



**Tribunals Service**  
Information Tribunal

**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER  
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Environmental Information Regulations 2004**

**Decision Promulgated: 20 November 2007**

**Information Tribunal Appeal Number: EA/2007/0022**

**Information Commissioners Ref: FS50104384**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Chris Ryan**

**And**

**LAY MEMBERS**

**Michael Hake**

**Henry Fitzhugh**

**BETWEEN**

**MARK WATTS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Decision**

The Tribunal allows the Appeal and substitutes the following decision notice in place of the decision notice dated 22 February 2007

**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)**

**Environmental Information Regulations 2004**

**Information Tribunal**

**Appeal Number: EA/2007/0022**

**SUBSTITUTED DECISION NOTICE**

**Public authority:** Bridgend County Borough Council

Address of Public authority: Civic Offices  
Angel Street  
Bridgend  
Mid Glamorgan  
CF31 4WB

**Name of Complainant:** Mr Mark Watts

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is that the Public Authority should have disclosed the information requested in the Appellant's request dated 12 November 2005.

**Action Required**

The Public Authority is required to disclose the information within 28 days of the date of this Substituted Decision Notice

Dated this 20<sup>th</sup> day of November 2007

Chris Ryan

Deputy Chairman, Information Tribunal

## Reasons for Decision

1. In our decision of 6 July 2007 we decided that the information in dispute in the Appeal should be considered under the provisions of the Environmental Information Regulations 2004 (“EIR”) and not the Freedom of Information Act 2000. In the course of reaching that decision we summarised the factual background to the Appeal and do not need to repeat it in this decision. Words defined in the earlier decision have the same meaning as in this decision. This decision has been reached, with the agreement of the parties, on the basis of written submissions and without an oral hearing.

2. The original request was for:

*“copies of the last three reports prepared by environmental health officers of Bridgend County Borough Council regarding John Tudor & Son of Bridgend, a large-scale meat supplier, or, if there are more than three, then all that have been produced in the last three years.”*

The public authority’s reason for refusing to disclose those reports was that the information fell within one of the exceptions to the obligation to disclose information contained in EIR and that the public interest in maintaining that exception outweighed the public interest in disclosure. It said that the exception arose because a joint Local Authority and Police investigation was in hand at the time and a public inquiry had been instigated by the National Assembly for Wales.

3. The relevant provision of EIR is regulation 12, which sets out the general rule on exceptions as follows:

*“(1) ... 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.”*

In this case the exception relied on is set out in regulation 12(5)(b) in the following terms:

*“ (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  
*... (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;...”*

The Council also relied on certain provisions of the FOIA, as did the Information Commissioner when dealing with the complaint about the Council's refusal, which the Appellant subsequently referred to him. However, in view of the conclusion reached in our decision on the preliminary issue we will consider just the issues arising under EIR. In that connection the Information Commissioner's Decision Notice dated 22 February 2007, at the end of his investigation, set out the factual conclusion that the reports were likely to be relied upon as documentary evidence in the event of a prosecution and that there was nothing in them to suggest that the interests of justice would require that they be opened to public scrutiny prior to the conclusions of the criminal investigations. On that basis he concluded that the regulation 12(5)(b) exception applied and decided that the public interest in maintaining the exception outweighed the public interest in disclosure.

4. A differently constituted panel of this Tribunal considered regulation 12(5)(b) in the case of *Archer v The Information Commissioner and Salisbury District Council* (EA/2006/0037). Although we are not obliged to follow other decisions of this Tribunal we consider that the following passages from that decision accurately summarise the approach which we should adopt:

*“Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure would adversely affect ‘the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature’.*

*“There are several points to note here. First, it is not enough that disclosure should simply affect the matters set out in [the preceding paragraph]; the effect must be “adverse”. Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure “would” have an adverse effect - not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”. All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one.”*

5. At the time when the request for information was made, and also when the Decision Notice was issued, criminal proceedings were pending against the owner of the premises in question. Those proceedings did not come to an end until 8 September 2007, when he was given a 12-month prison sentence after admitting six counts of placing unsafe food on the market and one count of failing, as proprietor of a business, to protect food against the risk of contamination. However, we have to decide the issue of disclosure, not at today's date, but at the date of the Council's original refusal. We take the relevant date to be 21 December 2005, the date on which a Mr P A Jolley, Head of Legal Services of the Council, wrote to the Appellant to say, that having carried out a review of the Council's original refusal to disclose the information, he concluded that the decision had been correct.
  
6. It is common ground between the parties that the reports in question came into existence before any criminal investigation was commenced. The Appellant has argued that the exception was not therefore engaged because it only applies to reports prepared after that date. He argued that reports of this type ought normally to be published. He said this was supported by the Information Commissioner who had said, in the Decision Notice:

*“The Commissioner is of the view that the type of information requested in this case, relating to routine health and safety reports, should ordinarily be*

*placed in the public domain as a matter of course, normally through inclusion in a publication scheme”*

He went on to argue that it could not be right that information that ought to be disclosed at the time of its creation should subsequently be removed from the public domain if a criminal investigation was commenced, to which it might be relevant. However, the language of EIR regulation 12 contains no suggestion that the exception in 12(5)(b) should only apply to material created after an investigation has been started. The only test to be applied is whether its disclosure would have the undesirable effects set out in sub paragraph (5) (b). Not only is the language of the regulation therefore clear but it does not in our view lead to an illogical or unworkable outcome, as the Appellant contends. It is obviously not ideal if information has to be withdrawn from publication, once it becomes apparent that a criminal investigation is to take place and that its further dissemination may prejudice a future trial, but that is a better outcome than the alternative for which the Appellant argues. We conclude, therefore, that the information was capable of falling within the scope of subparagraph (5)(b) of the regulation and that we should proceed to consider whether it actually did so.

7. The reports in question have not been made available to assist the Appellant in the preparation of his appeal because to do so would have effectively prejudged the outcome of the appeal. However, we have studied them and have considered whether their disclosure at the relevant date would have adversely affected the ability of the defendant in the criminal proceedings to receive a fair trial. We do not think that it would and have set out our reasons for that conclusion in a separate schedule to this decision, in which we analyse the information contained in the reports. The schedule is to remain confidential until the expiration of the period during which an appeal against our decision may be made, or, if an appeal is launched, until the subsequent disposal of any such appeal. In this public part of our decision we limit ourselves to pointing out that the test under EIR is harder for a public authority to overcome than under the broadly equivalent provision to be found in section 30 FOIA, which provides that information held by a public authority is exempt if it has at any time been held by it “for the purposes” of criminal proceedings. Under EIR regulation 12 it is only exempt if its disclosure would

“adversely affect ... the ability of a person to receive a fair trial”. Our attention was also drawn to the terms of a letter which the South Wales Police wrote to the Council on 1 July 2006. The letter asked that, pending completion of investigations, certain information should not be revealed, but it limited the categories of information covered by the request to information that would indicate the source of the outbreak or details of the evidence of any individual. In our view it follows that a blanket refusal to disclose all potentially relevant information may well not be justified. A public authority (whether or not requested by the police authorities to retain information) ought to give careful consideration to the potential effect on the criminal proceedings of the particular information being requested before refusing a request for disclosure. It should obviously adopt a cautious approach in making the assessment because of the importance of not prejudicing a fair trial in criminal proceedings, but if, on a sensible reading of the documentation in question, its disclosure would not adversely affect the prospects of a fair trial, then the fact that the information has some connection with the subject matter of a prosecution will not be sufficient justification for non disclosure. For the reasons set out in the confidential schedule to this decision we have concluded that, on the special facts of this case, the disclosure of the information requested would not have adversely affected the accused’s ability to have a fair trial.

8. Information will also be exempt under EIR regulation 12(5) (b) if it would “adversely affect ... the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. In this case the National Assembly for Wales established a public inquiry into the E. coli outbreak in December 2005. The Council drew attention to its establishment in a letter to the Information Commissioner dated 24 July 2006, and to the website containing information about it (<http://www.ecoliinquirywales.org> ). The website records the terms of reference for the inquiry, as follows:

*“To inquire into the circumstances that led to the outbreak of E.coli 0157 infection in South Wales in September 2005, and into the handling of the outbreak; and to consider the implications for the future and make recommendations accordingly”*

The website also makes it clear that, subject to the requirements of the criminal investigations, to which we have already referred, it was intended that documents and information supplied to the Inquiry were likely to become public at some stage of the process.

9. The submissions from the parties have concentrated on the criminal investigation and not the public inquiry. However, the public inquiry was mentioned in correspondence from the Council justifying its refusal and we ought therefore to deal with it. It is evident that the terms of reference do not bring the inquiry within regulation 12(5)(b) in that it is clearly not an inquiry “of a criminal or disciplinary nature”. It is also evident that it is intended to make the inquiry as public as possible, as we would expect. The arguments based on the criminal investigation having failed, we are satisfied that those based on the public inquiry, such as they were (and the parties did not lay any significant stress on them) also fail, in that the existence of the inquiry would not, on its own, have justified the refusal to disclose the information in dispute at the relevant date.
  
10. As we have mentioned, the effect of EIR regulation 12(1)(b) is that, if we had concluded that the regulation 12(5)(b) exception applied to the facts of the case, we would have been required to proceed to consider whether the public interest in maintaining the exception outweighed the public interest in disclosure. There is obviously great public interest in the outbreak of an illness which caused widespread suffering and led to the death of a young child. That interest may focus particularly on the performance of any public authority having duties to regulate the premises from which the outbreak may have emanated. However, the importance of ensuring that a defendant in criminal proceedings has a fair trial is such that, were we found to have been wrong in our primary conclusion, we believe that the public interest in maintaining the exception would outweigh the public interest in disclosure.

Date 20 November 2007

Chris Ryan

Deputy Chairman