



Case Reference: EA-2021-0229P

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

Heard in GRC Remote Hearing Rooms, Leicester: on the papers

Heard on: 11 May 2022

Decision given on: 25 May 2022

Before

**TRIBUNAL JUDGE ALEXANDRA MARKS CBE
TRIBUNAL MEMBER AIMÉE GASSTON
TRIBUNAL MEMBER PAUL TAYLOR**

Between

JAMES FIDELL

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Representation:

For the Appellant: in person

For the Respondent: Eric Metcalfe, Barrister and Sapna Gangani, Solicitor

Decision: The appeal is **allowed**.

Substituted Decision Notice:

To: City of York Council
Information Governance, Complaints and Feedback Team
West Offices, Station Rise, York YO1 6GA

The Tribunal directs the public authority within 35 days of the date of promulgation of Decision reference **EA-2021-0229P** of the First Tier Tribunal, General Regulatory Chamber (Information Rights):

1. to carry out the further searches for information set out in paragraph 53 (a) of the said Decision; and
2. to disclose the requested information in the Closed Bundle presented to the Tribunal and additionally to disclose (save to the extent that exceptions to such disclosure properly apply under the Environmental Information Regulations 2004) any further information found as a result of the further searches carried out pursuant to 1 above.

Dated: May 2022

Alexandra Marks CBE
(Recorder sitting as a Judge of the First Tier Tribunal)

REASONS

Background to Appeal

1. On 9 December 2020 (A35-41 Open Bundle ('OB'), the Appellant wrote to Councillors explaining the background to his requests for information from officers at City of York Council (the 'Council'):
 - (a) on 16 September 2019, he had bought a property at [address redacted] Salisbury Terrace, York;
 - (b) this is a terraced house which has a public footpath running adjacent to the front wall;
 - (c) the Appellant stated that there is a significant damp problem inside the property, originating from the base of the front wall and extending onto the hallway wall;
 - (d) the Appellant attached photographs which, he said, showed that the public footpath had been raised above its original level and slopes towards the house, resulting in rainwater collecting on the footpath being held at the base of his property's front wall and directed into an airbrick;
 - (e) this renders the property's original damp proof course ('DPC') redundant as the footpath is at a higher level than the DPC;

- (f) because the footpath is public, the Appellant said he cannot legally amend it and is *'entirely beholden to the Council to correct'* it;
- (g) the Appellant first reported the issue to the Council by telephone on 8 October 2019. An individual from the Council's Highways Department investigated and concluded there was no adverse camber to the public footpath and that the DPC would prevent damp ingress. The airbrick was not reported on. The Appellant considered this conclusion at odds with what could be seen. During the winter months, the damp within his property increased significantly;
- (h) the Appellant emailed the Council on 5 December 2019 with supporting photographic evidence which, he said, clearly refuted the Highways Department's findings and showed the problem;
- (i) on 31 December 2019, the Council's Head of Highways contacted the Appellant by telephone. Having looked at the issue again, he concluded that the public footpath required changing and that this would take place in January 2020;
- (j) the Council officer's conclusion was confirmed by several emails from different members of the Highways team, and a design drawing for the footpath's amendment was produced as late as April 2020. The footpath was also marked up with chalk by one of the engineers in preparation for its amendment;
- (k) during the winter of 2019/2020, there were several severe storms which increased the damage. The Appellant's claim to the Council's compensation scheme was for repair of the grout and airbrick in the front wall, replacement of the lower section of plaster, and replacement of rotten skirting board;
- (l) this claim was handled by the Council's Insurance & Risk Management team, and was passed to the Council's insurers, Zurich Municipal ('ZM');
- (m) the Appellant said that, having acknowledged that the footpath needed correcting, the Council then changed its position – and found no fault with the footpath;
- (n) the Appellant said that the Council did not inform him of this change of stance: he learnt of it by a brief email from ZM;
- (o) the Appellant asked the Council for a copy of the report provided to ZM but received no response;
- (p) the Highways Department did not provide the Appellant with information on the assessments conducted and subsequent reports on the footpath;
- (q) the Appellant said that escalation of his complaint to Stage 3 through the Council's 'Have Your Say' complaints process did not address the issues sufficiently;
- (r) having completed the Council's internal complaints procedure, the Appellant applied to the Local Government and Social Care Ombudsman on 14 July 2020. The Ombudsman advised this was a matter for the courts which, as the Appellant had told the Council's insurers on 1 April 2020, would be *'financially prohibitive'* for him (D411-413 OB).

The requests for information

2. On 18 May 2020, the Appellant asked the Council to provide him with:

'All information pertaining to the reported problem with the public footpath under case number 103847402 and [address redacted] Salisbury Terrace. Not limited to, but including:

- Details of inspections conducted by City of York Council.*
- Reports compiled - both official and unofficial.*
- Any communications had in respect to this case including any with York City Council Insurance and Risk Management Team.*

Also, details of other/historic reported problems with Salisbury Terrace public footpath and highway. Including corrective works undertaken.'

3. The Council confirmed receipt of the Appellant's request the same day.
4. On 6 July 2020, the Appellant asked for an update, noting that it had been 36 working days since his request was made.
5. On 13 July 2020, the Council responded, apologising for the delay and indicating that it would respond as soon as possible but that, due to the Covid-19 pandemic, "*we may take longer to respond to your request*".
6. On 29 July 2020, the Appellant complained to the Information Commissioner (the 'Commissioner') about the Council's handling of his request.
7. On 10 September 2020, the Council responded to the Appellant's request, saying it attached details of inspections, copies of the reports and records of correspondence held.
8. On 1 October 2020, the Appellant emailed the Council, saying that its response was incomplete, indicating various attachments appeared to be missing, and asking the Council to review its decision. He indicated information he considered the Council should hold as follows:

"1. a) Photos following an inspection conducted around December 2019.

b) An additional report that confirms the damp was caused by the window sill & cladding.

c) Information about a site visit during the week of 24-28th August 2020.

d) Reports, notes or outcomes of inspections of your property either formal or informal.

e) All communications requested between Zurich Insurance and the risk management team.

f) Details of other/historic reported problems with [address redacted] public footpath and highway. Including corrective works undertaken prior to 2019.

2. Records about why the roadway was raised from its original height.

3. Information about why the public footpath on the eastern end, northern side of [address redacted] has been amended to give it the correct positive camber.

4. *A copy of the proposed design for the corrective works as per email dated the 2 September 2020.*”

9. On 3 November 2020, the Council responded to the Appellant, summarising his complaint and explaining that it would now be reviewed under the Environmental Information Regulations 2004 (EIR) rather than the Freedom of Information Act 2000 (FOIA).

10. On 4 December 2020, the Council responded to the Appellant’s further requests for information as follows:

(1)(a) Photos following an inspection conducted around December 2019 – no additional records beyond that already disclosed;

(b) An additional report that confirms the damp was caused by the window sill & cladding – a comment (rather than a formal report) was provided to the Council’s insurance provider but this was withheld under reg. 12(5)(d) EIR (confidentiality of proceedings) pending an assessment of the balance of the public interest;

(c) Information about a site visit during the week of 24-28th August 2020 – further document concerning a water leak reported to Yorkshire Water disclosed;

(d) Reports, notes or outcomes of inspections of your property either formal or informal – no further information held;

(e) All communications requested between Zurich Insurance and the risk management team – withheld under reg. 12(5)(d) EIR pending a balancing of the public interest;

(f) Details of other/historic reported problems with Salisbury Terrace public footpath and highway. Including corrective works undertaken prior to 2019 – no information held save for ‘carriageway patching’ while the road was closed in January 2019;

(2) Records about why the roadway was raised from its original height – document ‘Enquiries 2 CRM’ disclosed;

(3) Information about why the public footpath on the eastern end, northern side of Salisbury Terrace has been amended to give it the correct positive camber – no information held;

(4) A copy of the proposed design for the corrective works as per email dated the 2 September 2020 – document ‘Salisbury Terrace Draft Design’ disclosed.

11. On 8 December 2020, the Appellant wrote to the Council stating that it still did not appear to have provided him with all information held and asking the Council to conduct a further internal review.

12. On 19 January 2021, the Council notified the Appellant that it had completed its assessment of the balance of the public interest in relation to items (b) and (e) above and concluded that this favoured the maintenance of the exceptions, in addition to those under regs. 12(4)(e) (internal communications), 12(5)(b) (information whose disclosure would adversely affect the course of justice), and reg. 12(5)(e) (commercial information).

The Commissioner’s investigation and Decision Notice

13. On 22 March 2021, the Commissioner commenced her investigation of the Appellant’s complaint.

14. On 27 July 2021, the Commissioner issued Decision Notice IC-48292-Y2F7 ('DN') which in summary stated:

(a) the Council was **not** entitled to apply reg. 12(5)(d) (confidentiality of proceedings) to the requested information since no legal proceedings were extant at the time the Appellant made his request (paras. 25-28 DN);

(b) the Council **was** entitled to rely on reg. 12(5)(b) (prejudice to the course of justice) on the basis that it was more likely than not that the disclosure of the requested information would undermine the Council's existing legal remedies in this matter and therefore adversely affect the course of justice (paras. 29-45 DN). In particular, the Council argued that the requested information was covered by litigation privilege (para. 31 DN) and its disclosure would undermine its ability to defend its case. In relation to the balance of the public interest, the Commissioner concluded that, given the provisions of CPR 31, "*there was a more appropriate regime than the EIR for accessing information that is relevant to potential claims such as in this case*" (para. 64 DN) and that there was a "*strong public interest in maintaining the integrity of [the judicial] process, as managed by the relevant court*" (para. 66 DN). Given the "*strong possibility of a formal claim before the courts being made*", there was an "*alternative access regime to the information via disclosure under the CPR*" (para. 67 DN) and that disclosure would "*undermine*" the court's "*ability to manage disclosure of relevant information*" as well as the "*current level playing field in the court proceedings*" (para. 68 DN). Given the strong public interest in maintaining the exception in this instance and in the absence of any opposing factors "*such as clear evidence of unlawful activity or negligence on the part of the Council*" (para. 69), the balance of the public interest in protecting the course of justice outweighed the private interests of the Appellant (para. 70 DN);

(c) the Council was entitled to rely on the exception under reg. 12(4)(e) (internal communications) on the basis that the information in question consisted of "*correspondence and discussions between officers of the council*" (para. 77 DN). In this instance, the communications concerned the Appellant's "*claim for damages, and discussions surrounding the allegations he has made regarding fault*" and would therefore fall to be considered under the CPR in the event that the Appellant issued a claim for damages (para. 85 DN). The Commissioner accepted that the effect of such disclosure was that council staff "*would feel dissuaded from being full and frank in their discussions in the future in order to prevent information which could hinder the defence of a claim made against the Council*" (para. 86 DN) and this might adversely affect discussion in future cases, which would risk "*Council decisions on claims being made on a less informed basis*" (para. 88 DN). Consequently, the Commissioner was satisfied that the balance of the public interest favoured the maintenance of the exception under reg. 12(4)(e) in this case (paras. 90-91 DN);

(d) in relation to the further information which the Appellant complained must be held by the Council in relation to his case, the Commissioner considered the details given by the Council of the searches it had undertaken in relation to the Appellant's request, together with the Appellant's claims concerning particular items of information which he considered ought to have been held and disclosed. Having done so, the Commissioner concluded that the Council had "*carried out adequate and appropriate searches of the relevant areas of the Council in order to locate the requested information*" (para. 112 DN) and was therefore satisfied that "*on a balance of probabilities, no further information is held falling within the scope of the complainant's requests for information*" (para. 113 DN);

- (e) the Council's delay in responding to the Appellant's request breached the requirements of art 5(2) EIR (paras. 114-117DN); and
- (f) the Council was not required to take any further steps (para. 3DN).

Appeal to the Tribunal

- 15. On 24 August 2021, the Appellant sent a Notice of Appeal to the Tribunal challenging the Commissioner's Decision Notice.
- 16. The parties consent to this matter being dealt with on the papers rather than at an oral hearing.
- 17. The papers available to Panel and the parties are set out in paragraph 25 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

- 18. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'1 (1) Any person making a request 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 this is the case, to have that information communicated to him.'

Regulation 2 EIR: definition of 'environmental information'

- 19. 'Environmental information' is defined by Regulation 2(1) EIR as any information 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 with 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)'

Regulation 5 EIR: access to environmental information held by public authorities

20. Regulation 5 EIR sets out a specific duty by public authorities to make environmental information available on request.

21. There are exceptions to this duty. Those pertinent to this appeal are set out in Regulation 12 EIR, the relevant parts of which provide:

'12 (1) Subject to paragraphs (2)... 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.

...

(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; [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 –

...

(b) the course of justice...

...

(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...'

22. A public authority is permitted to withhold the requested information under the exceptions in regs. 12(4) and 12(5) *only* if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

The powers of the Tribunal

23. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of EIR are set out in FOIA, as follows:

‘s.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.58 Determination of appeals

(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.’

The burden of proof

24. The burden of proof rests with the Appellant in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

25. Before the hearing, the parties had submitted written evidence. This comprised one Open Bundle of 474 pages (and an Index); and a Closed Bundle of 22 pages (and an Index).

Submissions

The Appellants’ submissions in his Appeal Notice dated 24 August 2021

26. So far as material to the Tribunal’s role, in summary the Appellant submits that:

(1) the Council has omitted details of engineers’ inspections: Council officers are ‘cherry picking’ favourable reports, having repeatedly changed their position:

(a) the Council’s Highways Department misdiagnosed the issue on 10 October 2019 (the only report the Council has released);

(b) the Council’s Head of Highways’ email of 31 December 2019 shows that the Council accepted that the footpath needed amending, yet the Council says no records exist of any inspection;

(c) released photos show that engineers visited the site and marked the path with chalk yet the Council says there are no records of this visit either;

(d) the Council has released a design plan which would have required a site visit but again no records have been provided;

- (e) the Council's third assessment of the issue was provided by ZM which would have required an engineer to have visited the site but again no records have been provided;
- (2) His request for information is not driven by a liability claim but to have a faulty public footpath amended;
 - (3) A case has been made for 'protecting the public purse' but the public should be able to scrutinise how public money is being spent. There is public interest if a public path has been laid incorrectly, affecting multiple residents. There have been at least four inspections by Council engineers with different findings. This casts doubt on their credibility, and shows a waste of public funds and resources which is in the public interest to know.
 - (4) The Council's main justification for withholding information hinges on hypothetical court action following a claim through the Council's compensation scheme. They believe this is the sole driving factor for seeking this information. The claim was made on the Council's own advice, three months after the problem was first reported, the Council having accepted that the footpath needed amending despite its Highways Department's misdiagnosis of the issue on 10 October 2019;
 - (5) The Decision Notice states that the public interest in this matter is just the Appellant's but other residents of the street have made similar complaints, and the local Councillor believes the problem is not isolated to one property: there is a public interest if a public path has been laid incorrectly which affects multiple residents;
 - (6) The Council has repeatedly (though inconsistently) accepted that the footpath needs amending: the Decision Notice is incorrect to state that the Council currently accepts that the footpath needs work;
 - (7) The Council's responses have omitted to comment on crucial issues such as the footpath being raised above the level of the airbrick in the Appellant's front wall, thus allowing water to enter his property. Despite the Appellant's repeated invitations, the Council has not carried out an internal inspection of his property;
 - (8) The Council has been deliberately devious, and demonstrated an intention to delay, even releasing an email which says '*...this tactic will hopefully help [the Council] save face and mitigate any risk of prolonged correspondence...*';
 - (9) Council officers have displayed a lack of integrity in changing their findings when it was beneficial for them to do so. If council officers can suppress the release of information which may show them in a bad light, there is no accountability;
 - (10) As the Appellant's surname has been incorrectly spelt on numerous Council documents, this casts doubt on the thoroughness of Council searches which were name-based.

Submissions on behalf of the Commissioner dated 25 October 2021

27. The Commissioner's Response dated 25 October 2021 characterises the Appellant's appeal as challenging the Commissioner's assessment of the public interest, and questioning the Commissioner's conclusion that certain information was not held. Each ground is denied on the basis that:

- (a) The Appellant does not suggest the exceptions relied on by the Council are not engaged but challenges the Commissioner's assessment of the public interest;

(b) It is incorrect to suggest that the possibility of legal proceedings is ‘hypothetical’: the Commissioner took account of the fact that no proceedings had been brought at the time of his request (para. 25 DN). However, reg. 12(5)(b) does not require proceedings to be in train. Information is capable of falling within reg. 12(5)(b) if it is privileged, or where proceedings are merely anticipated;

(c) The Commissioner did not err in taking account of the disclosure regime under the Civil Procedure Rules (CPR) which provides the Appellant with alternative means of seeking the requested information. This is consistent with legal authority, and with the fact that the powers under the CPR are exercisable prior to the commencement of proceedings;

(d) The Commissioner did take account of the broader public interest in the disclosure of the requested information: she did not need to cite the specific value of disclosure to other residents whose properties may or may not be affected by the same issues; (paras. 49-51 and 80 DN);

(e) The Commissioner did take account of the cost to the public purse of investigating and rectifying damage to a private citizen’s property as well as the costs of legal action (paras. 50 and 65 DN);

(f) The Commissioner also took account of the public interest in the Council being transparent and accountable for its actions (see para. 49 DN); and

(g) The Commissioner made appropriate enquiries of the Council, including details of the searches that it had undertaken. Having done this, she was entitled to conclude that, on the balance of probabilities, it was more likely than not that no further information existed.

Discussion

Environmental information?

28. The Panel first considered whether the information sought by the Appellant meets the definition of ‘*environmental information*’ as defined in reg. 2(1). Bearing in mind that the information sought in this case is about a public footpath; surface water drainage from it; alleged water ingress into abutting residential property; and the development of a damp problem within that property, the Panel is satisfied that the EIR regime applies rather than the Freedom of Information Act 2000.

A claim against the Council?

29. The Panel notes that, in the Decision Notice the Commissioner characterises this case as a ‘*claim against the Council*’ for which the Council denies liability. The Commissioner concludes, however, that because no proceedings were extant when the Appellant made his requests for information, the Council was incorrect to apply reg. 12(5)(d).

30. Neither the Council nor the Appellant has challenged the Commissioner’s conclusion in this respect – nor does the Panel consider that the Commissioner made any error of law in finding that the exception in reg. 12(5)(d) was not engaged.

31. Nevertheless, the Council maintains that by making his requests, the Appellant was effectively gathering information – including potential defence arguments – prior to him taking a case against the Council to court. This position appears to have been accepted by the Commissioner, and is

reflected in the Decision Notice which finds it *'more probable than not that a disclosure of the information would undermine existing legal remedies in this matter...'* (para. 45 DN).

32. However, the Panel has seen no evidence to support the Council's stance that the Appellant's request for information was with a view to pursuing legal proceedings at court. Instead, the Council appears to assume that litigation might follow. For her part, the Commissioner accepts there is *'a set process for necessary information to be obtained if there is a need to make a claim to the courts for damage to property'* (emphasis added) (para. 38 DN). The Panel has seen no evidence in this case of any *'need to make a claim to the courts'* nor any intention on the part of the Appellant to do so. In any event, the EIRs are blind as to applicant and motive.

33. Further, the Panel rejects the Commissioner's analogy of 'pot hole' claims for damage to cars because, in this case, there is no *'legal claim in process of being resolved'* (para. 41 DN).

34. In this case, the possibility of a claim to the Council's compensation scheme was seemingly first raised by the Council rather than the Appellant (in an email dated 6 January 2020), and likewise it was not the Appellant but the Council's insurers which raised for the first time the issue of liability (in ZM's email to the Appellant dated 23 January 2020 at D403 OB).

35. Far from wishing to pursue a claim at court, the Appellant expressly stated in his email to the Council's insurers, ZM, dated 1 April 2020 that litigation would be *'financially prohibitive'* for him (D411-413 OB).

36. The Panel recognises that the Council was entitled to assess the position as at the date of the information request, but notes that, now two years after the Appellant's initial request, there is no evidence that the Appellant has taken, or intends to take, any steps to pursue legal proceedings.

37. Contrary to the Council's position – as accepted by the Commissioner – the Panel considers that, as the Appellant himself says, he is primarily seeking from the Council as the relevant Highways Authority rectification of the public footpath which abuts the front wall of his property, and has requested information from the Council about this.

Error of law or wrongful exercise of discretion?

38. In considering whether the Commissioner made any error of law in her Decision Notice, or wrongly exercised her discretion, the Panel has been hindered in its task in this appeal by the Council's failure to identify which exceptions under EIR are claimed to apply to which information withheld from the Appellant.

39. The Commissioner requested clarification of this issue in her initial letter to the Council dated 22 March 2021 (D211 OB) seeking *'detailed explanations for the parts of the EIR cited'*. Having received no response from the Council on this point (see D223 OB), the Commissioner did not pursue the matter. The Decision Notice does not identify which EIR exception applies to which withheld information but instead recites general principles with little reference to the specific materials involved in this case.

40. The Panel therefore strived to establish for itself from the papers which exceptions from disclosure might apply to the withheld information.

41. Having carefully reviewed the Closed Bundle (CB), where the Tribunal would usually expect to find copies of withheld material, in this case the Panel found that the CB comprises mainly emails

to and from the Appellant himself, and documents already included in the Open Bundle (OB). The small remainder of CB materials withheld comprise five pages:

- (a) an internal email (at A1 CB)
- (b) a completed form (at A9 CB);
- (c) internal exchanges of email (at A13-14 CB);
- (d) another internal email (at A18 CB).

42. In view of the very limited withheld material contained in the CB, it is unclear what information the Commissioner was referring to in para. 111 DN where she says '*some of the information which the [Appellant] argues should be held falls within the scope of the information withheld under the other exceptions applied. The Commissioner has taken this into account in her decision as regards the application of Regulation 12(4)(a).*'

Applicable exceptions under EIR?

43. In the absence of any indication by the Council or the Commissioner as to the precise extent of any other material withheld yet not included in the CB, the Panel is unable to express a view on the application of EIR exceptions to any material other than that contained in the CB.

44. The Panel therefore considered solely whether the Commissioner erred in law in concluding that the EIR exceptions mentioned in the DN apply to the items (1)-(4) listed in para. 41 above.

Reg. 12(5) exceptions

45. First, we considered the exceptions in reg. 12(5), all of which permit a public authority to refuse to disclose environmental information to the extent that disclosure **would** have an **adverse** affect. Such an adverse effect needs to be significant (more than trivial) and relevant to the exception claimed; be the result of a causal link between the disclosure and negative consequence; and be more likely than not to happen.

Reg. 12(5)(b) [course of justice]

- (1) We do not accept the Commissioner's analysis that disclosure of this information **would** affect the 'course of justice', let alone **adversely** affect it. Our reasons are that:
 - (a) Nothing in the CB documents reveals the Council's *legal* position, nor breaches legal professional privilege (because none of the material comprises legal advice) nor litigation privilege because these documents were not produced for the dominant purpose of litigation: we consider that at the highest only item (3) comes close to satisfying any of these criteria.
 - (b) In the Panel's view, the disclosure process in the Civil Procedure Rules (CPR) would not be 'undermined' were these documents to be disclosed to the Appellant. To the extent that these documents undermine the Council's stance, and support the Appellant's position in the seemingly unlikely event any litigation were to ensue, as the Decision Notice itself acknowledges, the CPR would in all likelihood require such material to be disclosed in due course in any event.
- (2) Overall, we consider that the 'course of justice' exception is not engaged because:
 - (a) Item (1) – the contents are administrative.

- (b) Item (2) – the Appellant has apparently already seen this (see his submissions at para. 26(1)(a) above);
 - (c) Item (3) – the gist has already been disclosed in the Open Bundle (D436 OB); and
 - (d) Item (4) – the contents are essentially administrative.
- (3) Consequently, the Panel considers the withheld information in the Closed Bundle, far from adversely affecting ‘*the smooth running of the wheels of justice*’ (para. 38 DN) would add little of substance to the information already known to the Appellant and/or disclosed in the Open Bundle.

Reg. 12(5)(d) [confidentiality of proceedings]

- (4) As noted in paragraph 30 above, we agree with the Commissioner’s analysis, unchallenged by the parties, that the exception for confidentiality of proceedings not engaged; and

Reg. 12(5)(e) [confidentiality of commercial information]

- (5) This exception was neither discussed in the DN nor was it pursued with any vigour by the Council. However, the Panel has considered this exception since it was claimed by the Council albeit with no evidence to support the proposition that an **adverse** affect **would** result from disclosure of ‘*confidential commercial information*’. In the Panel’s view, none of items (1)-(4) could plausibly be described as ‘*commercial or industrial information*’, let alone such where ‘*confidentiality is provided by law to protect a legitimate economic interest*’. Our reasoning is that all the items are internally produced, and have been internally retained, by the Council and comprise emails between staff and an eForm. Thus we do not consider that the ‘*commercial confidentiality*’ exception is engaged in relation to this withheld material.

Reg. 12(4) exceptions

46. The Panel then considered whether any of the exceptions under reg. 12(4) apply. We concluded that of those exceptions, only reg. 12(4)(e) [internal communications] applies to items (1)-(4) listed in paragraph 41 above. We considered separately reg. 12(4)(a) [information not held].

Reg. 12(4)(e) [internal communications]

47. Accepting the Commissioner’s general analysis at paras. 76 and 77 of the Decision Notice (DN), the Panel concluded that at least items (1), (3) and (4), and possibly item (2) could properly be described as ‘internal communications’ and that this exception is therefore engaged.

Reg. 12(4)(a) [information not held]

48. The Commissioner accepted, and described in paras. 98-105 DN, the Council’s account of the searches it had carried out. The Commissioner also accepted the Council’s explanation that ‘*the level of information which the [Appellant] suggests should be held would not be held by it.*’ (para. 106 DN)

49. The Commissioner concluded that ‘*having considered both the arguments of the Council, and of the [Appellant]...[she] is satisfied that the Council has carried out adequate and appropriate searches...*’ (para. 112 DN) and that she ‘*is therefore satisfied that, on a balance of probabilities, no further information is held falling within the scope of the complainant’s requests for information.*’ (para. 113 DN)

50. The Panel recognises that the Commissioner’s role is not to decide whether or not the public authority *should* hold the information: merely whether, on the balance of probabilities, it does or does not hold it.

51. However, the Panel noted the persuasive (albeit not binding) comments of this Tribunal in the case of *Bromley and others v. Information Commissioner EA/2006/0072* that:

“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. We think that [the balance of probabilities] 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.”

52. Having reviewed all the factors mentioned above, the Panel shares the Appellant’s doubts that the Council, as a competent Highways authority, has no further records of various site visits nor information such as measurements and written-up reports of such site visits. We note that there was apparently one breach of the Council’s practice for storing and recording information in this case (see para. 100 DN). The Panel considers that, in view of this, other records may be held informally by individuals in the Highways Department who are or were involved in this matter. It is unclear from the Council’s description of the searches it has conducted (see D223 OB) which refers to ‘*a search was conducted of the team*’ whether searches were made of such individuals’ papers, files, notebooks etc. We therefore consider that there may be gaps in the Council’s account of searches so far carried out.

53. We recognise that EIR does not require public authorities to *create* information to answer a request, but they may have to bring it together from different sources. We therefore direct the Council:

(a) to conduct further searches as follows of all paper and electronic/audio records (including those on personal electronic devices of Council officers and other staff involved in this matter):

(i) relating to the Appellant (his name correctly spelled) and his address, as held at 18 May 2020;

(ii) otherwise relating to the stretch of highway and footpath from nos. 242-220 (inclusive) Salisbury Terrace, York within the scope of the Appellant’s request;

(iii) comprising notebooks; notes; folders; email accounts/emails/folders and attachments/documents with a view to locating photographs; measurements; drawings; diagrams; sketches; other documents relating to Salisbury Terrace, York within the scope of the Appellant’s request (as held at 18 May 2020) of the individuals identified as follows:

- a. The person who drew the Design Assessment of Salisbury Terrace dated 07.04.2020 (A47 OB);
- b. The author of the email dated 2 September 2020 (C103 OB);
- c. The author of the email dated 13 January 2020 (C90 OB);
- d. The author of the email dated 31 December 2019 (C91 OB);
- e. The person named on the Langan Schedule (C164 OB); and
- f. The sender of the email dated 10 March 2020 (D437 OB)

(b) if the above searches – or any other means – reveal any further information within the scope of the Appellant’s request (set out in paras. 8 and 10 above), the Council shall immediately disclose such information to the Appellant save to the extent that any exceptions to the EIR are engaged and, in accordance with the public interest test (including the factors identified below), the public interest weighs in favour of withholding that information.

Balancing the public interests for and against disclosure of the information requested

54. Having considered the engagement of the EIR exceptions claimed by the Council (to the extent upheld by the Commissioner), the Panel went on to consider whether the Commissioner should have exercised her discretion differently when applying the public interest test. The Panel bore in mind the presumption in favour of disclosure under the EIR and that information should be disclosed unless there is a good reason not to.

55. Under the EIR, the public interest test applies to reg. 12(4)(a) [information not held] but in this case the Panel considered that no meaningful application of public interest factors could be applied to that exception. However, the Panel did review the Commissioner’s application of the public interest test in relation to the exception in reg. 12(4)(e) [internal communications] which the Panel agrees is engaged, and also to the exception in reg. 12(5)(b) [course of justice] in case we are wrong in finding that the Commissioner erred in law when she concluded that this exception is also engaged.

56. In weighing the public interest, we considered first factors in favour of withholding the information, and then those in favour of disclosing it. We noted that we must consider the circumstances as at the time of the request, and only so far as directly relevant to the interests which the particular exception protects. Further, we bore in mind that, under the EIR, where more than one exception applies, public interest arguments in favour of withholding the requested information can be combined.

- (1) Public interest factors in favour of withholding the information (and maintaining the exception):

A. Reg. 12(4)(e) [internal communications]

(a) Para. 81 DN adopts the Council’s stance that ‘*the information withheld under this exception solely relates to the [Appellant’s] liability claim, and that the expectation under the CPR is such communications are confidential*’. For the reasons cited in paras. 31-37 above, the Panel does not accept this stance.

(b) The Commissioner cites various factors in favour of withholding the information – on the basis that the information sought is in relation to a ‘legal claim’ – but does not apply those factors specifically to the information actually withheld, namely items (1)-(4) in paragraph 41 above.

(c) In the Panel's view, at the highest these factors could apply only to item (3) and even that information could not plausibly be described as '*discuss[ions of] legal claims being made against them in a full and frank fashion*' (para. 87 DN).

B. Reg. 12(5)(b) [course of justice]

(d) Paras. 52 – 69 DN set out factors in favour of withholding the information. In the Panel's view, however, all these factors are based on the premise of anticipated litigation. As stated above, we do not accept this premise.

(i) Moreover, the various factors cited in the DN are in generic terms without considering the contents of the information actually withheld in this case, namely items (1)-(4) in para. 41 above. The Panel considers that at the highest such factors could apply only to item (3) and even that information could not credibly be described as '*detailed defence information*'.

(ii) Further, information contained in the Open Bundle (OB) is – in the Panel's view – such that any claimed litigation privilege or legal professional privilege has already effectively been waived because the communications are no longer confidential. Examples of such disclosure in the OB are:

- a. An email dated 2 September 2020 from one Council officer in the Highways Department to another saying '*it is a little embarrassing*' that there has been '*conflicting information*' about whether or not there is a backfall from the footpath (C103 OB);
- b. The same email says that '*renewing the full length of the concrete section [of the footpath] would; solve the issue but would have huge impact*' and refers to the nature, extent and cost of such impact (C103 OB);
- c. The emails dated 10 March 2020 repudiating the insurance claim (D436 OB);
- d. An email (apparently in September 2020) from a Senior Solicitor at the Council to a Highways colleague saying '*I do not believe unfortunately that there are any available exemptions under FOIA...and therefore we must disclose the information the [Appellant] seeks*'. (C101 OB)
- e. In the same email, the author discusses ways of ensuring that the carrying out of works '*doesn't amount to admission of liability on our part ... [and] whilst this tactic will hopefully help [the Council] save face and mitigate any risk of prolonged correspondence... I cannot guarantee that...[this] will convince the [Appellant] to draw a line under these proceedings...*' (C101 OB)
- f. Finally, in the same email, the author seemingly accepts that '*the works...being carried out (...arguably is what he [the Appellant] wants ultimately).*' (C102 OB)

(2) Public interest factors in favour of disclosing the information:

For both Reg. 12(5)(b) [course of justice] and Reg. 12(4)(e) [internal communications]

(a) Paras. 49-51 and 80 of the Decision Notice (DN) set out the factors the Commissioner considered when weighing the public interest in favour of disclosing the withheld information.

(b) The Panel agrees and accepts that there is a general public interest in the Council being transparent and accountable for its actions (para. 49 DN).

(c) The other two factors the Commissioner took into account (paras. 50 and 51 DN) relate to ‘*damage to the property of a private individual*’ and say that if the Council holds information ‘*which demonstrates that it was responsible for the damage*’ there is a significant public interest in it ‘*being fair and admitting its liability and recompensing the individual for the damage caused*’. In the Panel’s view, both these factors look at the Appellant’s request for information as if he were a private individual proposing to pursue litigation rather than, as he maintains, a property-owner seeking rectification works to a faulty public footpath which abuts not only his property but also numerous other residential properties and thus potentially affects multiple other users. In the Panel’s view, taking account of these multiple other users significantly affects the nature and weight of public interest factors.

(d) In the Panel’s view, the Decision Notice is flawed in failing to identify, and therefore seemingly fails to take account of, the following public interest factors in favour of disclosing the requested information, namely that:

- (i) multiple residents in addition to the Appellant have properties abutting the footpath and may be affected by the issues on which the Appellant seeks information;
- (ii) countless pedestrians and other users of the public footpath in question may also be affected by the state of the footpath;
- (iii) there is a potential health and safety impact for such pedestrians and others posed by the state of the footpath, as indicated by photographs in the Open Bundle (at A38-9);
- (iv) there are potential health and safety implications for occupiers of properties abutting the footpath if rainwater from the footpath causes - or contributes to - damp within their properties;
- (v) the Council, as highway authority, by disclosing the information, would:
 - a. openly and transparently demonstrate its procedures for - and outcomes of - inspection, appraisal, maintenance and rectification of or other works to public footpaths;
 - b. enable the public to scrutinise whether the Council’s approach to its responsibilities as highway authority is:
 - i. consistent and reliable;
 - ii. supported by comprehensive, accurate and factual measurements, drawings, diagrams, photographs and other media;
 - iii. properly recorded, filed and retrievable in accordance with good records management practice set out in the Lord Chancellor’s code of practice under section 46 FOIA; and
 - iv. efficient, cost effective and carried out in the interests of affected residents, Council taxpayers and the public at large.
 - c. disclosure of the information in question here would not harm the way in which the Council makes decisions or gives advice.

57. Taking all the above factors into account in this case and applying them specifically to the information withheld in this case, the Panel concludes that – in respect of each of the exceptions

claimed by the Council – the Commissioner ought to have exercised her discretion differently when balancing the public interest. The Panel considers that, contrary to the Commissioner’s conclusion in her Decision Notice, the combined public interest factors in favour of withholding the requested information are outweighed by the public interest factors in favour of disclosing it.

Conclusion

58. For the above reasons, the Panel finds that the Appellant has discharged the burden of satisfying the Tribunal that the Commissioner’s decision was wrong in law and that it also involved an inappropriate exercise of discretion. Accordingly, in accordance with s.58(1)(a), we substitute the Commissioner’s Decision Notice with that set out at the top of this decision.

59. The appeal is allowed.

Signed:

Date: 25 May 2022

Promulgated:

Date: 25 May 2022

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)