1990 which provides that:

"(1) If any person, for the purpose of procuring a particular decision on an application (whether by himself or another) for the issue of a certificate under section 191 or 192—,
(a) knowingly or recklessly makes a statement which is false or misleading in a material particular;
(b) with intent to deceive, uses any document which is false or misleading in a material particular; or,
(c) with intent to deceive, withholds any material information,
he shall be guilty of an offence."

23. Mr Plumb's argument in relation to section 194 ran as follows:

"The moment the [local planning authority] specifically engages with a potential witness, because they believe that witness has evidence to bring to bear, that witness is then under an obligation to respond and with the offences of Section 194 in mind. Given that the witness must respond since they have relevant information, that obligation places their response in a very different disclosure environment. Simultaneously, any past information of relevance supplied by that witness must be applied. The LPA should be very alert for inconsistency."

24. The Tribunal did not view this provision, even with the interpretation placed upon it by Mr Plumb, as having a material bearing on the expectations of those writing

in to the Council either with details of an alleged breach or in response to the CLEUD consultation.

25. Finally, the Tribunal accepted Mr Plumb's submission that there was a dearth of evidence proving intimidation of possible witnesses. Indeed, all there appeared to be was an assertion of such in a letter from the Council to the Information Commissioner. It accepts however that there was a reasonable assumption that in a small community such as this, any personal involvement in a contentious planning matter ran the risk of local divisions and difficulties between residents. Having found that it was a reasonable expectation of the particular data subjects that their personal data would not be disclosed, strictly speaking the question whether there had been any actual intimidation became irrelevant.

Conclusion

26. In light of the above, the Tribunal upholds the Commissioner's Decision Notice. It wished however to express again its strong recommendation that, being essentially on notice now that non-compliance with the Decision Notice is a live issue, he ensure that appropriate disclosure is made and failing that enforcement action is taken.

27. Our decision is unanimous.

Signed:

Melanie Carter

Judge Date 29 November 2011