



NCN: [2023] UKFTT 00052 (GRC)
Case Reference: EA-2022-0101

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard at: Field House, London

Heard on: 10 January 2023
Decision given on: 19 January 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER ROSALIND TATAM
TRIBUNAL MEMBER STEPHEN SHAW

Between

TREVOR S HARRISON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For Appellant: In person

For the Respondent: Did not appear

Decision: The appeal is dismissed.

REASONS

Introduction

1. This is an appeal by Mr. Harrison against the Commissioner's decision notice IC-81180-S6Y2 of 1 April 2022 which held that Kent County Council ('the Council') were entitled to withhold the requested information under regulation 12(4)(e) (internal communications) of the Environmental Information Regulations 2004 ('EIR'). The Commissioner held that the Council wrongly handled the request under the Freedom of Information Act 2000 ('FOIA') and breached regulation 5(1) and 14(1) EIR. The Council was not required to take any steps.

Factual background

2. In certain circumstances a local authority is under a statutory duty to transfer land it has provided for a school to the trustees or governors, who then hold it for the purposes of the school. In many of the circumstances where authorities have to transfer land, the requirement does not extend to 'playing fields'.
3. There is an ongoing dispute between the Council and a number of schools, including the school in relation to which which Mr Harrison is a trustee, about the definition of 'playing fields'.
4. In outline, the Council applies a wider definition of playing fields and consequently takes the view that less land needs to be transferred. The schools apply a narrower definition and therefore take the view that more land needs to be transferred. The Department for Education has made clear on a number of occasions that its view is that the narrower definition applies, and has, on occasion, issued directions to require transfers on these terms. These directions have not, according to Mr. Harrison, always been complied with. Ultimately the definition of 'playing fields' is a matter for a Court to decide. There is currently no binding authority on this issue.

Request

5. Mr. Harrison made the following request to the Council on 26 August 2020:

Please may I have sight of the position paper referred to in the third paragraph of Keith Abbot's letter to me of May 17, 2019 and the third paragraph of Roger Gough's letter to me of February 5, 2020.

6. The Council replied by letter dated 13 October 2020 withholding the information under s 43(2) FOIA (commercial interests) and s 44 (prohibitions on disclosure).
7. The Council upheld its position on internal review by letter dated 3 November 2020.
8. Mr. Harrison referred the matter to the Commissioner on 6 January 2021.

9. During the course of the investigation the Council withdrew its reliance on section 44 and relied in addition on section 36 and section 42 FOIA.
10. The Commissioner asked the Council to reconsider the matter under EIR, and the Council provided a response under EIR dated 2 November 2021 withholding the information under regulation 12(5)(e) (confidentiality of information to protect economic interests) and 12(4)(e) (internal communications). It upheld its position on internal review on 19 January 2022.

Decision Notice

11. In a decision notice dated 1 April 2022 the Commissioner decided that the Council wrongly dealt with the matter under FOIA and was in breach of regulation 5(1) and 14(1) EIR.
12. The Commissioner decided that regulation 12(4)(e) was engaged and that the public interest favoured maintaining the exception.
13. In relation to the balance of the public interest the Commissioner was sceptical about the Council's arguments in relation to the chilling effect. He considers that the underlying rationale for the exception was to protect a public authority's need for a private thinking space. This need is strongest when the issue is still live.
14. The Commissioner stated that it was not his role to reach a decision in relation to whether or not the council was acting wrongly in its handling of statutory transfers and contrary to the relevant guidance. The Commissioner accepted that the perception of wrongdoing can be an argument for transparency and disclosure but that this needed to be considered alongside other public interests the extent of public money involved and the degree of impact on the local community.
15. The Commissioner concluded that the matter was of limited interest to the wider public. Further the information related to a matter which was under dispute and it had not been shown that the Council had committed any wrongdoing. The Commissioner accepted that the public interest might change once the matter was no longer live but that, at that time, he did not consider that the EIR was the appropriate mechanism for addressing disputes about the Council's decisions. He concluded that disclosing the information would damage the Council's ability to make and defend its decisions. Other legal remedies are available should Mr. Harrison wish to pursue this further.
16. The Commissioner did not go on to consider regulation 12(5)(e).

Appeal

17. The notice of appeal challenges the Commissioner's decision notice on the basis that the Commissioner reached the wrong conclusion in relation to the public interest balance. Mr. Harrison raises the following points in particular:

17.1. The Commissioner gave insufficient weight to the public interest in showing that a suspicion of non-compliance with the law is unfounded

All government should be conducted in an open and honest way and in compliance with the law. Any perception or suspicion that this is not happening should be swiftly shown to be without foundation to ensure confidence is retained in the integrity of government. It is clear that the Council has acted in direct conflict with the Department of Education's view of the law. Mr. Harrison believes that the Council's justification for continuing to act in non-compliance with the School Standards and Framework Act 1998 ('SSFA') is set out in the requested information. If the Council are properly justified in taking the position, they have nothing to lose by exposing it to public scrutiny.

17.2. The Commissioner wrongly took account of Mr. Harrison's position as a trustee

The Commissioner has failed to distinguish between Mr. Harrison's responsibilities as a trustee and his application for information as an individual taxpayer concerned that the Council appear to be spending public money in an effort to justify an untenable position.

17.3. The Commissioner placed too much weight on the fact that the dispute was 'live'

This factor is not conclusive.

17.4. The Commissioner was wrong to take account of the availability of other legal remedies.

It is not realistic to expect an individual to take on a local authority to establish whether or not they are acting in an inappropriate manner.

The Commissioner's response

18. The fact that regulation 12(4)(e) is a class-based exception shows the importance that the government has placed in protecting internal communications of public authorities such that the integrity of decision making be preserved.

19. Suspicion of wrongdoing is only a factor where the disclosure serves a wider public interest and the suspicion amounts to more than a mere allegation. There must be a plausible basis for the suspicion. Here, disclosure is of limited wider interest and there is no evidence of wrongdoing by the Council.

20. The Commissioner included Mr. Harrison in his analysis of the wider public interest as a taxpayer even though this is not explicitly set out in the decision notice.

21. The Commissioner agrees that the fact that the decision-making process is live is not conclusive in the balancing exercise.
22. The Commissioner maintains that he was correct to acknowledge that the limited public interests and the concerns about the Council's alleged wrongdoing could be addressed through alternative remedies rather than through EIR.

Legal framework

23. The relevant part of regulation 12 EIR provides that a public authority may refuse to disclose environmental information requested if an exception to disclosure applies under regulation 12(4) and, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) a public authority must apply a presumption in favour of disclosure.
24. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that-
 - (e) the request involves the disclosure of internal communications.
25. If the conditions of 12(4)(e) are met, the information must only be withheld to the extent that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

The Task of the Tribunal

26. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

27. It is not in dispute that the request should be considered under the EIR, nor that regulation 12(4)(e) is engaged.
28. The issue we have to determine is whether the public interest in maintaining the exception outweigh the public interest in disclosing the information.

Evidence and submissions

29. We have read an open and a closed bundle of documents. We also took account of additional documents provided by Mr. Harrison in advance of the hearing.

30. We have taken into account the oral submissions of Mr. Harrison. In summary he submitted as follows:

- 30.1. It is the right of the public to know the principles on which the Council processes applications for statutory transfers of title under SSFA and how the Council justifies its actions in this area.
- 30.2. The Council is acting in conflict with clear guidance from the Department for Education. The Council has failed to comply with Ministerial Directives.
- 30.3. The Commissioner has failed properly to weigh the public interests against the reasons for non-disclosure.
- 30.4. The tribunal is asked to provide a more cost-effective way of progressing the matter, as was envisaged by FOIA. The charitable trust has limited resources and it is not realistic to expect it to sue the Council.

Discussion and Conclusions

31. We agree with the parties that EIR is the appropriate regime and that regulation 12(4)(e) is engaged.

Reg 12(4)(e) - public interest balance

32. Our deliberations below would have been the same if Mr. Harrison were not a trustee involved in a dispute with the Council. EIR, like FOIA, is applicant blind.
33. Regulation 12(4)(e) is not an absolute exception. Employees of a public authority exchanging internal documents are expected to be aware that such documents are potentially disclosable under the EIR. Any general chilling effect is likely to have been caused by the enactment of the EIR, not by disclosure in this particular appeal.
34. When considering the public interest in maintaining the exception we note the purpose behind the exception of preserving a private space for internal communications. Having reviewed the report contained in the closed bundle, in our view it contains full and frank views and we conclude that its contents are sensitive. We accept that there is a clear need for a safe space for candid discussion whilst any disputes are ongoing. In our view this relates to the whole report. Given that the disputes to which this information relates were live at the time of the response to the request, we place very significant weight on the need to maintain this safe space. It is not conclusive, but it carries very significant weight in the balance.
35. Turning to the public interest in favour of disclosure, the alleged wrongdoing in this appeal relates to the correct definition of the term 'playing fields' in relation to transfers of land from the Council to a school under the School Standards and Framework Act 1998. Mr. Harrison asserts that the Council should have applied the definition adopted by the Department for Education and that the Council are applying a definition used in the statute in relation to 'disposals' of land.

36. In our view this is a legal dispute as to the correct interpretation of a statutory term. Mr. Harrison takes the view that the Council's interpretation is 'untenable', given the 'clear guidance' from the Department for Education.
37. The guidance that he refers to is set out in an email to Mr. Harrison from the Team Leader in the Land Policy Unit in the Department for Education dated 4 April 2018 which states as follows:

Due to some wider changes which may be coming to our external guidance, we have not yet issued specific guidance on the definition of playing fields for the purpose of statutory transfers of land. However, I am happy to make the position clear, and point you toward guidance which does exist on the definition which applies in relation to disposals of land under the 1998 Act and the Academies Act 2010.

Education legislation provides a number of instances where local authorities are required to transfer the interest they hold in school land to the governing body or trustees of a foundation or voluntary school. This is most often the case when a new school is established, or an existing school moves to or acquires a new site. In many of these circumstances, the requirement to transfer land does not extend to playing fields, and the Department has recently seen a number of cases where disagreement has arisen between parties on what constitutes a playing field for the purpose of these statutory transfers.

The question centres on the definition of playing fields for the purposes of **statutory transfers** versus the definition applied in relation to **disposals of school land** under Section 77 of the Schools Standards and Framework Act 1998 and paragraph 17 of Schedule 1 to the Academies Act 2010.

In the Department's 2015 guidance on the disposal of publicly funded school land <https://www.gov.uk/government/publications/protection-of-school-playing-fields-and-public-land-advice> we take a wide view of what constitutes a "playing fields", to encompass (for example) hard play areas and other recreational spaces. This reflects the legislation in Section 77 of the School Standards and Framework Act 1998 and Schedule 1 to the Academies Act 2010. The intention of this wide definition is that the impact of any potential loss of facilities can be fully assessed against the stringent criteria the department applies to these disposals, and it is therefore intended to act as a safety net to build in added protections for school land.

The definition of "playing fields" considered in the 2015 guidance on disposals is, however, only applicable to Section 77 and Schedule 1 disposals (and indirectly to disposals made under Part A1 of Schedule 22 to the School Standards and Framework Act 1998). It does not have a more general application and should not be used in dealing with other cases. In particular, the definition contained in the guidance does NOT relate to statutory transfers of school land to foundation and voluntary schools under Schedule 3 to the School Standards and Framework Act 1998 or Schedule 2 to the Education and Inspections Act 2006.

For the purposes of these statutory transfers of school land, in the absence of a definition of "playing fields" in either Schedule 3 to the 1998 Act or Schedule 2 to the 2006 Act, the department's position is that the phrase must be given its natural meaning and must be taken to mean clearly-defined playing fields, as the expression is commonly understood. So, it does not include, for example, asphalt play areas round a school.

The intention of the legislation is to ensure that the school has the land it needs in order to operate as a school. This includes having outdoor recreation space and so places a duty on

the local authority to transfer such spaces so long as they are not clearly-defined playing fields - which as set out above are excluded from the transfer requirement.

The department has already confirmed this view in relation to specific examples of statutory transfers (including making directions to local authorities), and will continue to do so in order to ensure that statutory transfers of land do not result in undue fragmentation of school sites which may create further problems in the future.

38. Mr Harrison also provided a note entitled 'Definition of playing fields for the purposes of statutory transfer' ('the Note'), which was provided to him by the Department for Education attached to an email dated 6 January 2023. The covering email states that the 2015 guidance has since been updated (in September 2021) but the policy and principle around the narrower definition of playing fields applying to statutory transfers of land still applies. The email notes that this is not yet reflected in a published external guidance document and continues, 'However, it is Departmental policy as repeated to local authorities, trustees and their legal firms. To that end, we use the attached note which we supply to the parties in specific cases.'

39. We are considering the public interest at the date of the response to the request, so the fact that the 2015 guidance was updated in September 2021 is irrelevant, but the 'policy and principle' still applies and thus the Note can be seen as broadly representing the position of the Department for Education at the relevant time.

40. The Note includes the following:

In many of the circumstances where authorities are required to transfer land to school trustees or governing bodies, the requirement to transfer land does not extend to playing fields. The Department has seen cases where disagreement has arisen between parties on what constitutes a playing field for the purpose of these statutory transfers and what land local authorities may therefore exclude from the transfer.

It is ultimately for the court to determine whether or not any particular land comprises playing fields or not. In the meantime, the Department is willing to present a policy view that will be supported by action in individual cases where this is necessary. The Department's view is that the definition of a playing field depends on the circumstances which give rise to the statutory transfer - i.e. whether the transfer duty has arisen in connection with a statutory proposal for the alteration of a school on or after 28th January 2014 to which the 2013 regulations apply, or not.

Most cases that currently reach the Department have not arisen in connection with such a statutory proposal but with the provision of a site in addition to, or instead of, the school's existing site or with the establishment of a school. They have therefore been considered under Schedule 3 to the School Standards and Framework Act 1998 or Schedule 2 to the Education and Inspections Act 2006 or under predecessor legislation. The definition of playing field here is different from the wide definition that applies to **voluntary** disposals of school land under section 77 of the Schools Standards and Framework Act 1998 ("Section 77") and paragraph 17 of Schedule 1 to the Academies Act 2010 ("Schedule 1"). The intention of having, in Section 77 and Schedule 1, a wide definition for the disposal of playing field land is so that the Secretary of State can fully assess the impact and value of any potential loss of facilities against stringent criteria, as set out in the guidance on these disposals.

But that definition does **not** relate to statutory transfers of school land for foundation and voluntary schools that are required under Schedule 3 to the School Standards and Framework Act 1998 or Schedule 2 to the Education and Inspections Act 2006 or under predecessor legislation.

For the purposes of these statutory transfers of school land, in the absence of a statutory definition of "playing fields" in either Schedule 3 to the 1998 Act or Schedule 2 to the 2006 Act, the Department's view is that the phrase must be given its ordinary, natural meaning: in other words, it must be taken to mean clearly defined playing fields, as the expression is commonly understood (for example, grassed areas and MUGAs laid out for playing team sports or athletics). So, it does not include, for example, asphalt play areas round a school.

The intention is, in the Department's view, to preserve the integrity of the site being transferred, avoiding landlocked islands of ownership, and to ensure that the school has the land it needs in order to properly operate as a school. This includes having outdoor recreation space, and so the legislation places a duty on the local authority to transfer such spaces so long as they are not clearly defined playing fields as such (which are excluded from the transfer requirement). In the case of VA schools, this also reflects the legislative provision that maintaining playing fields is the responsibility of the LA.

The Department has already confirmed a position consistent with this view in relation to specific examples of statutory transfers and, where appropriate in the circumstances, will continue to do so in order to ensure that statutory transfers of land do not result in undue fragmentation of school sites, which may create further problems in the future.

In some cases, however, a statutory transfer arises because of a statutory proposal for the alteration of a school made on or after 28th January 2014 under the School Organisation (Prescribed Amendments to Maintained Schools) (England) Regulations 2013 (SOPAM13). Those regulations have expressly adopted the wide definition of playing fields in Section 77. Local authorities are therefore not obliged to transfer any "land in the open air which is provided for the purposes of physical education or recreation", though they may transfer such land if they wish.

41. This is a slightly more nuanced position than that set out in the 2018 email. It is not our role to make a finding in relation to the particular circumstances of the school of which Mr. Harrison is a trustee, but it was not clear to us from our questions to Mr. Harrison in the hearing whether that particular situation would fall under the 2013 regulations referred to in the note, where the wider definition applies, or whether it would fall under schedule 3 to the 1998 Act or schedule 2 to the 2006 Act, where the Department of Education takes the view that a narrower definition applies.
42. In any event, whatever the position in relation to this particular transfer, Mr. Harrison is clearly right that the Council's view on the definition of 'playing fields' is different to that of the Department for Education. This is not, in the tribunal's view, evidence of wrongdoing or of non-compliance with the law. The communications from the Department for Education do not set out 'the law' – they are not binding or statutory.
43. The correct forum for determining whether or not the Council has complied with the law is not the information rights tribunal. As the Department for Education observe in the Note, it is ultimately for a Court to determine whether or not any

particular land comprises playing fields or not. Further, it is clear from the Note that the Department for Education will, in appropriate cases, take action. These legal remedies are, in our view, relevant to the public interest balance, despite the attendant costs and any potential inequality of arms between a school and the Council.

44. Mr. Harrison produced an example of a direction made by the Secretary of State to Kent County Council in 2015 to transfer land to the trustees of another school. He stated in submissions that he had been told that it had not been complied with, and that he was aware that Kent County Council had not complied with other directions of the Secretary of State. This does not in our view, amount to sufficient evidence on which we could properly base a finding that there was a plausible suspicion of wrongdoing on the part of Kent County Council.
45. We do, however, accept that there is at least some increased public interest in transparency in relation to the Council's decision-making process in relation to its approach to statutory transfers because the Council appears to have adopted a position different to that taken by the Department for Education. It is probable that this issue is not just limited to Kent County Council, given that the Department for Education has found it necessary to produce a Note for circulation in the event of such a dispute. This also increases the public interest in disclosure to some extent.
46. We accept that transparency allows the public to see how decisions are being made and can provide reassurance that the proper processes are being followed. Disclosure allows the public to be better informed, rather than having to guess at what might have been going on behind the scenes. It is in the public interest that public authorities are accountable and that the public, with greater knowledge, can understand and scrutinise more effectively the Council's decision making. This is particularly so where the Council appears to have adopted a different position to that taken by the Department for Education.
47. We have taken into account all the matters set out above, and we bear in mind the presumption of disclosure in reg 12(2). Despite the fact that there is some increased public interest in transparency due to the matters set out in paragraphs 43 to 45 above, we find that, while these disputes remain live, in all the circumstances the very weighty public interest in maintaining the exception outweighs the public interest in disclosure.
48. For the reasons set out above, the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 18 January 2023

Promulgated: 19 January 2023

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