First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0290

Decided without a hearing
On 7 November 2018

Before

JUDGE ANTHONY SNELSON
ROGER CREEDON
SUZANNE COSGRAVE

Between

MS JENNY PERRYMAN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

NORFOLK COUNTY COUNCIL

Second Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Ms Jenny Perryman, to whom we will refer by name, is a resident of King's Lynn, in Norfolk.

2. In February 2012 the Second Respondent, Norfolk County Council ('NCC'), entered into a 25-year contract ('the contract') with a company called Cory Wheelabrator ('the contractor') to build and run a power and recycling centre, to be funded through PFI arrangements. Just over two years later, NCC took the decision to bring the contract to an end prematurely. In December of the same year it made public the fact that it had paid the contractor £33.7m as compensation for the early termination.

3. On 11 December 2016 Ms Perryman wrote to NCC requesting information in these terms:

> **Please provide me with copies of correspondence (emails, letters including attachments) between NCC officers and councillors and legal advisors Sharpe Pritchard, prior to signing the contract with Cory Wheelabrator in February 2012, wherein Sharpe Pritchard advises anyone at [NCC] of the impact of the delay by Defra awarding the PFI on the dates in the contract, thereby threatening the PFI under the terms and conditions.**
>
> **Please also provide me with copies of all correspondence (emails, letters including attachments) between officers and councillors and Sharpe Pritchard, prior to signing the contract with Cory Wheelabrator in February 2012, wherein Sharpe Pritchard advises anyone at [NCC] of the risks and/or merits of NCC taking on the risk of foreign exchange rates, and the risks and/or merits of signing the contract in February 2012.**

The two elements of the request will be referred to in these Reasons as 'part (1)' and 'part (2)'.

4. NCC refused to supply any of the requested information, citing the legal professional privilege and commercial interest's exemptions under the Freedom of Information Act 2000 ('FOIA'). It later relied instead on the (more or less) parallel provisions of the Environmental Information Regulations 2004 ('EIR'), reg 12(5)(b) (course of justice) and 12(5)(e) (commercial confidentiality)[1]. All parties have since proceeded on the common footing that the case falls to be considered under EIR only.

5. In the meantime, following a review completed in April 2017, NCC confirmed that its position was unchanged.

6. On 13 June 2017 Ms Perryman complained to the First Respondent ('the Commissioner') about the way in which NCC had dealt with her requests.

7. The Commissioner proceeded to investigate. NCC's reliance on the two exemptions was examined. In addition, NCC delivered to the Commissioner copies of withheld information, consisting of a chain of two emails sent on 16 May 2011 and stated that this was the entirety of the withheld information within the scope of the request.

[1] The change in stance seems to have been prompted by remarks in a letter from the Commissioner's office dated 2 October 2017.

8. By a decision notice dated 9 November 2017 the Commissioner determined that EIR reg 12(5)(b) was engaged but that the public interest favoured disclosure of the requested information and that NCC had failed to demonstrate that reg 12(5)(e) was engaged. The decision notice made no explicit comment on NCC's assertion that the information within the scope of the request was limited to the two emails of 16 May 2011.

9. Those emails were disclosed by NCC to Ms Perryman on 6 December 2017.

10. By a notice of appeal dated 23 October 2017, Ms Perryman contended that further information within the scope of the request was, or ought to be, held by NCC.

11. In her submissions of 30 January 2018 responding to the appeal the Commissioner stated (para 15):

> **The Commissioner's Decision Notice does not address whether any further information is held by the Council. However, the Commissioner did ask whether further information was held during her investigation and, having received the Council's submissions and assurances, did not pursue this matter further. Whilst it was not an explicit feature of the Commissioner's Decision Notice she accepts, in these circumstances, that it was implicit that she was satisfied no further information was held, and the matter ought to be addressed in these appeal proceedings.**

She went on to say that she was unable to assist the Tribunal as to NCC's interpretation of Ms Perryman's request for information or as to the nature and extent of the searches it had conducted, and to request directions for the delivery by NCC of a response on these points.

12. In an undated document NCC set out its response to certain questions posed by the Registrar. We will refer to is at NCC's first response.

13. In a 16-page, closely typed document dated 18 March 2018 with 11 attachments, Ms Perryman raised numerous challenges to NCC's first response.

14. Having reviewed these documents the Commissioner wrote to the Tribunal on 16 April 2018 contending that NCC's first response called for clarification and asking for directions for the delivery of further submissions from NCC and thereafter from her.

15. In the meantime, on 3 April 2018, the judgment of the Upper Tribunal ('UT') in the case of *Information Commissioner-v-(1) E Malnick and (2) ACOBA* [2018] UKUT 72 (ACC) was published.

16. On 25 April 2018 the Registrar issued further directions inviting submissions from the Commissioner as to whether, in the light of the material events and the guidance in *Malnick*, she had "entirely discharged her functions"[2] in circumstances where she had not stated (expressly at least) that NCC had complied with its duty to provide information, and if not, how the appeal could proceed.

17. In a document dated 9 May 2018 prepared by Mr Peter Lockley of counsel, the Commissioner advanced three submissions. First, *Malnick* was binding authority for the proposition that, having issued her decision notice, the Commissioner was *functus officio*: she had no power to supplement or amend her decision or to exercise any other function. Second, the Commissioner must be taken to have decided that a public authority has correctly identified the requested information unless she specifies otherwise. Thirdly, the Tribunal has a duty itself to determine the question of the scope of the requested information. Neither of the other parties has raised any challenge to these propositions. They seem to us to be plainly right, and we accept them.

18. On 12 June 2018, pursuant to a further direction of the Registrar, NCC delivered a document containing further representations in answer to the Commissioner's request of 16 April. We will call this NCC's second response.

19. On 26 June 2018 Ms Perryman delivered an eight-page rejoinder with nine attachments. This includes references to further requests for information presented since 11 December 2016.

20. Also on 26 June 2018 the Commissioner delivered further written submissions, in which she invited the Tribunal to find that the further information sought was not held by NCC and to dismiss the appeal accordingly.

21. The appeal is before us for consideration on paper, the parties being content for it to be determined without a hearing.

The applicable law

22. The information sought by the Appellants falls within the scope of the Environmental Information Regulations 2004 ('EIR'). By reg 2(1) relevant information comprises "any information in written, visual, aural, electronic or any other material form".

23. Reg 5(1) enacts a general duty on public authorities holding environmental information to make it available on request.

24. Exceptions to the duty are covered by reg 12 which, so far as material, provides:

[2] See *Malnick*, para 81

> **(1) Subject to … 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.**
>
> **…**
>
> **(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 …**

25. In *Bromley and Information Commissioner-v-Environment Agency* EA/2006/0072, the Information Tribunal held that any question under reg 12(1) and (4)(a) is to be decided on a balance of probabilities, adding:

> **Our task is to decide … whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.**

26. The appeal is brought pursuant to the Freedom of Information Act 2000, s57, as modified by EIR reg 18. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(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.**

Analysis

27. We start by considering the request and the interpretation placed upon it by NCC. Part (1) is directed to advice "prior to the signing of the contract in February 2012" about "the delay by Defra awarding the PFI on the dates in the contract". In their first response NCC stated:

> **It is worth noting from the outset that the [part (1) request] could not have led to any in scope material being identified. This is because this scenario did not occur as there was no such delay by Defra. Defra awarded the PFI Credits through issuing a letter confirming their award on 07 February 2012, the date the contract was signed. Issuing the letter on the same day as the signing of the contract was entirely standard.**

It seems to us that this passage suggests an unduly narrow interpretation of the request. On a fair reading, we consider that the words, "prior to the signing of the contract …" indicate that Ms Perryman was concerned with advice about the consequences of delay in the entire process culminating in the signature of the contract. A request premised on an alleged delay of what could only be a matter of some hours on 7 February 2012 would have made no sense. Where it appears that a public authority is applying an unreasonably narrow construction to a request, it is right that the Tribunal should scrutinise its response with particular care.

28. As for part (2), we remind ourselves that the request is directed to advice about (among other things), "the risks and/or merits of signing the contract in February 2012". In the first response, NCC commented that the request was "very narrow", although adding that for the advice to be "in scope" it must have come from Sharpe Pritchard, been generated prior to 7 February 2012, and constituted advice on the risks and/or merits of taking foreign exchange risk or signing the contract. That self-direction by itself does not appear to us to be particularly narrow. Immediately following is this:

> **The likelihood of finding any such information in scope is reduced by the fact that formal legal advice on these matters was not requested from Sharpe Pritchard.**

But then, a little later in the same document, we read this:

> **… it is not in the nature of large infrastructure projects [such] as this that such a risk assessment would or could be performed at the point of the contract being signed. It would be binary (sic) to define signing the contract as a matter in itself for which the risk and/or merits of doing so would then be assessed. Instead where there are so many risks to be examined it has become a standard discipline in such projects to define and assess the wide range of risks that exist and … the contract then distributes as appropriate risks between the parties.**

This obscurely drafted passage does suggest an over-narrow reading of the request, which is about not only the risk of signing the contract specifically on 7 February 2012, but also the risk generally of entering into the contract at all. Our concern is reinforced by the next paragraph, which reads thus:

> **That being the case, there remained only the possibility that, during the course of the procurement of the contract and the application for PFI Credit support for the project, there may have been correspondence in which Sharpe Pritchard advised on the matters referred to in the second of the Appellant's two questions. Those matters being the risks and/or merits of the County Council taking on the risk of the costs associated with the breakage of foreign exchange hedging arrangements …**

We think that these remarks (particularly the first seven words) point to a technical and arguably self-serving construction of part (2), limiting the request to advice about the risk of signing the contract *on 7 February 2012* (immediately discounted on the basis that there was no advice about signing the contract on

that particular date) and about the risk of being reliant upon foreign exchange ('forex') rates. Consistent with this, the first response goes on to describe searches seemingly confined to advice about the forex aspect and tells us nothing about any search for advice about any other risks associated with entering into the contract. NCC's account in its first response of the scope of the searches is a point in Ms Perryman's favour. Other aspects of the searches are considered below.

29. These criticisms warrant a sceptical approach from the Tribunal. Without more material we might well have been unpersuaded by NCC's case. But there is more. We cite four categories of material. In the first place, NCC put forward in its first response two principal reasons why it would not be likely to hold the information requested by Ms Perryman. Neither depended on the request being given a narrow interpretation. The first was that the contract with the contractor was modelled on a standard-form, waste-sector-specific HM Treasury agreement which had been developed over a period of time, during which it had been much scrutinised and refined. Accordingly, it was not likely than any term(s) would call for consideration by NCC's legal advisors. The second was that in any event any risk which might have been seen as calling for a professional opinion would have been regarded as financial rather than legal, and therefore any relevant advice would have been delivered by a person or organisation other than Sharpe Pritchard. The first point seems to us to be factually persuasive: we profess no specialist knowledge but it seems natural to think that by 2011 complex infrastructure contracts would have come to be based on largely standard terms, given the many years over which PFI arrangements had been commonplace. Nothing of substance is set up factually against the first point. We also attach some weight to the second point, which is in a sense an extension of the first. Although a public authority contemplating a very substantial and costly infrastructure project would be likely to be anxious to be advised about <u>all</u> forms of risk, it seems fair to regard the predominant risks as financial.

30. The second category of material is the information contained in the NCC's second response regarding the scope of the searches. In her email of 16 April 2018, the Commissioner analysed the request as asking for Sharpe Pritchard advice given before the contract was signed on three areas: (a) that corresponding to part (1) (see above); (b) risks and/or merits of taking on forex risks; (c) risks and/or merits of signing the contract in February 2012. These came to be referred to as 'limb (a)', 'limb (b)' and 'limb (c)', which terminology we will adopt below. She stressed:

> **… it is important for the Council to search for and confirm that searches have been undertaken for formal <u>and</u> informal legal <u>or</u> any other advice from Sharpe Pritchard relation to <u>all three</u> elements of the request.**

31. In their second response NCC made two important assertions. First, it had made no distinction between 'formal' and 'informal' advice, or between 'legal'

and 'other' advice. It had treated *any* advice from Sharpe Pritchard on limbs (a), (b) or (c) as within the scope of the request. Second, despite the way in which its first response had been presented, it had not confined itself to limb (b) but had conducted appropriate searches for advice about the risks and merits of signing the contract (*ie* limb (c) searches) at the same time and in the same files. The subject matter of limbs (b) and (c) pointed to those files being where the relevant advice (if any) would be found. On limb (c) the second response spelled out (para (9)) NCC's stated view that the request was for correspondence from Sharpe Pritchard dated prior to the signing of the contract containing advice on the risks and/or merits of signing the contract. Para (11) states:

> **To this end the search looked for correspondence that in some way made an assessment, however brief or lengthy, formal or informal, of the act of entering into the contract, signing the contract or making a decision to enter into the contract. No such advice was found in the course of the search.**

32. The third category of material consists of NCC's description of the searches themselves (set out in the first response, to which nothing of substance is added in the second). The first response recites the fact that a large number of files were checked but that the exercise was not unduly difficult because the material (all electronic) was in a well-organised form and the searches were conducted by an officer familiar with the project under consideration. It refers to "particular focus" being given to searching files at specified key stages, including the first stage and second stage of competitive dialogue, the issuing of the model contract, the development and drafting of 'Schedule 17 (Compensation on Termination)' to the draft contract between NCC and the then preferred bidder, and the drafting of the business cases to DEFRA for PFI funding. The document also refers to an approach to Sharpe Pritchard, which seems to have been confined to limb (b) and met the reply that forex risk was outside the terms of the firm's retainer. NCC went on to detail search terms used, explained that the material under review was all held on a corporate drive and stated its belief that no relevant material had been deleted or destroyed.

33. The fourth category of material is the content of Ms Perryman's written submissions. She argues that the failure of the Cory Wheelabrator contract was the direct result of the delay in the PFI process which, she says, left the council with contractual deadlines in relation to the obtaining of planning permission which were unachievable. That state of affairs exposed NCC to the risk of DEFRA withdrawing the PFI credits, which, in turn, made it necessary for the contract to be aborted with compensation to the contractor of almost £34m. She contends first that Sharpe Pritchard must have advised on the points to which her request goes, particularly limb (a). She points to an email from Anne Gibson, then Acting Managing Director of NCC, dated 19 September 2014 which includes this:

> **The issue around the risk of planning failure to the contract as a whole, and the termination provisions arising from that risk, and the appropriateness of that risk in the context of a PFI contract, would all have been issues considered and advised on by Sharpe Pritchard negotiating the Contract.**

We note that this comment does not come from someone who was directly involved at the material time. Ms Perryman also points to the undisputed fact that Sharpe Pritchard were handsomely rewarded for their work in relation to the contract and wonders how that work could not have included the crucial matters (as she sees them) to which her request relates. (In her submission of 13 March (p13) she appeared to accept that it was unlikely that Sharpe Pritchard would have offered, or been asked for, advice on forex risk, but she is consistent in making this argument in relation to limb (a) and (c).) She dismisses NCC's case that it has conducted diligent searches, maintaining that no-one searches for something he knows he does not have or is reluctant to produce. She sets out numerous arguments in support of the proposition that the disputed information *should* exist and *should* have been detected. She ends both her submissions with the same message, namely that NCC are shown to be knaves or fools: either they obtained (appropriate) advice on the subject-matter of her request, ignored it and are now falsely denying receiving it, or they did not receive such advice and negligently omitted to request it, proceeding to enter into the contract in ignorance of the grave risks involved.

Conclusions

34. We have not found this case altogether easy. There is obvious force in Ms Perryman's points about NCC's narrow interpretation of the requests (maintained to the bitter end in the case of limb (a)) and the inconsistent accounts given of the searches directed to limb (b and (c). And the contention that, apart from the two emails disclosed, no legal advice was sought or volunteered, particularly about the possible consequences of the delay in concluding the contract, is on the face of it surprising. At least with the benefit of hindsight, the delay in the PFI process has the appearance of a new and significant event on the possible consequences of which, one would have thought, a prudent council would naturally wish to be advised.

35. On the other hand, we cannot ignore the central implication of Ms Perryman's case, namely that NCC have deliberately suppressed evidence within the scope of the request and manufactured false responses to cover up the deception. That would be a strong finding to make, particularly as the author of both responses is a professional lawyer bound by a professional code of conduct. There would need to be powerful grounds for making such a finding on evidence, and all the more powerful in a dispute resolved (with the agreement of all parties) on paper and without witness evidence, even in the form of sworn statements. Ms Perryman's primary case confronts us with the task of weighing the probability that NCC would have resorted to the conduct alleged. The risks, personal and collective, associated with it are obvious. The

Tribunal's decisions are reported. The complaints and legal manoeuvres arising out of the contract and the losses to council tax payers show no signs of abating (Ms Perryman refers to ongoing requests for further information) and there is no imminent prospect of the story fading to oblivion. A whistle-blower might uncover the deception at any time. Or, depending on precisely what the deception sought to conceal, Sharpe Pritchard might feel compelled to set the record straight. In short, a deception of the sort suggested would run the considerable risk of turning an embarrassing problem into a scandal. And to what end might NCC have shouldered that risk? The answer seems to be: to replace a charge of negligent failure to follow advice with one of negligent failure to seek advice.

36. Having weighed the matter up with care, we conclude that, although Ms Perryman has identified points which have caused us to regard NCC's reaction to the request with suspicion, the core theory that they have suppressed relevant material and knowingly delivered false responses is distinctly improbable and must be rejected as unfounded.

37. That leaves a second possibility, that NCC has failed to disclose relevant material, not by design but purely because the searches carried out were inadequate. We cannot accept that proposition. It seems to us that, once the primary allegation of deception is rejected, NCC's case as to the searches carried out should be accepted as factually accurate. We see nothing to call its account into serious question. On that factual foundation, we further find that the searches carried out were proportionate and appropriate. NCC has explained how the potentially relevant material was stored and its reasons for searching where it did. Those explanations are rational and plausible. We see nothing unreasonable about the methodology. On the information before us, we are quite unable to say that it is likely that a search in some other form would have had a better prospect of unearthing documents within the scope of the request, had they existed. Furthermore, we think it more likely than not that, had any relevant documents in addition to those disclosed been in NCC's possession at the time of the request, the searches which were in fact carried out, being reasonable, proportionate and appropriate, would have detected them.

38. We would add that it is a matter of regret that the inquiry of Sharpe Pritchard seems to have been confined to the forex area. Had the firm been notified of the precise extent and terms of Ms Perryman's request, one would have expected a clear and complete answer to come back, which might have spared the parties all or at least some of the trouble and expense to which they have been put since delivery of the NCC's first response. (This does not undermine our findings in the last paragraph: we stand by our view that, had relevant correspondence existed, it would have been in NCC's records and, on a balance of probabilities, the searches actually carried out would have detected it; our point is only that if the denial had come from Sharpe Pritchard (in

relation to limbs (a), (b) and (c)) Ms Perryman might have been prepared to accept it and this litigation might have been averted or shortened.)

39. The result is that, on a balance of probabilities, we find that the further information sought by Ms Perryman was not held by NCC at the time of the request and does not exist today. The exemption under reg 12(4)(a) applies and the public interest is plainly against disclosure (it being idle to order disclosure of something which does not exist). Accordingly, the decision notice of 9 November 2017, implicitly finding that NCC did not hold the further information sought, was in accordance with the law and the appeal must be dismissed.

Signed

Judge of the First-tier Tribunal
Date: 28/11/2018