



**In the First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

Neutral citation number: [2024] UKFTT 803 (GRC)

Case Reference: EA/2023/0367

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

**Heard at: Haverford West  
Heard on: 30 July 2024  
Decision given on: 5 September 2024**

**Before**

**DISTRICT JUDGE WATKIN  
MEMBER PEPPERELL  
MEMBER MURPHY**

**Between**

**RICHARD NAYLOR**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: No attendance

**Decision:** The appeal is Allowed

**Substituted Decision Notice:**

1. The Public Authority must disclose a copy of the Final Report to the Appellant by 5pm on 5 October 2024
2. If the Public Authority contend that the Final Report should be redacted to ensure compliance with regulation 13 Environmental Information Regulations 2004 ~~remove the details of any person who may require protection for the~~

~~reasons set out in the exception at regulation 12(5)(f),~~ the Public Authority must:

- a. disclose the redacted version of the Final Report to the Appellant by the date stipulated at paragraph 1 above (subject to any further order of the Tribunal); and
- b. provide the following to the Tribunal by 5pm on 15 September 2024, for the attention of District Judge Watkin:
  - (i) details of the Final Report showing the redactions.
  - (ii) written reasons setting out the basis upon which the officers of the Public Authority consider that the Final Report would contravene regulation 13 if the redactions are not made.

## REASONS

### ABBREVIATIONS

3. Within this decision, certain the terms will be abbreviated as set out in the table below.

<b>Case Management Directions</b>	CMDs
<b>Environmental Information Regulations 2004</b>	EIR
<b>Freedom of Information Act 2000</b>	FOIA
<b>Information Commissioner</b>	ICO
<b>The Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009</b>	The Rules

4. This is the decision of the Tribunal in the appeal of Mr. Richard Naylor (the “**Appellant**”) dated 9 August 2023 (the “**Appeal**”) against the decision issued by the ICO (“**ICO**”) on 18 July 2023. The ICO decision upheld the decision of Pembrokeshire County Council (the “**Public Authority**”) which refused to disclose a Final Report in relation to the South Quay development dated 22 February 2023 (the '**Final Report**').
5. By an email dated 16 December 2022, the Appellant made a request for disclosure (the “**Request**”).

6. In the interests of brevity and the Senior President of Tribunals practice direction dated 4 June 2024, the Tribunal does not repeat the background chronology, the parties' submissions, or the legal framework within this decision, save where it is relevant or necessary to explain the Tribunal's reasons for its decision.

## **BACKGROUND**

7. The Public Authority first responded to the Request with a refusal to disclose the Final Report basing its decision on FOIA. A complaint was sent by the Appellant to the ICO who responded indicating that the Request should be reconsidered pursuant to EIR. All references to regulations within this decision are to regulations within the EIR, unless otherwise stated.
8. A further response was provided by the Public Authority on 22 June 2023, refusing disclosure and quoting the exceptions at regulation 12(4)(e) (internal communications) and 12(5)(f) (adverse effect on the interests of the information provider).
9. The Appellant submitted a further complaint to the ICO who issued a decision notice upholding the position as outlined by the Public Authority in respect of the regulation 12(4)(e). Having upheld that exception, the ICO did not then proceed to consider whether the exception at regulation 12(5)(f) was applicable.
10. The Appellant appealed to the Tribunal and requested a hearing in person. The hearing was held at The Law Courts, Haverford West, on 30 July 2024. Neither the ICO nor the Public Authority were in attendance.

## **ANCILLARY MATTERS**

### **The Final Report postdates the Request**

11. The Tribunal was initially concerned to note that the document that appears to have been requested (the Final Report) post-dates the Request. As a copy of the Request had not been provided to the Tribunal, for certainty in relation to precisely what was requested, the Tribunal ordered its production by CMDs dated 23 July 2024. The Request was produced to the Tribunal at the hearing.

12. The wording of the Request described the required information as “*Mr Michael Holden(sic)’s review of the South Quay Development*”.
13. The CMDs also requested that the ICO provided the Tribunal with any documentation that fitted the description outlined in the Request and which existed on 16 December 2022. By email dated 30 July 2024, received by the Tribunal on 31 July 2024, the day following the hearing, the ICO confirmed that it had only been provided with the information contained within the closed hearing bundle.
14. The CMDs were not served on the Public Authority as they have chosen not to take part in the proceedings, as is recorded in the Case Management Directions dated 2 October 2023.
15. At the hearing, the Appellant informed the Tribunal that he was himself interviewed as a contributor to the review in February 2022 and was originally informed that the Final Report would be prepared by May 2022. Subsequently, he was told August 2022 and then September 2022. Therefore, by December 2022, he believed that the report was in final form. Mr Matthew Holder was the Audit, Risk & Counter Fraud Manager within the Public Authority at the time that it was produced and, therefore, it was reasonable for the Appellant to believe that the Final Report was a review by Mr Matthew Holder. It was, therefore, clear from the Appellant’s evidence to the Tribunal that the document of which he seeks disclosure, is the Final Report, even though it didn't come into existence until after the Request was made.
16. It is apparent from the submissions of the parties and the documentation that has been provided within the Closed Bundle that all parties accept that the Final Report was the document requested. No party has raised any issue with the fact that it was not in existence at the time of the Request nor sought to rely upon the exception set out at regulation 12(4)(a).
17. Therefore, as the regulations clearly contemplate the production of documentation that came into existence after the date of a request (by the existence of regulation 12(4)(a)), the Tribunal does not consider the fact that the Final Report postdates the Request is material. Furthermore, the Public Authority will be aware of its obligation under regulation 9 to provide advice and assistance to the Appellant and, therefore, if it had objected to the production of the Final Report due to it not being in existence at the time of the Request, it would also have had an obligation to inform the Appellant of the date that the Report was produced which would have led to another request

having to be made and would serve no purpose other than to delay matters further. The Public Authority, in its reconsidered decision under EIR in June 2022 is, therefore, commended for taking a pragmatic approach by not objecting due to the Final Report post-dating the Request.

### **Closed Bundle**

18. During the hearing, the Appellant made it clear that he considered that the submission of a closed bundle containing the disputed information prejudiced the proceedings and he requested the authority which the Tribunal relies on in enabling it to consider undisclosed material. The Appellant had previously raised this concern in his submissions dated 18 February 2024 (not within the open bundle) and repeated his concerns in an email to the Tribunal dated 30 July 2024 (received by the Tribunal after the hearing on 31 July 2024).
19. During the hearing, the Tribunal informed the Appellant that the question of the Final Report being provided to the Tribunal in a Closed Bundle had been dealt with within CMDs. For completeness the position is set out herein.
20. At paragraph 18 of the CMDs dated 2 October 2023, at paragraph 18, the Tribunal invited the ICO, to prepare a closed bundle and to provide it to the Tribunal together with an application under Rule 14.

*“Should a Closed Bundle be considered necessary the First Respondent shall be responsible for preparation of the Closed Bundle and must serve this on the Tribunal along with their application under Rule 14 by no later than **08 December 2023.**”*

21. Rule 14(6) provides:

*“The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons or specified other persons.”*

22. By CMDs dated 15 December 2023, the following direction was included at paragraph 8:

*“In the circumstances I direct that the Closed Bundle will be held, pursuant to Rule 14(6), on the basis that it will not be disclosed to anyone except the Information Commissioner.*

*8.1 I am satisfied that disclosure of the document will prematurely reveal the nature / content of disputed information or otherwise defeat a purpose of the appeal.*

8.2 *I have considered whether it will, at the proper time, be necessary for the Judge/Panel to consider that document: I conclude it will be necessary."*

23. The Tribunal is, therefore, satisfied that the provision of the Closed Bundle complied with the Rules and that no prejudice has arisen due to the Final Report having been disclosed to the Tribunal and not to the Appellant. The Tribunal has found that it was necessary and helpful for the Final Report to have been provided as this enabled the Tribunal to assess the implications of its disclosure.

### **ISSUES IN THE APPEAL**

24. In relation to the Appeal, the Tribunal, has considered the following issues:
- a. Is the Final Report an "*internal communication*", for the purposes of regulation 12(4)(e)?
  - b. Would the disclosure of the Final Report have an adverse effect on the interests of any person who provided the information, for the purposes of regulation 12(5)(f)?
  - c. Where the Tribunal concludes that either of the exceptions applies, does the public interest in maintaining either or both exceptions outweigh the public interest in disclosing the information when applying the presumption in favour of disclosure (regulation 12(1) and (2))?
  - d. Whether the Final Report should be disclosed.

### **Is the Final Report an internal communication?**

25. The Public Authority relies upon the exception at 12(4)(e), which states that "*a public authority may refuse to disclose information to the extent that ... the request involves the disclosure of internal communications*".
26. This is a class-based exception, as opposed to a prejudice-based exception. Therefore, for it to be engaged, it is only necessary to show that the information is from the particular class of information and not that any adverse effect would arise from its disclosure.
27. The Appellant states that he does not consider the Final Report to be an internal communication for the following reasons:

- a. A report is not within the usual description of internal communications as set out within guidance provided by the ICO such as a letter, email or recording of the minutes of a meeting.
  - b. The Appellant contends that the Final Report was not intended to be an “internal communication” as it was commissioned following Audit Wales contacting the Public Authority who agreed to arrange for an “independent” audit by their internal audit department. On questioning the Appellant further in relation to this point, he accepted that it was not his best point and did not choose to elaborate.
  - c. The Public Authority, in an email from the Interim Data Protection Officer, Mr Justine Blewitt, dated 10 July 2023, acknowledged the Final Report has been disclosed to Audit Wales. The Appellant understands Audit Wales to be an entirely separate legal entity to the Public Authority and not part of the Welsh Government.
28. The Tribunal notes that the Public Authority contends that the Final Report is an internal communication. However, it does not put forward any justification for that. It simply contends that, if disclosed, the Final Report would inhibit the discussion or debate necessary before effective policy making. It is suggested that if officers believed that discussions during audit investigations would be publicly disclosed, they might not speak freely on similar issues in future.
29. The ICO addresses the question of whether the Final Report is an internal communication only in so far as it refers to the explanatory memorandum to the Directive (which implemented EIR) as identifying the rationale behind the exception as the “*public authorities should have the necessary space to think in private*”. Reference is also made to the ICO guidance which states “...*The exception is drafted broadly and covers all internal communications, not just those actually reflecting internal thinking.*”
30. The Tribunal accepts that this is a class-based exception and, therefore, it is either engaged, due to the information being an internal communication or it is not.
31. In the case of Secretary of *State for Transport v Information Commissioner (May 2009)* (“the Tribunal considered the question of whether a draft report was “*internal communications*” and stated: “*Whether the Draft Report amounted to an internal communication such that the exception under Regulation 12(4)(e) is*

*engaged is a question of fact and law*". In that case, the appellant contended that there was a need for "*thinking space*", the draft report had only been disclosed to a small internal group, submissions to internal departments were "*internal*" and that communication with the external adviser was "*assumed by all parties to be confidential and internal*". The tribunal concluded that the (draft) report and the communications relating to it amounted to "*internal communications*". The tribunal stressed that:

*"We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external communication, for example, by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation"*.

32. On the same basis, the Tribunal in this matter considers that if the Appeal had been for the purposes of obtaining disclosure of a draft audit report, that the internal communication exception is likely to have applied as it is important that, whilst the document is being prepared, that there is a need for a "safe space", where ideas can be discussed in relation to the appropriate content and even for mistakes to be made and corrected without fear of adverse consequences. However, the document which the Appellant seeks to have disclosed is not a draft report, but the Final Report prepared by professional and qualified auditors. No evidence has been put before the Tribunal to suggest that the auditors involved believed that the Final Report was an internal document, and the Tribunal considers that it would be unusual for them to consider that it was.
33. Indeed, the Tribunal notes that the Final Report has been disclosed to an external agency, Audit Wales, which is a separate organisation to the Public Authority. The Tribunal considers that as the Report was commissioned due to the Public Authority having been contacted by Audit Wales in January 2022, it is likely that the officers of the Public Authority (including the auditors) would have been aware that the Final Report would need to be disclosed, at the very least, to Audit Wales and, therefore, that it was intended to be an external document. On balance, therefore, the Tribunal does not accept that the Final Report is an internal communication or, therefore, that the exception applies.
34. In response to the Public Authority's suggestion that disclosure would inhibit policy making, the Tribunal notes that the Final Report is not a policy and there is no reason to connect the disclosure of an audit report with any discussions that may take place internally in relation to policy in the present context.



## The Adverse Effect Exception (Regulation 12(5)(f))

35. In the response dated 22 June 2023, the Public Authority also relied on the exception at regulation 12(5)(f). As the ICO had concluded that the Final Report was an internal communication, it did not consider regulation 12(5)(f).
36. As the Tribunal concludes that the decision of the ICO was not in accordance with the law, due to the exception at regulation 12(4)(e) not being engaged, (s.58(1)(a) FOIA), the Tribunal is entitled to either “*allow the appeal or substitute such other notice as could have been served by the Commissioner*”.
37. Therefore, the Tribunal will now consider whether the exception at regulation 12(5)(f) is engaged. The exception is as follows:
- “(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 –
- ...
- (f) *the interests of the person who provided the information where that person –*
- (i) *was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority.*
- (ii) *did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*
- (iii) *has not consented to its disclosure.*”
38. Whilst the Appellant states within his submissions that arguments in support of exception 12(5)(f) are not relevant, the submissions that he has put forward generally in relation to the Final Report apply (i.e. the Final Report is an audit commissioned as a result of involvement from Audit Wales and, therefore, that it was foreseeable that it would be disclosed externally).
39. Additionally, the submissions of the Public Authority are stated to apply to both exceptions. These include the protection of internal deliberation and the decision-making processes by providing “*private thinking space*” away from “*external scrutiny*”.
40. Neither the Public Authority nor the ICO mentions any specific person who it seeks to protect by relying on the exception at 12(5)(f). The Tribunal has

scrutinised the Final Report and cannot identify any individual who has been named, save for by reference to their position within the Public Authority - all of whom are likely to have been under a legal obligation, by virtue of their employment by the Public Authority, to provide the content and are likely to have done so in the knowledge that the Final Report would a) be released to Audit Wales; and b) that the Public Authority is at liberty to disclose the Final Report. As such, the Tribunal does not accept that the exception in relation 12(5)(f) is engaged.

41. In any event, if there are specific persons named within the Final Report who may be adversely affected, these can be dealt with by way of the redaction of their names and, potentially, their comments from the Final Report. However, no names of persons who require protection have been provided by the ICO or the Public Authority (who has had the opportunity to take part in the Appeal and has declined) on either an open or closed basis.
42. The Tribunal accepts the Public Authority's requirement for thinking space but, again, highlights that the thinking space is not present within a Final Report that was intended for external communication and does not accept that the individuals mentioned by their position are likely to be adversely affected by the disclosure of the Final Report.

### **The Balance of Public Interest**

43. In light of the Tribunal's conclusions set out above, it is not necessary for the public interest balance at regulation 12(1) and (2) to be considered. However, for completeness, the Tribunal does now consider whether, if it had been decided that either (or both) of the exceptions applied, the public interest in maintaining either exception (or both) would have outweighed the public interest in disclosing the Final Report.
44. The Appellant says that there are several reasons why it is in the public interest for the report to be disclosed. He states that it is probably a short report that contains nothing sinister and that it is unlikely that it will affect anyone if it is disclosed. However, he adds that the failure to disclose leads to suspicion on the part of the public. He gives further details within his submissions of his belief that the public should know what the Public Authority does, that the Public Authority should be held accountable, and that freedom of information provides a check against error and misdemeanour. He considers that it is in the public interest that the Public Authority is open and transparent.

45. The ICO contends that public interest would not be served by disclosing the Final Report due to the risk of its disclosure preventing future open discussions between officers of the Public Authority and others who may have openly contributed to the Final Report without fear of their comments being made public. (12(4)(e)).
46. The public interest in favour of disclosure is clear, the public has a legitimate interest in assessing the working of public authorities and the basis upon which they apply policy and make decisions, particularly where the decisions involve public funds, and are matters of public concern.
47. The public interest in relation to maintaining the exception in relation to internal communications is also important. However, even if the Tribunal did consider the Final Report to be an internal communication, as it does not reveal the identity of individuals (save for the authors and by reference to their roles), the Tribunal is not able to conclude that there are persons who may be reluctant to contribute to discussions in future if the Final Report is disclosed. All officers referenced, including the auditors, are professionals who should anticipate that any audit carried out by them may be the subject of public scrutiny.
48. In relation to the public interest in maintaining the exception in relation to an adverse effect, if there were persons named within the Final Report who require protection, they could be dealt with by their names and, potentially, their comments being redacted prior to publication.
49. For these reasons, the public interest balance is in favour of disclosure of the Final Report but with redactions of the names of individuals, where any are present.
50. Furthermore, the Tribunal is conscious that the presumption at regulation 12(2) is in favour of disclosure.

## **SUMMARY**

51. In summary, the Tribunal concludes that neither of the exceptions in regulations 12(4)(e) or 12(5)(f) apply to the disclosure of the Final Report and, therefore, the Appeal succeeds, and the Final Report should be disclosed. The Tribunal has substituted the decision of the ICO with the decision set out above which requires the Public Authority to disclose the Final Report, subject to any

redactions (to ensure compliance with regulation 13) which would first need to be approved by the Tribunal.

### **Final Comments**

52. At the end of the hearing, the Appellant requested the opportunity to express his views on the process for obtaining information from a Public Authority. His views are repeated here as the Tribunal agrees that, even though the documentation sought by the Appellant is now to be produced to him, the length of the delay is unacceptable and not in the spirit of freedom of information.

53. The Appellant commented as follows:

*“There is probably nothing in it, no one is going to get disciplined or fired. It’s important the principle of freedom of information is upheld. ... The right (to information) has gone...It has been a huge task, fighting through the responses and I think it is important that that is represented in a positive outcome.”*

54. FOIA and EIR are intended to provide public access to information held by public authorities. If documentation that should be provided can be delayed for a period of more than 12 months, the aim of the legislation is not being achieved as the information remains inaccessible for significant periods of time.

District Judge Watkin  
Tribunal Member Pepperell  
Tribunal Member Murphy

4 September 2024