



NCN: [2024] UKFTT 00381 (GRC)

Case Reference: EA/2023/0002

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: Determined on the papers

Heard on: 11 January 2024

Decision given on: 16 May 2024

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER MURPHY
TRIBUNAL MEMBER SCOTT

Between

KATE SHARP

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) HEREFORDSHIRE COUNCIL

Respondents

Decision: The appeal is **ALLOWED**

Substituted Decision Notice:

1. Within 35 days of 16 May 2024, Herefordshire Council must send to the Appellant:
 - a. the email exchanges running between 12:02 and 15:17 on 23 February 2022 between the Councillor of Herefordshire Council named by the Appellant in her request for information of 26 February 2022 to Herefordshire Council, and Ms Morgan, the Senior Planning Officer at Herefordshire Council, redacted to disclose only:
 - i. the dates and times of issue of the emails, their subject headers, and Ms Morgan's role and contact details;
 - ii. the first and second paragraph of the Councillor's email to Ms Morgan of 12:02 on 22 February 2022;
 - iii. the first paragraph of Ms Morgan's email to the Councillor of 14:58 of 23 February 2022.
 - b. the email sent at 10:12 on 7 March 2022 by the Councillor to Ms Banks, Neighbourhood Planning Manager at Herefordshire Council, save for the words in parenthesis after the Councillor's name at the conclusion of the email and above their email signature.
2. In the case of a. and b. above, the Council shall not disclose the name, email address or contact details of the Councillor.

REASONS

Introduction to the Appeal

2. On 26 February 2022, the Appellant made the following request ("the Request") of Herefordshire Council ("the Council") for copies of correspondence between the Council and a named councillor of a parish in Herefordshire, to whom we refer in this decision as Councillor X:

"I request all correspondence between Herefordshire Planning Department and [Councillor X] regarding planning application [details of planning application redacted]. To include renewable technologies, reinstatement of heritage orchard and biodiversity enhancements.

I can see that [Councillor X] has sent in a letter of objection to the application dated 30th January 2022, but I have been informed that [Councillor X] has also contacted the Head of Planning and one other senior planner, or others in relation to this application and they have corresponded directly with him/given advice. I would like to see all letters, emails, records of phone calls or meetings etc regarding these exchanges."

3. On 16 March 2022, the Appellant clarified the Request to the Council as follows:

“Even though we have made our FOI quite broad in terms of any correspondence between [Councillor X] and the ‘planning department’ please can you ensure that this includes conversations and correspondence with Samantha Banks (the NDP Manager or members of the team) too.”

4. By Decision Notice referenced IC-170328-S8Z2, dated 25 November 2022, the Information Commissioner (“the Commissioner”) upheld the Council’s refusal to disclose the information requested (“the withheld information”). This is the Appellant’s appeal against the Decision Notice.

Mode of Hearing

5. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
6. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with Rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.
7. The Tribunal had before it two bundles, an OPEN bundle and a CLOSED bundle. The CLOSED bundle contained the withheld information. The Tribunal considered all the material in the OPEN and CLOSED bundles, a witness statement filed by the Council and held CLOSED, and all the parties’ written submissions.

Background

8. The Request was made against the background of concern by the Appellant that the Monitoring Officer of a parish council decided on 20 June 2022 that Councillor X had acted in breach of the parish council’s code of conduct in that Councillor X appeared to have used their position as a parish councillor to attempt to further their personal interests in resisting a planning application made for development on land neighbouring their own. That matter was not before the Tribunal. Its relevance is only that it underpins the Appellant’s legitimate interest in seeking the withheld information; the Appellant is concerned that Councillor X has been using their position as a councillor unduly to influence the outcome of the Council’s assessment of the Appellant’s planning application.

9. On 24 March 2022, in response to the Request, the Council provided the Appellant with a link to certain representations made by Councillor X in relation to the Appellant's planning application which were already publicly available, but it withheld the remainder of the requested information on the basis that it was exempt from disclosure pursuant to Regulation 13 of the Environmental Information Regulations 2004 ("EIR") (personal data). The Council stated that "*The council has not received any correspondence with [Councillor X] in [their] capacity as a Councillor.*"
10. The Appellant requested an internal review. On 27 April 2022, the Council maintained its position. It said it had consulted Councillor X, who had confirmed that at the time of corresponding with the "planning department/neighbourhood development team", they were acting in a personal capacity, not as Councillor; moreover, they did not consent to disclosure of their emails. The Council said there was a reasonable expectation that an individual's right to the privacy of their correspondence should be upheld; disclosure of personal data would not be fair and lawful; and the emails in question comprised personal data rather than containing personal data and could not, therefore, be redacted.
11. On 27 and 28 April 2022, the Appellant pressed the Council for disclosure of specific categories of correspondence between Councillor X and the Council which she said fell within scope of the Request, and, specifically, sight of Councillor X's correspondence with Samantha Banks of the Council's Neighbourhood Planning Team.
12. On 9 May 2022, the Council informed the Appellant that it could not locate correspondence of the specific categories described by the Appellant, but it did disclose two emails between Councillor X and Ms Banks on the basis that they related to the neighbourhood development plan which was in the public domain. It is not obvious to the Tribunal that just because the plan was in the public domain, email correspondence between Councillor X and Mr Banks about the plan could or should be disclosed but that is not an issue before the Tribunal.

The Decision Notice

13. The Commissioner decided, by way of the Decision Notice, that the withheld information was exempt from disclosure pursuant to Regulation 13(1) EIR: it was the personal data of an individual other than the Appellant, and the condition provided for in Regulation 13(2A)(a) EIR was met, namely that disclosure would contravene principle (a) relating to the processing of personal data, as set out in Article 5 of the UK General Data Protection Regulation ("GDPR"): "personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

14. The Commissioner found that the Appellant was pursuing a legitimate interest, and that disclosure of the information requested was legitimate to meet that interest. He noted that Councillor X had not consented to disclosure of the withheld information; that Councillor X had confirmed they were acting in a personal capacity when they contacted the Council regarding the Appellant's planning application and not in their capacity as a parish councillor; that the Council considered Councillor X had a reasonable expectation that their correspondence with the Council would remain confidential; and that disclosure would cause Councillor X some distress and would result in their privacy being lost.

15. The Commissioner concluded that that, as the withheld information was not already within the public domain and that Councillor X was acting in a personal capacity when corresponding with the Council, Councillor X had a strong and reasonable expectation that the withheld information would remain confidential. He concluded, consequently, that there was insufficient legitimate interest to outweigh the fundamental rights and freedoms of Councillor X, that there was no legal basis for the Council to disclose the withheld information, and that disclosure would breach principle (a). Accordingly, he decided that the Council was entitled to rely on Regulation 13(1) EIR to refuse to provide the withheld information.

Notice of Appeal

16. By Notice of Appeal dated 2 January 2023, the Appellant appealed against the Decision Notice. In summary, the basis of her appeal was that there was a legitimate interest in knowing whether Councillor X was using their position as a councillor to influence the outcome of planning applications near their home, which interest outweighed their privacy right.

The Commissioner's Response

17. By his Response to the Notice of Appeal, dated 13 March 2023, the Commissioner contended that the legitimate interest in disclosure did not outweigh Councillor X's privacy rights:
 - a. Councillor X had not consented to the disclosure of the withheld information;
 - b. Councillor X had confirmed to the Council that they were acting in a personal capacity when they contacted the Council and not in their capacity as a parish councillor; it was speculation on the part of the Appellant that Councillor X was acting in their capacity as a parish councillor;
 - c. it was again speculation on the part of the Appellant that the withheld information would reveal that Councillor X had used their position as parish councillor to influence the Council's planning department in its decision making;
 - d. having considered the withheld information, the Commissioner maintained that he was correct to give weight to the view of the Council that there was a

reasonable expectation that the withheld information would not be disclosed to the public and that such disclosure would cause Councillor X some distress from an unexpected loss of privacy.

The Appellant's Reply

18. By her Reply dated May 2023, the Appellant submitted that Councillor X had no reasonable expectation that their correspondence with the Council would not be shared in the public domain; and that it was unacceptable that Councillor X could correspond with the Council and comment on the planning application "*under the radar*".

The Council's Response

19. On 17 August 2023, the Tribunal ordered that the Council be joined as a Respondent to the appeal, and that it should file and serve evidence addressing the following specific matters: the basis on which it maintained that Councillor X was corresponding with the Council about the planning application in a personal capacity; provision of a copy of any guidance/policy regarding the publication of representations about planning applications; an explanation as to why that correspondence was not published given the publication of Councillor X's two previous representations in relation to the application and/or why the correspondence was said not to amount to representations which require publication; why it was material to the issues in the appeal that the correspondence was sent in Councillor X's capacity as a private individual rather than as a parish councillor, if representations from individuals regarding planning applications are published; what was said to be the harm that would be caused to Councillor X.
20. By its Response to the Notice of Appeal, dated 13 September 2023, the Council submitted that:
 - a. it continued to rely on the reasons it gave for refusing to disclose the withheld information on 24 March 2022 and 27 April 2022.
 - b. it was a matter for the Tribunal to determine whether disclosure of the withheld information would be fair and lawful; the legitimate interest in disclosure must outweigh the relevant privacy rights.
 - c. Councillor X did not consent to disclosure and therefore there was a reasonable expectation that the withheld information would not be disclosed to the public and would cause them some distress due to an unexpected loss of privacy.
21. In compliance with the directions ordered by the Tribunal on 17 August 2023 for evidence from the Council on specific issues, the Council filed a witness statement from its Information Governance Manager dated 14 September 2023. We have noted that on 15 December 2023, the Tribunal ordered that that statement be held, pursuant

to Rule 14(1)(b) of the Rules, on the basis that it should not be disclosed to anyone other than the Commissioner.

The Legal Framework

22. The parties do not dispute, and the Tribunal finds, that the information requested is environmental information within the meaning of the EIR, which are the applicable regulations.

23. Regulation 5 EIR provides:

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

...

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

24. Regulation 12 EIR provides for exceptions from disclosure:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

25. Regulation 13 EIR provides:

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if—

(a) the first condition is satisfied

...

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations—

(a) would contravene any of the data protection principles

...

26. The first data protection principle under Article 5(1)(a) GDPR provides that personal data shall be “*processed lawfully, fairly and in a transparent manner in relation to the data subject.*”

27. Article 6 GDPR provides:

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

28. Information is personal data if it relates to an identified or identifiable living individual (Art 4(1) GDPR, and s 3(2) Data Protection Act 2018 “(DPA”).

29. Processing data means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration,

retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction (Art 4(2) GDPR, and s3(4) DPA). Disclosure of the withheld information to the Appellant would constitute processing of the data.

Analysis

30. The Respondents accept that the Appellant was pursuing a legitimate interest, and that disclosure was necessary for the purpose of that interest. However, they contend that disclosure would not be lawful because that legitimate interest did not override the fundamental rights of Councillor X to protection of their personal data.
31. We agree that the Appellant was pursuing a legitimate interest, namely seeking to ascertain whether Councillor X was taking advantage of their role as Councillor to influence the outcome of a planning application. We also agree that disclosure of the withheld information was necessary to meet that interest; that interest could not be equally well pursued without sight of the information requested.
32. In assessing whether disclosure would be lawful, fair and transparent, we have had regard to the Council's policy called "Planning - Letters of Representation" which provides, inter alia, as follows:

"Personal data

The documentation for planning applications and any representations received in response to them must be made available for public inspection, in accordance with the Local Government (Access to Information) Act 1985. Provision is made within the Data Protection Act 1998 for publishing such information. This means that we cannot treat such documentation or representations as confidential. We will redact e-mail addresses, telephone numbers and signatures before publishing letters of representation online, but the name and postal address of the author will not be removed. Please do not include other personal or sensitive data within your representations.

The name and postal address of those making representations is crucial so that the Council may establish who and where representations come from so comments can be given full weight and for transparency. If you do not want your name and address to be published or do not provide both a name and postal address your comment will be treated as anonymous. Any anonymous representations will be given little or no weight in the decision making process."

33. We have also had regard to the Council's "Redaction Procedure" which provides, inter alia, as follows:

“ ...

Members of the public who submit a planning application need to be made aware that the application, plans and any related documents are part of the public record. They will be made aware that any document (or part of) which they specifically request to remain confidential will not be included on the register and will not be available for public inspection.

Applicants for planning permission will be advised of the statutory duty to make documents available for any member of the public to see and to have copies of, and that the planning application documents are scanned and placed on the Internet. This is typically done through the provision of a “Privacy Notice”, made available to applicants and objectors before their personal data is processed (typically on our application forms, website and correspondence).

Any document received during the planning application process will similarly be made available electronically for public inspection. These will include consultation responses and letters of representation.

Herefordshire Council will ensure that personal information given during the planning application process which is not required as part of the public record, or else creates a risk of identity theft if made available in certain formats (such as signatures made available globally on a public web site) will not be made available on the electronic record. This information will be redacted in line with Herefordshire Council’s Document Redaction Policy and the Data Protection Act 1998 before it is made publicly available. ...”

34. It is evident both from the “Planning - Letters of Representation” policy and the Redaction Procedure that any representations received in response to planning applications must be made available for public inspection and cannot be treated as confidential. Although email addresses, telephone numbers and signatures will be redacted before representations are published, the identity of the person making the representations is not withheld or anonymised. We find that Councillor X cannot have had a reasonable expectation that anything they submitted by way of representation would be held confidential.

35. The withheld information consists of a series of email exchanges between Councillor X and the Council. Councillor X wrote their emails from what appears to be their business address, which we find for current purposes to be a personal email address, given that we understand that Parish Councillors do not have Parish Council email addresses (unlike Council employees who have a Council email address). In any event, we do not consider the identity of an email address to be determinative or indicative of the capacity in which an author sends an email under that address. It is the content which counts.

36. We consider that parts of those exchanges constitute what are effectively representations by Councillor X in relation to the determination of the planning application and raise material planning matters. Given that the Council makes clear that representations will be made available for public inspection, we do not consider that such information engages consideration of any privacy right enjoyed by Councillor X in relation to those representations so as to require us to weigh a legitimate interest in disclosure against that right. Disclosure of that information (subject to the redactions we indicate below) would be lawful.
37. We consider that other parts of the withheld information do not constitute representations but fall more naturally to be characterised as exchanges between the Councillor as a private individual and the Council. Accordingly, Councillor X's privacy right in relation to that information is not outweighed by the Appellant's legitimate interest. Disclosure of that information would not be lawful.
38. We find that one of Councillor X's emails in the withheld information was written by them in their capacity as a Councillor. It is not evident that this email relates to the planning application, but it would appear to fall within the scope of the Request as subsequently clarified by the Appellant on 16 March 2022, namely any correspondence between Councillor X and Ms Banks of the Council. We do not consider that any privacy right is engaged in relation to it, and we consider that its disclosure would be lawful, subject to one small redaction required (identified below) of information which we find reflects Councillor X's personal opinion on a matter i.e. not an opinion advanced by them in their capacity as Councillor, which may properly be withheld.
39. Of the individual exchanges of correspondence constituting the withheld information:
- a. the first is an email sent at 10:14 on 17 December 2021 by Samantha Banks, Neighbourhood Planning Manager of the Council, to Councillor X (page A5 of the CLOSED bundle). The Council has already disclosed this email to the Appellant in April 2022, having redacted both Councillor X's name and email address, and a comment by Ms Banks, both of which redactions we uphold;
 - b. the second is an email (with attachment) between the Appellant and Councillor X dated 16 February 2022 (page A6 of the CLOSED bundle). We do not know how it came to be in the Council's possession because there are no other obvious parties to the email. It is not correspondence with the Council. We do not see that the information in the email comes within the scope of the Request, and the Appellant, as a recipient of it, already has it in any event. It need not be disclosed;
 - c. the third is an email exchange running between 12:02 and 15:17 on 23 February 2022 between Councillor X and Elsie Morgan, Senior Planning Officer at the Council (from which it is evident that Councillor X attempted to email Ms Morgan on 22 February 2022 but that their email was returned by an

automated process). We consider that within that exchange (and subject throughout to redaction of Councillor X's name, email address and contact details under their email signature):

- i. the first two paragraphs of Councillor X's intended email to Ms Morgan of 22 February 2022, under the heading which references the planning application, (page A10 of the CLOSED bundle) constitute a representation by Councillor X in relation to the planning application, so that no privacy right is engaged. Its disclosure would be lawful.
 - ii. the third (and final) paragraph of Councillor X's intended email to Ms Morgan of 22 February 2022 (page A10 of the CLOSED bundle) does not constitute a representation but a private enquiry by Councillor X in relation to a question of process, which engages their privacy right. Its disclosure would not be lawful.
 - iii. the paragraph in blue font from Councillor X in their email to Ms Morgan of 12:02 on 22 February 2022 (page A10 of the CLOSED bundle) does not constitute a representation but a private observation by Councillor X in relation to issues with their email being returned. Its disclosure would not be lawful.
 - iv. the first paragraph of Ms Morgan's responsive email to Councillor X of 14:58 of 23 February 2022 (page A9 of the CLOSED bundle) addresses Councillor X's representation and does not engage any privacy right. Its disclosure would be lawful.
 - v. the second (and final) paragraph of Ms Morgan's responsive email to Councillor X of 14:58 of 23 February 2022 addresses Councillor X's private enquiry, and so, even though it contains material which is in the public domain, it engages Councillor X's privacy right. Its disclosure would not be lawful.
 - vi. the first paragraph of Councillor X's responsive email to Ms Morgan of 15:10 of 23 February 2022 (page A9 of the CLOSED bundle) relates to personal matters concerning Councillor X's property and does not constitute a representation. Its disclosure would not be lawful.
 - vii. the second paragraph of Councillor X's responsive email to Ms Morgan of 15:10 of 23 February 2022 relates to Councillor X's private enquiry and engages their privacy right. Its disclosure would not be lawful.
 - viii. Ms Morgan's responsive email to Councillor X of 15:17 of 23 February 2022 (page A8 of the CLOSED bundle) relates to Councillor X's private enquiry. Its disclosure would not be lawful.
- d. the fourth is an email sent at 10:12 on 7 March 2022 by Councillor X to Ms Banks (page A12 of the CLOSED bundle). We find that this was an email clearly sent by Councillor X in their capacity as a councillor. It does not engage any privacy right enjoyed by Councillor X. We find that the Council was not entitled to withhold this email save for the final observation by Councillor X in parenthesis after their name at the conclusion of the email and above their email signature, which we find constitutes a personal opinion of Councillor X, offered outwith their role of Councillor.

- e. the fifth is an email from Ms Banks to Councillor X sent at 09:49 on 9 March 2024 (page A13 of the CLOSED bundle). The Council has already disclosed it to the Appellant, with Councillor X's name and contact details properly redacted.
40. In the case of all the material within the withheld information, Councillor X's email address, name and contact details on those emails constitute personal data, whose disclosure would not be lawful.
41. In relation to that information whose disclosure we consider would be lawful, we are also of the view that its disclosure would be fair and transparent; the former being so in circumstances where the Council make clear that representations will not be held confidential; the latter being so both self-evidently and in a context where Councillor X has been made aware by the Council of the Request, and given, and taken, the opportunity to make representations to the Council resisting disclosure. We do not agree with the Council's assessment that disclosure of that information would cause some distress to Councillor X, as the Council put it, "with regard to an unexpected loss of privacy", as we do not consider that Councillor X had any reasonable expectation of privacy in relation to what we have found to be a representation by them.
42. We find that the Commissioner erred in the exercise of his discretion and the Decision Notice involved an error of law in concluding that Regulation 13(1) EIR was engaged in respect of that information whose disclosure we have identified as being lawful, fair and transparent. The Council was not entitled to rely on Regulation 13(1) EIR to withhold disclosure of that information. To that extent, therefore, we allow the appeal, and make the Substituted Decision Notice set out above.

Signed: *Judge Foss*

Dated: 15 March 2024