

ENGLAND AND WALES / JUDGMENT

Leander Developments Ltd v Information Commissioner

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Neutral citation number: [2025] UKFTT 00443 (GRC) Case Reference: EA/2024/0292 First-tier Tribunal General Regulatory Chamber Information Rights Decided without a hearing. On: 6 March 2025 Decision given on: 28 April 2025 Before TRIBUNAL JUDGE WILSON TRIBUNAL MEMBER MURPHY TRIBUNAL MEMBER COSGRAVE Between LEANDER DEVELOPMENTS LTD and INFORMATION COMMISSIONER Appellant Respondent Decision: The appeal is Dismissed Background to Appeal

REASONS

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 3 July 2024 (IC-285814-Q0S2, the “Decision Notice”). The appeal concerns information about planning application 2861/23/FU requested from the West Devon Borough Council (the “Council”).
2. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. On 22 September 2023, the Appellant wrote to the Council and requested the following information (the “Request”): “... a copy of all correspondence sent or received by West Devon in relation to planning application 2861/23/FUL.”
4. The Council responded on 15 December 2023. The Council treated this as a request under the Environmental Information Regulations 2004 (‘the EIR’). The Council provided some information within the scope of the request. However, some information was withheld pursuant to regulations 13(1) (personal data) and regulation 12(4)(e) (internal communications) of the EIR.
5. The Appellant requested an internal review. The Council responded on 20 December 2023 and maintained its original position.
6. The Appellant complained to the Commissioner on 31 January 2024. The Commissioner decided that the EIR applied. The Commissioner concluded that the Council had correctly applied regulation 12(4)(e) of the EIR. This was on the basis that the Commissioner was

satisfied that the information constituted internal communications as they were sent between council officers including a council officer working on a contractual basis. In addition, the public interest weighed in favour of withholding the information. The Appeal, Response and Reply.

7. The Appellant appealed on 30 July 2024 and submitted a Reply dated 23 September 2024. So far as is relevant to this decision and reasons the Appellant's position can be summarised as follows: a. b. c. d. e. f. The information relates to a planning application, planning policy and the provision of housing which do not fall within the scope of the definition of environmental information. As such, the appropriate regime to consider the request is the Freedom of Information Act 2000 (FOIA) not the EIR. Planning applications are usually debated and decided in the public arena. A decision made through delegated powers should be open to the same level of disclosure. This weighs in favour of the public interest in disclosure. The Council's decision making function has ended. The application is now before the Planning Inspectorate. As the Council's decision making process is complete. The need for a "safe space" is greatly reduced as the decision is no longer live. This weighs in favour of disclosure. The Respondent has fettered its discretion and has "bound itself to the opinion of the Council". It has not fully considered whether the decision making process remained live. The Council could have delayed determining the application until the Planning Inspectorate had reached a decision. If the withheld information relates to an Environmental Impact Assessment then there is a public interest in its disclosure particularly as the information relates to a National Park. The Appellant believes that the withheld information relates to an unlawful act as it will reveal that the application was predetermined. It is not possible to scrutinise the decision making process which was undertaken pursuant to delegated powers which heightens the public interest in disclosure. In addition, the Council has exercised delegated powers unlawfully. Albeit the focus within the Appellant's reply is on predetermination not the unlawful delegation of powers g. h. The communication between the Council and an individual "employed on a contractual basis" are not internal communications. The treatment of the relevant party as an external contractor is contrary to the Respondent guidance. In addition, the Respondent acted improperly by signposting the limited circumstances in which communication with an external contractor could be considered external communications. Regulation 13(1) should have been considered in the Decision Notice.
8. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner takes the following position: a. b. c. The requested information relates to a specific planning application regarding 28 dwellings on a specific piece of land. This is clearly a measure affecting or likely to affect the state of the elements listed in regulation 2(1)(a) or factors listed in regulation 2(1)(b) of the EIR. Accordingly, the EIR apply. The communications are between officers of the Council and as such are internal communications. In relation to the public interest test:

- i. The need for a safe space continued at the time of the response to the request given the potential for onward appeal and challenge by way of Judicial Review. ii. There must be more than mere allegations of wrongdoing. iii. disclosure must serve the wider public interest not merely the requester's private interests. iv. The relevant time to assess the public interest is at the time of the response. Delaying the Decision Notice until after the Planning Inspectorate's decision would have had no bearing upon the public interest considerations. Applicable law 9. The relevant provisions of EIR are as follows. ...“environmental information” has the same meaning as in Article 2(1) of the 2(1) Directive, namely any information in written, visual, aural, electronic or any other material form on— (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c); 5(1) available on request. ...a public authority that holds environmental information shall make it Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose 12(1) 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. 12(2) A public authority shall apply a presumption in favour of disclosure. Requests for environmental information are expressly excluded from the Freedom of 10. Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR. It is well established that “environmental information” is to be given a broad meaning 11. in accordance with the purpose of the underlying Directive 2004/4/EC. The definition was explained by the Court of Justice of the European Union in Case C-316/01 Glawischnig v Bundesminister für soziale Sicherheit und Generationen [2003] All ER (D) 145 as follows: “The Community legislature’s intention was to make the concept of information relating to the environment defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of

excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.” The definition was considered by the Court of Appeal (CA) in *Department for 12. Business, Energy and Industrial Strategy v Henney and ICO* [2017] EWCA Civ 8444. a. b. c. The Regulations, the Directive, and the Aarhus Convention “are to be construed purposively. Determining on which side of the line information falls will be fact and context specific.” The CA went on to provide some general guidance. The CA used as a starting point the recitals to the Aarhus Convention and the Directive – “They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as “on” a given measure.” At paragraph 43 the CA went on to say that it is permissible to look beyond what the information is directly or immediately concerned with: “...identifying the measure that the disputed information is ‘on’ may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned ... It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of those matters may be apparent on the face of the information itself.” At paragraph 52 of its judgment, the CA warned against an “overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition.” d. The Upper Tribunal in *Department for Transport v Information Commissioner and 13. Cieslik* [2018] UKUT 127 (AAC), put the point as follows: “...the principle established by the Court of Appeal in *Henney* and in *Glawischnig* [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect. Issues and evidence

14. The issues in dispute can be summarised as follows:
 - a. whether the requested information is environmental information within the meaning of regulation 2(1)(c) EIR;
 - b. whether the requested information can be categorised as internal communications; and
 - c. whether the public interest in the maintenance of the exception outweighs the public interest in disclosure of the withheld information

15. By way of evidence and submissions we had an agreed open bundle of documents [160 PDF pages], which included the Appeal, Response and Reply and a closed bundle [21 PDF pages]. In making our decision, we have read and taken into account all documents and written submissions. Discussion and Conclusions Is the Requested information “on” (c) a measure or activity as provided for within regulation 2(1)
16. The information relates to a planning application for the construction of 28 dwellings on a specific piece of land. The application process, as reflected in the planning refusal letter considered landscaping, a planting scheme, flood risk, energy efficiency and biodiversity.
17. The information requested is written information relating to the planning application.
18. Adopting the approach in Henney, given the nature of the planning application and associated process described above, we are satisfied that the requested information is written information on a measure affecting or likely to affect the state of the elements set out in regulation 2(1)(a)) or factors listed in regulation 2(1)(b). Accordingly, the EIR apply and the request is considered under the EIR. Is the Information Internal Communications/Is Regulation 12(4)(e) engaged?
19. There is no dispute that the withheld information comprises communications. As to whether the relevant communications are internal, the relevant test is whether the communications remain within one public authority.
20. There is no dispute that, other than one person, those involved in the email communications comprised within the withheld information were council officers. The dispute relates to one individual who was engaged by the Council on a different basis to other council officers. The Appellant asserts that the individual in question had an external email address and it was acknowledged by both the Respondent and Council that the relevant individual was employed upon a consultancy basis. The Appellant asserts, relying upon the Respondent’s guidance, that this is indicative that the relevant person was an external adviser/contractor such that the communications with this individual could not be considered internal. We do not agree.
21. We agree with the analysis set out in DfT v Information Commissioner (EA/2008/0052) cited in the Respondent’s guidance. A primary consideration is whether the relevant person is embedded within the public authority.
22. The Responses to questions to the Council indicate that the Council’s Planning department require their internal Environmental Health service to provide internal consultation responses to planning applications. The relevant person was engaged to provide these internal consultation responses on behalf of the Council’s Environmental Health service department. The reason for engaging the person in this way is that there was not sufficient capacity within the Environmental Health services department to provide the relevant responses. The arrangement also was cost-effective and provides flexibility.

23. On the basis of the evidence before us we find the relevant person is discharging an internal function of the Council. The relevant person is responsible for internal consultation responses within the Council. Whilst we accept that the relevant person is engaged on different terms to that of other Council officers and uses an external email address she is nonetheless engaged to discharge the internal functions of an Environmental Health officer. For these reasons, we find that the relevant person is embedded within the Council. It follows that in our judgement the emails passing between this person and the other Council officers are internal communications and Regulation 12(4)(e) is engaged. Is the Application Live
24. The issue of whether the application was live as at the date of the response to request is relevant to the weight that is afforded to the safe space in decision-making and in turn the balance of the public interest.
25. There is no dispute between the parties that the Council had made its planning decision prior to the date of the request. The request is dated 17 November 2023. The refusal decision is dated 21 August 2023. The response to the request is 15 December 2023.
26. The Appellant asserts that the Council's decision making process was complete at the time of the response to the request. There was no ongoing requirement for a safe space which weighs in favour of disclosure.
27. The Respondent submits that the judicial review challenge for the decision had yet to expire at the relevant time. In addition, there was an appeal to the Planning Inspectorate. Accordingly, the application remained live.
28. It is settled law that the date at which the public interest is considered is the date of the response to the request. As at the date of the response to the request almost 4 months would have expired from the date of the decision. We have not been directed to any evidence or applicable law to indicate that the judicial review period, usually considered to be three months, remained live or that a judicial review had been made within that period. Accordingly, we are not satisfied that the application remained live due to an unexpired judicial review period.
29. However, it is common ground that there has been an appeal to the Planning Inspectorate. Whilst we accept that the Council decision-making process was at an end following the refusal decision we find the Council still had an ongoing role in relation to the application on account of its role in the Planning Inspectorate proceedings. In addition, the application remained live as it was yet to be finally determined via the Planning Inspectorate proceedings. For these reasons we find that the application remained live and the Council continued to have a role in relation to the application such that it could continue to expect to be able to have internal discussions in relation to the application in a safe place. Accordingly, we find that the weight that we place upon the safe place for internal discussions is not reduced on account of the planning decision having been made by the Council on 21 August 2023.

30. For completeness we reject the argument that the Council should have delayed processing the request. Delay would have had no material effect on the decision making process to withhold or disclose the requested information. The relevant date for consideration of whether the application was live would have been the earlier of the actual response or the statutory deadline for response. Accordingly, the relevant date at which the pertinent facts are considered would remain substantively the same even if there were such a delay. In any event, even if we had accepted this submission, which we do not, it is not reasonable nor proper administration to require a local authority, of its own volition, to delay determining an application to a point in time that would yield the most advantageous outcome for an applicant. Unlawful Decision-Making
31. The Appellant submits that the Council has unlawfully made its decision as the Council predetermined the planning application. In addition, the Appellant submits that the Council failed to follow proper procedure when exercising delegated powers. However, as set out above, arguments in relation to the unlawful exercise of delegated powers were not pursued with any force in the Appellant's reply. Instead the Appellant focused on predetermination arguments.
32. As set out above, it is insufficient for an Appellant merely to assert there has been impropriety or unlawful conduct. The Appellant has brought forward no significant evidence outside of its assertion that there has been such conduct. There is nothing within the closed evidence to indicate that the Council has engaged in such conduct. Accordingly, we find that the Appellant has failed to demonstrate that the Council has engaged in unlawful conduct in relation to the application. It follows that we find that there is no enhanced public interest in disclosure on the basis that it will enable proper scrutiny of an unlawful process. Balance of Public Interest
33. In considering the public interest we consider factors that are neutral, weigh in favour of disclosure and weigh against disclosure of the requested information.
34. As set out above the Appellant has failed to demonstrate that there is any impropriety or the decision-making process was unlawful. Accordingly, we find this is a neutral factor.
35. We consider that the following factors weigh in favour of disclosure:
- d. There is a general public interest in transparency. In particular, there is a strong public interest in the public understanding the decision making process of public bodies and having confidence in decision-making processes.
 - e. There is a need for the public to have access to information in order to engage in meaningful debate about planning decisions, the environment and the local area. This is in accordance with the Aarhus Convention which reflects these principles. There is a presumption in favour of disclosure (regulation 12(2) of the EIR); f.
36. We consider that the following factors weigh in favour of maintaining the exception.

- g. We have found that the Council continues to have a role in relation to the planning application which is now before the Planning Inspectorate. We consider that there is a significant public interest in ensuring that public authorities have a safe space in which to discuss and consider planning applications, whilst the planning process is ongoing, away from external interference and influence.
- h. More generally disclosure could undermine the ability of authorities to have open and frank internal conversations in relation to the planning processes if officers felt such communications would be disclosed in the future whilst matters remain live. In our judgement this is a weighty factor. The public interest in disclosure is significantly reduced in this appeal as some disclosure in relation to the request has already taken place. In addition, information in relation to the planning application is already in the public domain. Accordingly, the public interest in disclosure has to some extent been satisfied. i.
37. We considered each of the public interest factors set out above both individually and cumulatively. We find that the significant public interest in ensuring that public authorities have a safe space in which to consider applications and can engage in free and frank discussions without fear of disclosure combined with the fact that transparency has to a degree been achieved are weighty factors and outweigh the public interest factors in favour of disclosure. These factors are determinative that the public interest weighs in favour of maintaining the exception.
38. It follows from all that we have said above that we find that the EIR applies. The withheld information constitutes internal communications such that regulation 12(4)(e) is engaged. However, the public interest in disclosure is outweighed by the public interest in maintaining the exception.
39. We dismiss the appeal for the reasons explained above. Signed: Judge Wilson Date: 23 April 2025

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